PRESERVING THE PUBLIC INTEREST: A TOPICAL ANALYSIS OF CABLE/DBS CROSSOWNERSHIP IN THE RULEMAKING FOR THE DIRECT BROADCAST SATELLITE SERVICE

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In the early 1980’s the direct broadcast satellite service (“DBS”) was envisioned both as a revolution for the nation’s television screens and as a technical curiosity that would forever supplement cable television in areas where cable could not reach. Today, with names such as DirecTV and Dish Network becoming ubiquitous, DBS’s future is assured. It has made one of the most successful debuts in consumer electronic history, with industry analysts touting that in the short period between the service’s inauguration in 1994 to present, DBS has acquired over 9 million sub-

1 DBS is a non-broadcast video service in which satellites beam television signals back to earth using high-powered transponders (transmitters) that allow the use of small size satellite receiving antennas (dishes). See Daniel L. Brenner, Monroe E. Price and Michael I. Meyerson, 2 Cable Television and Other Nonbroadcast Video § 15.01 (April 1998) [hereinafter Nonbroadcast Video]; c.f., Satellite Communications/ Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance, 97th Cong. 97-81 (Testimony of Stanley S. Hubbard, President, United States Satellite Brdcasting. Co.) (Dec. 15, 1981) The current “players” in the current “players” in the market for DBS include DirecTV and USSB, which are licensed at 101° West Longitude (W.L.), EchoStar (Dish Network) licensed at 119° and 61.5° W.L., Continental and Dominion Video Satellite are licensed, but have not launched their satellites at 61.5° and 166° W.L. Tempo Satellite launched a satellite at 119° W.L. in March of 1996 and an outstanding authorization at 166° W.L., but has yet to offer service. See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd. 1034, paras. 54-67 (1998) [hereinafter 1997 Competition Report].

2 See Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Report and Order, 90 F.C.C. 2d 676 (1982) [hereinafter 1982 DBS Order] (stating that the DBS service “holds the unique promise of meeting the programming needs of the underserved”). The surveys and estimates in the 1980’s believed that if the DBS service launched in 1986 as anticipated, that DBS would serve a limited audience with a subscribership that would top out at around 5 million homes after 8 years of the service’s existence. Most estimates at the time placed the total potential audience somewhere between 3 and 9 million subscribers. See John P. Taylor, “DBS Service Still Long Way Off Despite FCC Permits,” Television/Radio Age, Oct. 18, 1982 at 37. Ironically, the latest FCC survey indicated that there were 7.2 million DBS subscribers at the end of 1997. See In re Policies and Rules for the Direct Broadcast Satellite Service, 15 FCC Rcd. 6907, n.2 (1998); and 1997 Competition Report, supra note 1.

Testimony before Congress in the 1980’s was pessimistic about DBS. The Commission stated in the 1982 DBS Order that DBS would remedy the lack of commercial television in rural areas. One witness before Congress disputed this assertion, testifying that DBS reception would be problematic and that it would serve a non-existent consumer demand for entertainment sources (citing that video cassettes and discs, among other media, would more easily satisfy this demand). See Satellite Communications/Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance, 97th Cong. 100-103 (statement of Wallace J. Jorgenson, Assoc. of Maximum Service Telecasters and the Three Television Network Affiliates Associations). He argued that DBS is not local, is subject to various technical limitations and would place control of the national television medium in the hands of the few. See id.; and 1982 DBS Order at para. 32. Other testimony supported the Commission’s prediction that DBS would bring video service to the “tens of millions of homes” that would be unlikely to ever receive terrestrial video service and that DBS would inject a much needed element of competition into the MVPD market. See Satellite Communications/ Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance, 97th Cong. 97-81 (Testimony of Irving Goldstein, President, Satellite Television Corp.) (Dec 15, 1981) (quoting Notice of Proposed Policy Statement and Rulemaking, Gen. Docket No. 80-603, 86 F.C.C.2d at 728).


5 See Cable T.V. Competition: Testimony Before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. On the Judiciary (Testimony of Leo J. Hindery, Jr., President of Tele-Communications, Inc.) 1997 WL 631202 (Oct. 8, 1997) (“In the last year alone, DBS added 2.7 million new customers, an astounding annual growth rate of 85%. In fact, it has been reported that DBS had ‘the most successful launch of a major product in consumer electronics history.’”).

6 DirecTV/USSB began service in 1994, EchoStar launched the DISH Network on March 4, 1996. See Hughes
Since 1982, the Federal Communications Commission ("FCC" or "Commission") has regulated DBS as an experimental service because of problems with financing and marketing DBS as well as technical challenges. The Commission decided that it would be best to let the industry decide how to use the technology. This policy of regulatory flexibility and experimental status continues to this day.

In February of 1998, the Commission issued a Notice of Proposed Rulemaking ("NPRM"). In re Policies and Rules for the Direct Broadcast Satellite Service proposed to finalize the rules for DBS by moving separately established regulations in Part 100 of the Commission's rules into the regulatory scheme of the domestic satellite service ("DOMSAT") in Part 25.

The NPRM also solicited public comment on several important policy questions, specifically: (1) the existence and modification of the rules on foreign ownership of DBS; (2) the possible strengthening of the existing rules involving service to Alaska and Hawaii; and, (3) whether the Commission should promulgate new rules to address the horizontal concentration of multi-channel video programming ("MVPD"), in the form of the prohibition of cable/DBS crossownership. These proposals were contested by the commenta-

Addressing horizontal concentration in the NPRM, the Commission sought comment on whether it should continue to address competitive and public interest issues on a case-by-case basis or adopt some form of MVPD/DBS crossownership rule. The FCC asserted that continuing to address competition concerns on a case-by-case basis would continue a "longstanding commitment" to DBS regulatory flexibility and would not hinder the Commission's ability to address specific cases on the facts in existence at the time. However, a formal rule would provide "greater predictability and consistency" and avoid the costs to the applicant and Commission of addressing specific questions on an individual basis in licensing proceedings.

This Comment first discusses the Commission's concurrent power to regulate competition in the communications industry. This Comment will then examine the predicate for the Commission's establishment of a cable/DBS crossownership prohibition. Next, this Comment analyzes the arguments against imposing a blanket ownership restriction, focusing on the concerns raised by the parties in the NPRM. Finally, this Comment advocates that the Commission continue to analyze DBS ownership on a case-by-case basis, but with a heightened degree of scrutiny.

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Footnotes:

7 See Satellite Industry Optimistic Despite Market, Launch Failures, Comm. Daily, Sept. 5, 1998. (Satellite TV subscriber totals reaching 9.6 million at the end of August 1998); See e.g. DBS, Cablefax, Sept. 9, 1998. (DirectTV acquires subscriber 4 million and has acquired roughly 1 million subscribers a year; up nearly 30% from last year); and DirecTV Activates 4 Millionth Subscriber, Businesswire, Sept. 17, 1998.

8 See 1982 DBS Order, supra note 2; and see generally Nonbroadcast Video, supra note 1 at §§ 15.03 & 15.06 (Rel. # 11 1997) (providing detailed account of the history, development and regulation of the DBS service). The Commission was given explicit authority to regulate DBS by section 205 of the Telecommunications Act of 1996. See 47 U.S.C.A. 503 (v) (West Supp. 1998).

9 See No Big Surprise: 3rd Major Player Bails Out of DBS, Citing Immature Market, Comm. Daily, July 11, 1984 at 1. Two of the three major potential DBS entrants were Comsat and Western Union. Id.

10 See 1982 DBS Order, supra note 2; see also National Assoc. of Broad. v. FCC, 740 F.2d 1190, 1200 (D.C. Cir. 1984) (Upholding the 1982 Order and stating that Commission has the authority to approve services on an experimental basis in an effort to gather important market data to complete a regulatory framework).


13 See id. at para. 2. (stating that the Commission has historically regulated DBS and DTH-FSS (direct-to-home fixed satellite service), which is transmitted using fixed-satellite service (FSS) frequency bands separately.) The Commission rule for the DBS service are codified in Part 100, while FSS rules, including those applicable to DTH satellite service providers, can be found in Part 25. See 47 C.F.R. § 25.101 et seq. (1998); and 47 C.F.R. 100.1 et seq. (1998); see e.g. Nonbroadcast Video, supra, note 8 at § 15.07.

14 See NPRM, supra note 11.

15 See id. at paras. 20-21, 32-36, 54-59.


17 See id. at para. 59.

18 See id.

19 See id.
I. REGULATING DBS IN THE PUBLIC INTEREST

A. The FCC’s Shared Authority to Regulate Competition

The FCC shares responsibility for the oversight of competition in the communications industry with the Department of Justice and the Federal Trade Commission. The FCC’s oversight is derived from its statutory obligation to grant licenses, to regulate, and to create policy. The Commission considers the competitive effects of a grant or transfer of a license as a factor in determining whether the transaction will be in the “public interest, convenience and necessity.”

B. Scarcity, the Public Interest and Diversity

1. Scarcity as the Basis of Commission Regulation

The conceptual foundation for the FCC’s regulation of radio frequencies can be traced to the scarcity doctrine. This doctrine is founded on the numerical limit on licenses and the limited nature of the radio frequency spectrum.

The Commission’s regulatory power has been justified on this doctrine in several landmark cases, notably Red Lion Broadcasting Co. v. FCC. In Red Lion, the Supreme Court upheld the Commission’s Fairness Doctrine that mandated broadcasters air opposing viewpoints on community issues. While Red Lion is primarily viewed as a content regulation case, it is also cited for the Court’s justification of the need to limit the use of the spectrum by licensing. The Court equated broadcasting with two persons speaking at the same time. That is, if both spoke at once nothing would be understood by either. The limited nature of the spectrum imposed a duty upon the Commission to ensure that licensees would benefit the public at large. Notwithstanding the express authority to regulate particular services in the Communications Act of 1934, the general duty to license in the public interest provides the Commission broad discretion to regulate the qualifications and actions of licensees.

2. The Public Interest: Intertwining Competition and Diversity

The Commission’s interpretation of the public interest includes the related principles of competition and diversity. Promotion of competition convenience, and necessity will be served. See 47 U.S.C.A. § 310 (West Supp. 1998).

20 See James R. Weiss and Martin L. Stern, Serving Two Masters: The Dual Jurisdiction of the FCC and the Department of Justice Over Telecommunications Transactions, 6 Comm.Law Conspectus 195, 196 (Summer 1998) [hereinafter Two Masters]. Weiss and Stern concentrated on the Department of Justice (“DOJ”) and FCC combined jurisdictions because “virtually all telecommunications mergers” are within the jurisdiction of both the FCC and the DOJ. Their thesis is that the Commission is subject to public scrutiny and political pressure in making competitive decisions which the DOJ, as an enforcement agency, is not. This difference in character, with the FCC as a broad prospective policy-making body and the DOJ as a narrow retrospective enforcement body, creates inefficiencies and wildly fluctuating results under the two agencies’ disparate analysis. Id.

21 See 47 U.S.C.A. §§ 301 & 308 (West Supp. 1998). See also Two Masters, supra note 20 at 197-198 (noting that the Commission has an express grant of power under the Clayton Antitrust Act for enforcement in the area of wire and radio communication, but that the FCC is limited to administrative antitrust proceedings. Therefore, it often chooses not to use this explicit grant of authority). The Commission cites section 310 (d) as its basis for its competitive analysis. See 47 U.S.C. § 310 (d) (West Supp. 1998); and In re Application of Motorola, Inc. and American Mobile Sat. Corp. for Consent to Transfer Control of Ardis Company, Memorandum Opinion and Order, 13 FCC Rcd. 5182 (1998) (adopting a formal competitive analysis in satellite regulation for the first time). Section 310 (d) states that no permit or license can be transferred, assigned, or disposed of by transfer of control except upon the Commission’s finding that the public interest, competition, convenience, and necessity will be served. See 47 U.S.C.A. § 310 (West Supp. 1998).

22 See id.; and Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950) (upholding the denial of a grant of a broadcast license to a newspaper on finding the “intent and practice of suppressing competition”). Id. at 35. The Court stated that Congress’ creation of policy and criminal penalties against monopoly does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to be applicable. Id. at 33.

23 See Bethany M. Burns, Comment, Reforming the Newspaper Industry: Achieving First Amendment Goals of Diversity Through Structural Regulation, 5 Comm.Law Conspectus 61, 69 (Winter 1997) (proposing that media concentration should be the touchstone for preserving the First Amendment through regulation of the broadcast and print media) [hereafter Achieving First Amendment Goals].

24 See id.


26 See id. at 373-75.

27 See id. at 375-76 & 396-97.

28 See id. at 388-89.

29 See id. at 387-88.

30 See 395 U.S. at 389-90.


32 See id. at 370-77.

33 See Benjamin A. Compaine, The Impact of Ownership on Content: Does it Matter?, 13 Cardozo Arts & Ent. L.J. 755, 761 (1995) [hereinafter Impact of Ownership on Content] (positing...
will result in the diversity of content.\textsuperscript{34} The Commission attempts to further encourage diversity by redefining licensing standards\textsuperscript{35} or through promoting competition by limiting the number or type of licenses that may be held by an entity.\textsuperscript{36}

In \textit{National Citizens Committee v. FCC},\textsuperscript{37} the Supreme Court rejected the argument that it was impermissible for the Commission to use its licensing authority to promote diversity in the communications industry because, "[t]his argument undersells the Commission’s power to regulate broadcasting in the ‘public interest.’"\textsuperscript{38} The Court asserted that the Commission had the statutory authority to make rules based on a policy of promoting diversity of ownership.\textsuperscript{39}

C. The Commission’s Available Choices of Protecting the Public Interest in DBS Ownership

The Commission has three options in formulating that the Commission’s policies designed to increase viewpoint diversity through market structure regulation will continue to be ineffective).

\textsuperscript{34} See id.

\textsuperscript{35} For a discussion of the Commission’s efforts to increase license ownership by the implementation of racially preferential licensing standards, see Mary Tabor, Encouraging “Those Who Would Speak Out with Fresh Voice” Through the Federal Communications Commission’s Minority Ownership Policies, 76 IOWA L. REV. 699 (March 1991) (arguing that the Commission’s attempts to increase minority participation have failed).

\textsuperscript{36} See \textit{Impact of Ownership on Content}, supra note 33 at 762.


\textsuperscript{38} See id. The Supreme Court has been described as encouraging the Commission to exercise a Congressionally mandated goal of diversity. See \textit{Achieving First Amendment Goals}, supra note 23 at 69. In turn the Commission is said to have been “very clear” about the great lengths it will go to accomplish the maximum diversity of ownership that the technology will permit. See \textit{Impact of Ownership}, supra note 35 at 761.


\textsuperscript{40} See NPRM, supra note 11 at paras. 58 & 61.

\textsuperscript{41} See id.


\textsuperscript{43} The concerns about the concentration of electronic media ownership are far from new. In 1924, President Calvin Coolidge warned that concentration of radio in the hands of the few was especially insidious because of the limited and exclusive right of broadcasters to use the radio spectrum. See \textit{Jonathan W. Emord, The First Amendment Invalidity of FCC Ownership Regulations}, 38 CATH. U. L. REV. 401, 405 (Winter 1989) [hereinafter \textit{First Amendment Invalidity}]. Since the 1940’s, the FCC has promulgated rules limiting the number of broadcast stations an entity could own. See \textit{FCC v. National Citizens Comm. for Broad.}, 436 U.S. 775 (1978). The case presents a concise summary of the ownership restrictions the Commission placed on radio. The Supreme Court cites Multiple Ownership of Standard Broadcast Station, 8 Fed. Reg. 16065 (1943); and Rules and Regulations Governing Television Broadcast Groups, 6 Fed. Reg. 2284, 2284-2285 (1943); The Court traces the early ownership restrictions from the early days of AM radio, to the regulations prohibiting the ownership of more than one broadcast network, to the newspaper/broadcasting cross-ownership prohibitions. \textit{Id.} at 780-782 & 781, nn. 1-5. \textit{FCC v. National Citizens Comm. for Broad.} upheld the Commission’s newspaper/broadcast cross-ownership restrictions, which are still in effect. See 436 U.S. 775 (1978); and 47 C.F.R. § 73.3555 (d) (1998).

\textsuperscript{44} See \textit{FCC v. National Citizens Comm. for Broad.}, 436 U.S. at 781. The Commission has historically balanced this concern for diversity of control as “a factor of primary significance” against the Commission’s sometimes-conflicting goal of ensuring “the best practicable service to the public.” \textit{Id.} at 781-82. Because of this, a waiver provision was included in the regulation, which often allowed newspaper owners to hold licenses for stations in their community of license if they demonstrated that they were the only party that could provide the best service. \textit{Id.} at 782-783; and see 47 C.F.R. § 73.3555, n. 4 (1998).


\textsuperscript{34} See id.

\textsuperscript{35} See \textit{Achieving First Amendment Goals}, supra note 23 at 69.

\textsuperscript{36} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{37} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{38} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{39} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{40} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{41} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{42} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{43} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{44} See \textit{First Amendment Invalidity}, supra note 38.

\textsuperscript{45} See \textit{First Amendment Invalidity}, supra note 38.
were consumers’ primary source of news. The ing the public interest in independent informa-

A. The Newspaper/Broadcast Crossownership Restrictions

The prohibition on newspaper/broadcast cross-

B. The LMDS/Cable Crossownership Restrictions.

Recently, the Commission enacted a crossown-

against blanket crossownership bans are discussed below in section III (A).

55 See LMDS Order, supra note 46. The MMDS (wireless cable) service has a statutory provision that is a “blanket” cable/local exchange carrier crossownership provision, put in place by the Telecommunications Act of 1996. The LMDS Order was affirmed by Melcher v. FCC, 134 F.3d 1143 (D.C. Cir. 1998). LMDS is a wireless service that can provide one or two way fixed video, voice, and data services. LMDS licenses are versatile and can be used to provide service in the local MVPD market, the local telephone market, a broadband data market, or a combination of these services. Id. at para. 170.

56 See discussion infra. Part III.D.2.a.

57 See id. at 169. The Commission licenses LMDS in 493 geographical service areas defined as BTAs. See LMDS Order, supra note 46 at paras. 126 & 135.


59 See 47 C.F.R § 101.1003(a)(1) (1998). The provision automatically expires (“sunset”) three years after June 30, 1997 unless it is extended by the Commission. Id.

60 See Melcher v. FCC, 134 F.3d 1143, 1149 (D.C. Cir. 1998).

61 See id.

62 See id. Melcher argued that there was a lack of evidence that an entity would use its licenses primarily to block entry into an MVPD market. See id.

63 See id. (quoting dicta in United States v. Radio Corp. of Am., 358 U.S. 354, 351-352 (1959)).

64 See id. at 799-802. The First Amendment arguments publisher could create a mass media monopoly. The Court rejected arguments that the ownership restrictions infringed on free speech.

65 See First Amendment Invalidity, supra note 43 at 416-417; and 47 C.F.R. § 73.3555 (c) (1998).


68 See FCC v. National Citizens Comm. for Broad., 436 U.S. at 783 & 785. The Commission established these policies despite the contradictory, inconclusive testimony and the lack of evidence of specific competitive abuses. See id. at 786.

69 See id.


71 See id. (quoting dicta in United States v. Radio Corp. of Am., 358 U.S. 354, 351-352 (1959)).

72 See id. at 799-802. The First Amendment arguments
III. CHALLENGING A BLANKET DBS/CABLE CROSSOWNERSHIP PROHIBITION

A. The First Amendment

1. The First Amendment as a Barrier to Spectrum Regulation


In Red Lion Broadcasting v. FCC, the court concluded broadcasters cannot receive absolute First Amendment protection because the limited spectrum cannot accommodate all individuals who wish to broadcast over it. Thus, the Court reasoned it would be impractical to find an unabridgeable First Amendment right to broadcast. The Court asserted that no one has a First Amendment right to monopolize the radio frequencies. Therefore, a denial of a license on public interest concerns cannot be equated with the denial of free speech.

2. The First Amendment as Barrier to Competition Regulation

Just as the denial of a license in the public interest does not offend the First Amendment, it is not a barrier to licensing and regulating broadcasting, and it does not provide a sanctuary for anticompetitive behavior. In Citizen Publishing Co. v. U.S. and Associated Press v. U.S., the Supreme Court clarified that the First Amendment is a powerful reason for antitrust enforcement. The Court asserted that the First Amendment rests on the assumption that diverse viewpoints are essential to the public welfare because the freedom to publish is guaranteed. Nevertheless, the freedom to combine and keep others from publishing is not guaranteed.

Recently, in Sunbelt Television v. Jones Intercable, a district court noted that the Supreme Court consistently finds media antitrust defendants not immune from suit if their activities are guided by anti-competitive motives. The court, citing Lorain Journal v. U.S., determined the First Amendment is not a cloak for activities that destroy the competitive marketplace. The court reasoned the goal of protecting the competitive marketplace is a factor that should be considered in the First Amendment jurisprudence. Thus, the First Amendment protects competition that would result from free speech. From this perspective, the First Amendment is not a barrier to establishing a crossownership prohibition in DBS.
3. Turner Broadcasting v. FCC: Some Regulations Offend the First Amendment

Commentator Time Warner Cable cites Turner Broadcasting System v. FCC\(^80\) for the proposition that any regulation promulgated by the Commission implicating the First Amendment would not pass intermediate scrutiny.\(^81\) The Turner court invalidated regulations mandating cable carriage of certain television stations.\(^82\) It found that there was not enough evidence on the record to indicate that broadcast stations were in financial trouble or in need of protection or that a blanket rule was the least restrictive means available.\(^83\)

Time Warner correctly stated that the United States v. O'Brien\(^84\) First Amendment test would sustain a content-restrictive regulation, but only if it furthered an important governmental interest and only incidentally infringed the First Amendment.\(^85\) However, the application of Turner to DBS is a misreading of the Court's holding because the proper standard for review of DBS ownership regulation is to examine whether the ownership qualifications would assure that the DBS licenses granted are in the public interest.

This public interest takes DBS beyond the parameters of O'Brien\(^86\) and Turner Broadcasting System and places it under the deferential review accorded in FCC v. National Citizens Committee for Broadcasting.\(^87\) The Turner Broadcasting System court refused to apply the National Citizens Committee line of reasoning because cable does not fall into the unique physical limitations of broadcast-

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\(^{81}\) See Comments of Time Warner Cable, supra note 80 at 7 (stating that the Supreme Court has "unequivocally held" that cable operators engage in speech and are entitled to the full protection of the First Amendment and that a complete cable/DBS cross-ownership ban could not withstand any legal standard of scrutiny under the First Amendment).


\(^{83}\) See id.

\(^{84}\) See Comments of Time Warner, supra note 80 at 7. (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968) (stating that a regulation that incidentally infringes upon the First Amendment will be upheld as long as it is the least burdensome alternative)).


\(^{88}\) See id.

\(^{89}\) See id.

\(^{90}\) See id. at 780. The court in Ameritech makes it clear that the "economic characteristics of the broadcast market" is not the underlying basis for the broadcast regulation cases, but rather the "special physical characteristics of the medium." Id. at 730-731. Stating that the "Supreme Court made clear" in Turner Broadcasting that "such a 'market dysfunction' rationale was not at the root of the broadcast regulation cases. . ." Id. at 731 (citing Turner Broadcasting Sys. v. FCC, 512 U.S. 682).


\(^{94}\) See id.

\(^{95}\) See id.


\(^{97}\) See id. A cable system could lower its rates, improve its service, add more attractive programming or engage in a more effective advertising campaign. Id.
B. Alleging DBS Lacks the Necessary Scarcity

The scarcity rationale articulated in *Red Lion v. FCC* is based on the premise that radio broadcasting was more susceptible to reality of interference created by multiple speakers. For example, until the establishment of the Federal Radio Commission in 1927, each operator chose the frequency on which he would broadcast. The result was chaos. The Radio Act of 1927 and the Communications Act of 1934 restored order to the airwaves. Regulations that limit the use of radio frequencies are necessary to avoid a return to airwave anarchy. Therefore, the concept of scarcity is not likely to disappear from radio regulation.

However, because broadcast regulation is premised on the scarcity concept, if scarcity does not exist in a particular situation the regulation will be invalidated. A DBS ownership restriction could be attacked by refuting the existence of scarcity.

1. The Presence of Other Competitive Media Means DBS is Not Scarce

Critics of DBS ownership restrictions assert that because the Commission has broadly defined the relevant competitive marketplace for DBS as the multi-channel video programming distribution market. The definition assumes that the American consumer could ideally choose to watch MTV, CNN or ESPN by subscribing to one of a number of choices outside cable and DBS. However, alternative choices to DBS are irrelevant to the concept of licensing. Further, while DBS is a MVPD system, it is a broadcast medium with regulatory and performance characteristics different than those of cable.

The Commission’s licensing process is concerned more with the method of information delivery to the home rather than the media’s content. As such, the Commission’s duty to protect the public interest makes ownership concentration of licenses an overriding concern.

Like radio and television broadcasting, DBS has two constant scarcities: spectrum and satellite orbital positions. One commentator noted that the Commission’s *DISCO II* decision allows entities to avail themselves of another country’s licensing procedures via the requisite reciprocal agree-

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98 See Red Lion v. FCC, supra note 9 at 367-76.
99 See id.
100 See id. at 375-76; and Michael F. Finn, *The Public Interest and Bell Entry into Long-Distance Under Section 271 of the Communications Act*, 5 COMMLAW CONSPECTUS 193, 207 (Summer 1997) (hereinafter *The Public Interest*).
101 See Red Lion Broad. v. FCC, supra note 9 at 375.
102 See id.
103 See The Public Interest, supra note 100 at 207. The *Red Lion Court*, in footnote five quotes one of the Radio Act’s sponsors who stated that the right of all Americans to enjoy radio communication can only be preserved only by the regulation of the idea that anyone who wishes to transmit may transmit and replacing it with the assertion that the right of the public to service is superior to the right to any individual.
104 See Red Lion Broad. Co. v. FCC, supra note 9 at 376, n. 5.
105 See id. at 375-76.
108 See id. The consumer’s choices outside DBS or cable would include a satellite master antenna television system (“SMATV”), a wireless cable system like “LMDS”, as well as “cable” delivered by one’s telephone company or over the Internet. See id.
109 This argument is also belied by participant behavior in the last auction period and in the Primestar licensing proceedings. If the availability of spectrum and orbital positions were not scarce, then the value of a license would arguably be less than prices that have been paid at auction. See NAB Attack on Satellite TV Won’t Hurt DBS Growth, Investors Say, Satellite Week, July 29, 1996 (stating that a industry member comments MCI/News Corp. will need $3 million viewers to break even because of the $682 million it paid for DBS license).
110 This goes back to the Commission’s basic premise that the radio spectrum is a scarce resource. Cable TV and telephone regulations are premised on the concept that they are natural monopolies along the lines of a public utility. See generally Nonbroadcast Video, supra note 1 at §§ 3.01-3.06; also Michael K. Kellogg, et al., *Federal Telecommunications Law and Policy* 1-4 (1992); and see Thomas G. Krattenmaker, Telecommunications Law and Policy 343-46 (2d ed. 1998). The Commission only licenses the use of the radio spectrum.
111 Concentration of control of DBS is not a new concern, even before the service was authorized, commentators expressed trepidation in placing the control of national video in the hands of the few. See Satellite Communications/ Direct Broadcast Satellites Hearing Before the Subcomm. on Telecom., Consumer Protect., and Finance, 97th Cong. 97-81 (Testimony of Wallace J. Jorgenson, Representing MST and the Three Television Network Affiliates Assoc.) (Dec. 15, 1981).
112 See Red Lion Broad. v. FCC, supra note 9 at 400; and NPRM, supra note 11 at para. 6.
113 The DBS service has three full-continental United States “slots” internationally allocated with several others than can only “see” part of the country (the satellite would be below the horizon of the earth for the rest of the country). See Nonbroadcast Video, supra note 1 at § 15.01; and NPRM, supra note 11 at para. 6.
114 See Comments of Primestar to *In re Policies and Rules
ments and broadcast to the American consumer. This effectively increases the spectrum and orbital positions available to the domestic market. While the effect is the creation of more choices in the satellite MVPD market, it does not enlarge the DBS resources available for licensing by the Commission.

2. Refuting Scarcity with the Advancement of Technology

A second argument against the presence of scarcity in DBS is premised on the advancement of technology creating additional MVPD media. In Turner Broadcasting, the Court applied this argument to invalidate a cable television “must carry” regulation. But the court spoke only to cable content regulation and the potential for technology to expand the capacity of cable systems to carry more “speakers.”

DBS capacity has increased dramatically since its 1982 inception when the average DBS satellite only had the capacity to broadcast six channels. Current DBS satellites broadcast at least six channels on each transponder with the current maximum capacity of a satellite equaling 32 transponders. Such technological advances make DBS more attractive to consumers because the program capacity is increased. However, this ignores the fundamental problem: the finite amount of licenses and radio spectrum.

C. A Blanket DBS Crossownership Prohibition is an Arbitrary and Capricious Change in the Policy Tide

When the Commission acts inconsistently with its past action, it is subject to the possibility of a legal challenge and judicial review. As the court held in Greater Boston Television Corporation v. Commission, there is no danger of physical interference between two cable speakers attempting to share the same channel. See Greater Boston Television Corporation v. Commission, 444 U.S. 568, 571 (1980).
interest from holding the general policy of Congress to be preclude an administrative agency charged with the public interest.

This argument is countered by the Commission’s need and responsibility to re-evaluate its regulatory standards on a regular basis. The Commission has the right to modify and overrule long-standing precedents, though "such abrupt shifts constitute 'danger signals' that the Commission may be acting inconsistently with its mandate." When enacting a DBS/cable crossownership restriction, the Commission is required to provide a reasoned analysis that must indicate that prior policies and standards are being deliberately changed and not casually ignored.

Several commentators remark that the Commission would completely changing its policy by enacting a blanket DBS/cable crossownership prohibition. The argument is flawed on two regards. The argument ignores the precedent of the past 64 years of broadcast regulation and jurisprudence. First, deregulation and regulatory flexibility is still a relatively new concept in communications regulation, having taken root in the 1970’s and advocated in the Telecommunications Act of 1996. Second, the Commission has long taken antitrust concerns into its determination of the public interest.

While the Commission considered and rejected crossownership restrictions on DBS in the past, it reserved the authority to impose them if a need arose in the future. Several commentators argued the 1982 DBS Order established Commission precedent that ownership restrictions on the DBS service were unnecessary.

1. The 1982 DBS Order: Precedent for the Rejection of a Crossownership Prohibition

The situation faced by the Commission in the 1982 DBS Order was unique. DBS had not been deployed so no evidence existed as to the viability of the service with consumers or financiers. The Commission assumed that many alternative video sources would be available by the time DBS systems became operational, and ownership restrictions would limit the availability of service applicable top questions arising in the proper discharge of its duties. Monopoly in the mass communication of news and advertising is contrary to the public interest, even if in terms proscribed by antitrust laws." Id. at 33; see also Serving Two Masters, supra note 19 at 207 (citing U.S. v. FCC, 652 F.2d 72, 87 (D.C. Cir. 1980) for the proposition that the FCC is required to take antitrust considerations into its public interest analysis).


See id. at para. 30. ("[b]alancing the competitive concerns against the public interest concerns — such as the expedience of service and allowing the market to maximize efficient use of public resources — We [the Commission] believe that the single, temporary structural rule. . . should be adequate."); and 1982 DBS Order, supra note 2 at para. 98 (stating that if the Commission’s experience with the early DBS systems indicates that excessive concentration of control limits access to information it will retain the option of imposing ownership restrictions).

See Comments of Time Warner, supra note 60 at 3-4; and In re Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, 13 FCC Rcd. 6097, Comments of the National Cable Television Association to In re Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 5-7 (April 6, 1998) [hereinafter Comments of NCTA].

See note 2, supra.

See 1982 DBS Order, supra note 2 at para. 95. While technically true, LMDS and SMATV has a minor percentage

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125 See Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970).
126 See id. at 852.
128 See id.
129 See id. at 1425. The court also indicates that the "reasoned analysis and factual bases" will be scrutinized closely for assure that there is a rational and considered discussion that is supported by the facts and law. Id. at 1426.
130 See Comments of the News Corp., supra note 117 at 3-5.; Comments of Primestar, supra note 117 at 13-17; Comments of Tempo Satellite to the Notice of Proposed Rulemaking in FCC 98-26 at 7 (April 12, 1998) [hereinafter Comments of Tempo]; Comments of Time Warner Cable, supra note 60 at 2-7.
131 See notes and text, supra.
133 See Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950). "The fact that a policy against monopoly has been made the subject of criminal sanction by Congress does not preclude an administrative agency charged with the public interest from holding the general policy of Congress to be
provided by the most experienced and capable suppliers.\textsuperscript{139} The Commission believed that an ownership restriction would prevent DBS operators from assembling attractive program packages.\textsuperscript{140} The Commission also assumed that the penetration and ownership concentrations in the cable industry would remain at 1982 levels because it stated that it would address concerns about concentration of control on a locality by locality basis.\textsuperscript{141}

The marketplace assumptions that underlie the 1982 DBS Order do not reflect the present day competitive reality. First, heavy national concentration of cable system ownership implicates control issues that span large aggregate blocks of jurisdictions, not just limited individual localities.\textsuperscript{142} Second, the 1992 Cable Act has removed the television program access advantages that cable ownership was purported to bring to DBS.\textsuperscript{143} As a result of the Cable Act, program suppliers are forbidden to discriminate against DBS, so cable operators and DBS systems have equal footing to program acquisition. Third, the Commission did not exclude enacting ownership restrictions: the 1982 DBS Order simply stated that it was not going to institute an ownership control provision absent a useful purpose.\textsuperscript{144}

of the MVPD marketplace today, and while DBS is growing, cable still dominates the field. This may change in the long run, but the anti-competitive concerns exist now.

\textsuperscript{139} See 1982 DBS Order, supra note 2 at para. 97.\textsuperscript{140} See id. at para. 97. The questions of program access have been eliminated, at least in the eyes of the law, by the provisions of the Telecommunications Act of 1996, the 1992 Cable Act. However, program access violations still occur. See generally In re Echostar Comm. Corp v. Fox/Liberty Networks, Program Access Complaint, 13 FCC Rcd. 7394 (1998).

\textsuperscript{141} See 1982 DBS Order, supra note 2 at para. 98.

\textsuperscript{142} See 1997 Competition Report, supra note 1 at paras. 149-56.


\textsuperscript{144} See id.


\textsuperscript{146} See id. at para. 73.

\textsuperscript{147} See id. The Commission also states that it has recognized that cable-affiliated MVPD's bring "certain positive attributes as DBS permittees." Id.

\textsuperscript{148} See id. at para. 72. The Commission also addresses the fact that it may have figuratively already left door open for cable in Tempo II. It states that "it is not necessary to reverse Tempo II and exclude a cable-affiliated operator from the opportunity to control or use DBS spectrum..." See id. at para. 74. It notes Tempo/TCI's "substantial" investment in its DBS system and makes a deference to that decision at least partially attributable to reliance. Id. The Commission then concludes that it will still have the power to grant, deny or condition any proposed transactions in the event a non-DBS MVPD attempts to acquire one of the existing and operational DBS systems at the other two full-CONUS positions at 110° and 119° W. See supra note 1 at para. 76. The Commission seems to have ignored the fact that in Tempo II that it severely conditioned Tempo's authorization. See In re Application of Tempo Satellite, Inc. for the Construction Permit for New Direct Broadcast Satellite Service, Memorandum Opinion and Order, 7 FCC Rcd. 2728 at para. 12 (1992). It also ignores the fact that it stated that Tempo's participation in the DBS industry could accelerate the initiation of DBS service. Id. at para. 10. Allowing the unconditional entry of a non-MVPD operator in the context of the 1995 auction proceedings does not logically flow from the heavily conditioned authorization granted Tempo in the name of expediency. In Tempo II, the public interest in "the best service" was clearly equal to encouraging the initiation of service where there was none before. In 1995, with four, now three, operators broadcasting already, the same cannot be said to be true. See supra note 1.

\textsuperscript{149} See Comments of Primestar, supra note 117 at 6-10; and Comments of Tempo, supra note 130 at 7-8; see also Comments of United States Satellite Brdcstng. Co. to In re Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 7 (April 6, 1998) [hereinafter Comments of USSB].

2. The 1995 DBS Auction Order

Commentators use the Commission's decision in the 1995 DBS Auction Order\textsuperscript{45} not to impose a restriction on cable systems in a forthcoming DBS auction as a rejection of all ownership restrictions.\textsuperscript{146} In the Order, the Commission stated that the presence of existing non-cable affiliated DBS providers would severely constrain the strategic activities of a DBS-MVPD combination because consumers would have at least two other competitive sources for DBS service.\textsuperscript{147} However, the Commission also asserted that the non-aggregation rule it was adopting in the Auction Order eliminated the need for a separate restriction on non-DBS multi-channel video program distributors.\textsuperscript{148}

D. The Commission has Evidence of a Need for an Ownership Restriction

Some commentators argue that there is not enough evidence to support a crossownership restriction.\textsuperscript{149} The opposite is true. First, the video program distribution markets will continue to be highly concentrated. Second, cable system operators have a history of unfair practices. Third, pre-
dictions of anticompetitive behavior are enough to justify crossownership restrictions.

1. The Video Program Distribution Market is and will Continue to be Heavily Concentrated.

The cable industry has the largest share of subscribers in the MVPD market. The cable industry continues to be vertically integrated with its programming networks. Further, the cable industry continues to consolidate itself into regional “clusters” of commonly owned cable systems in geographic areas. The Commission expects this trend to continue. It describes the local MVPD markets as “highly concentrated” and predicts that there may be a tendency for prices to rise above competitive levels and for product quality, innovation, and services to fall below competitive levels in both household and MDU (multiple dwelling unit) MVPD markets. Cable prices continue to rise and non-cable MVPD’s have increased their number of subscribers but have not had a significant effect on cable subscribers.

2. Cable System Operators Have a History of Unfair Play.

Cable interests have a record of anticompetitive conduct. The cable system operators have used their leverage as creators and distributors of video programming to make market entry more difficult for competitors.

a. Primestar is an Example of Past Anti-Competitive Behavior.

Five of the largest cable system operators own sixty percent of Primestar, a direct-to-home video satellite service that operates in the domestic satellite service (DOMSAT) bands. In 1992, Primestar and its cable system owners/partners were the subject of restraint of trade investigations and consent decrees. The decrees expired October 1, 1997, and Primestar is free...
under the decree to become a high-power DBS operator, investor, or licensee after it gives 45 days notice to the states.\textsuperscript{164}

While the \textit{Primestar} decrees and program access complaints are not directly part of the record in the NPRM, the Commission maintains authority to take into account its experience of a cable operator's past actions when it makes decisions based on predicted conduct.

b. \textit{Predictions of Economic Misbehavior Justify a Crossownership Prohibition.}

The Commission can institute a crossownership prohibition if it anticipates that anticompetitive behavior may occur. In upholding the LMDS/cable crossownership ban in \textit{Melcher v. FCC},\textsuperscript{165} the court asserted that a complete and factual support in the record is required when the Commission establishes criteria based on predictions of market and regulated entities behavior.\textsuperscript{166} However, when factual certainties do not exist or do not provide the answer, the Commission is only required to state and identify the considerations that it found persuasive.\textsuperscript{167} In \textit{Melcher}, the Commission's considerations were not limited to the formal record in the LMDS proceedings.\textsuperscript{168} For example, the Commission relied on standard economic theory, its experience, analogous situations in the cable industry, and an assessment of competitive and regulatory developments in the local telephony and MVPD markets.\textsuperscript{169}

From these criteria the Commission concluded that an LMDS license's value would be of its potential to preserve profits that a non-cable competitor would erode.\textsuperscript{170} The \textit{Melcher} court was influenced by the Commission's application of economic theory\textsuperscript{171} when it found the Commission's predictions reasonable and with adequate support.\textsuperscript{172}

Commenting on the NPRM, DirecTV notes that the Commission found in the \textit{LMDS Order} that a cable LMDS licensee would have the incentive to protect its market power and DirecTV believes that the same motives exist in DBS.\textsuperscript{173} This reasoning is sound because the economic arguments in LMDS should be even more applicable to DBS.\textsuperscript{174} Concentration of ownership and the economic theories of competitive behavior\textsuperscript{175} should be even more persuasive because a cable interest would be able to gain national coverage with the acquisition of a single license.

\textsuperscript{164} See id. at 369-70.
\textsuperscript{165} See \textit{Melcher v. FCC}, 134 F.3d 1143 (D.C. Cir. 1998) (upholding LMDS/Cable cross-ownership prohibition).
\textsuperscript{166} See id. at 1156.
\textsuperscript{167} See id.
\textsuperscript{168} See id. at 1155-57.
\textsuperscript{169} See id. (quoting the \textit{LMDS Order}, supra note 44 at para. 179).
\textsuperscript{170} See \textit{Melcher v. FCC}, 134 F.3d at 1157.
\textsuperscript{171} See \textit{LMDS Order}, supra note 46 at para. 174, n. 267 (citing multiple sources on preemption).
\textsuperscript{172} See id.
\textsuperscript{173} See generally DOUGLASS NEEDHAM, THE ECONOMICS OF INDUSTRIAL STRUCTURE, CONDUCT AND PERFORMANCE at 159-183 (1978). Economists studying the dynamics of business competition and business behavior have developed pertinent mathematical and theoretical models. These models include an analysis of the existence of barriers to market entry and attempt to predict the effect on potential market entrants. See id. at 1-25. INGEMAR DIERCKX and KAREN COOL, Competitive Strategy, Asset Accumulation and Firm Performance; STRATEGIC GROUPS, STRATEGIC MOVES AND PERFORMANCE at 63-79 (Herman Daems and Howard Thomas, ed. 1994). The economist can model and predict the likely conduct and performance of a particular company and the particular strategies it might choose. See generally Tracy R. Lewis, Preemption, Divestiture, and Forward Contracting in a Market Dominated by a Single Firm, 73 AM. ECON. REV. 1092-1101 (Dec. 1983); Marvin B. Leiberman, Excess Capacity as a Barrier to Entry: An Empirical Appraisal, 35 JOUR. INDUS. ECON. 607-627 (June 1987). The theory of preemption posits that a heavily concentrated market will continue to stay heavily concentrated because the advantages of incumbency grow over time and form a strong barrier to market entry by a competitor.
II. ANTITRUST ANALYSIS AS A PUBLIC INTEREST SAFEGUARD

Having stated that the Commission has the authority to affect a blanket crossownership prohibition, it is unlikely that the Commission would decide to maintain the status quo. The decision to address competition concerns ad hoc would arguably be against the public interest unless the argument stands that the service is still developing.

The general consensus of the commentators is best summarized by DirecTV which stated that "a per se cable/DBS crossownership ban is a harsh measure inconsistent with the flexibility that has characterized DBS service regulation." DirecTV's position is that as the MVPD market becomes more competitive, cable-DBS affiliations will not pose the competition concerns that exist now.

A. Precedent and Advantages of a Case-by-case Analysis

DirecTV's statement that cable participation in DBS may be welcome at some point in the future is logical. First, when the Commission conditionally authorized cable operator TCI's affiliate Tempo Satellite in the Tempo II decision, it stated that MVPD experience and resources would be helpful in the initiation and launch of the first DBS services. Secondly, the Commission has stated that it prefers addressing DBS competition on a case-by-case basis with a reliance on existing antitrust law, although it has never precluded a blanket ownership prohibition.

1. TEMPO II

The Commission in Tempo II approved a conditioned operation authorization for TCI-controlled Tempo Satellite. In that proceeding, the Commission stated that existing antitrust law, in combination with the conditions it imposed in the Order would be adequate to prevent any anti-competitive conduct by Tempo. The Commission also stated that in 1990 it recommended that Congress reaffirm the applicability of traditional antitrust principals to DBS and the obligation of firms to avoid interference with emerging competition.

2. 1995 DBS Auction Order

In its 1995 DBS Auction Order, the Commission disagreed that the public interest is furthered by freezing the structure of the DBS industry with a blanket crossownership prohibition. It believed that the adopted Order would leave it free to evaluate future transactions on a case-by-case basis.

In addition, the Commission noted that it would continue to have rulemaking authority to remedy anti-competitive conduct and consider additional rules, if required. The FCC also noted that the presence of DirecTV, EchoStar, and USSB would constrain a cable/DBS combination because consumers could still choose two other competitive DBS sources. In a nod to Tempo II, the Commission recognized that cable-affiliated MVPDs bring certain positive attributes as DBS permittees.

The Commission's expressed preference of a case-by-case approach to DBS crossownership is
not enough to continue an ad hoc policy. An administrative law case-by-case approach suffers from the same vagaries of the common law — it is inherently unpredictable and inconsistent. A case-by-case approach also subjects each proceeding to the possibility that any particular transaction's concept of the public interest will vary according to the political tide.

B. Adopting a Formal Antitrust Analysis

In the 1990’s, the Commission began to adopt a competitive analysis framework based on the Federal Trade Commission and Department of Justice’s 1992 Horizontal Merger Guidelines. The Commission primarily used this analysis in common carrier contexts. However, the International Bureau has since adopted the analysis in the context of satellite regulation in the 1998 Ardis Order.

The analysis compares the before and after effects of the transaction on competition. The Commission takes considers any beneficial efficiencies of the transaction along with any other public interest benefits that are likely to result. It relies heavily on the 1992 Horizontal Merger Guidelines while incorporating the Commission's independent expertise. The Commission’s analysis departs from that of the Department of Justice in that it incorporates decades of Commission experience in telecommunications market competition.

The analysis first begins with the definition of the relevant markets, both geographic and product. Second, current and potential participants are identified in these markets and, third, the effects that the transaction may have on the relevant markets are evaluated. Fourth, the analysis considers whether the transaction will have any harmful or beneficial effects, by weigh-

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191 See Commissioner v. Dubester, 363 U.S. 278, 290 (1960) (stating in dicta that a case by case approach may not satisfy an academic's desire for neatness).

192 Several commentators note that Commissioners Powell and Furtchgott-Roth assert a reliance on the Department of Justice's antitrust enforcement powers. See Comments of NCTA, supra note 136 at 4; see also Comments of Time Warner Cable, supra note 80 at 9; See also In re Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, Separate Statement of Commissioner Harold W. Furtchgott-Roth Dissenting, 13 FCC Rcd. 6907 (rel. Feb. 26, 1998); and In re Policies and Rules for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking, Separate Statement of Commissioner Michael K. Powell Approving in Part, Dissenting in Part, 13 FCC Rcd. 6907 (rel. Feb. 26, 1998). This would be an abdication of the Commission's duty to regulate in the public interest. In Applications of Telecommunications, Inc. and Liberty Media Corp., Applications for Transfer of Control of Radio Licenses, 9 FCC Rcd. 4783 at para. 21 (1994) (stating that it is "well settled" that the public interest means the public as a whole). That would be the case here also, because a reliance on the Department of Justice to address competition issues would prevent the Commission from getting the whole picture, let alone a quick glimpse of the statue of the marketplace.


194 See LMDS Order, supra note 46 at para. 37, n. 88. While the Commission has used the analysis primarily in a common carrier (telephone and long distance carrier) context, however, it was also used in the LMDS Order.

195 One of 5 divisions of the FCC, responsible for all satellite services and international telecommunications regulation.


197 See Ardis Order, supra note 196 at para. 9.

198 See id. In the 1992 Merger Guidelines, the Department of Justice and the Federal Trade Commission stated that the Agency seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral while challenging competitively harmful mergers. See 1992 Merger Guidelines, supra note 191 at § 9.1.

199 While the analysis is heavily based on the 1992 Merger Guidelines, the Commission's function is to enforce the standard of the public, interest, convenience and necessity and has the duty to refuse licenses or renewals to those that will engage in or propose to engage in actions that will prevent the full use of the licensed facilities. See In re Telecommunications, Inc. and Liberty Media Corp., Applications for Consent to Transfer Control of Radio Licenses, 9 FCC Rcd. 4783 at para. 18 (1994) (stating that it is not the function of the FCC to enforce the antitrust laws "as such}).

200 See Ardis Order, supra note 196 at para. 10.

201 See id. at para. 11; and 1992 Merger Guidelines, supra note 193 at § 1.2.

202 See Ardis Order, supra note 196 at para. 11; and 1992 Merger Guidelines, supra note 193 at § 1.1.

203 See Ardis Order, supra note 196 at para. 12; and 1992 Merger Guidelines, supra note 193 at §§ 1.3-1.5.

204 See Ardis Order, supra note 196 at para. 14; and 1992 Merger Guidelines, supra note 193 at §§ 2.0-2.2.
ing these effects to determine whether the overall effect is to enhance competition.\textsuperscript{205}

Applying this analysis in the \textit{Bell Atlantic/NYNEX Order},\textsuperscript{206} the Commission has stated that applicants carry the burden of showing that the proposed merger would not eliminate potentially significant sources of competition that the Communications Act of 1934, as amended, sought to create.\textsuperscript{207} Thus, a party must prove that the transaction will enhance and promote competition, rather than prove the competition will not be eliminated or retarded.\textsuperscript{208}

1. Relevant Geographic and Product Markets

In the case of DBS, the matters of geographic and product markets\textsuperscript{209} have been well settled. The 1995 Auction Order, the 1997 Competition Report, the Notice of Proposed Rulemaking and the parties' comments and reply comments are in agreement.\textsuperscript{210} The relevant product markets is the MVPD market and the relevant geographic market is the nation as a whole.\textsuperscript{211}

\begin{itemize}
\item[206] See Bell Atlantic/NYNEX Order, supra note 193.
\item[207] See id.
\item[208] See Bell Atlantic/NYNEX Order, supra note 193 at para. 3. The Commission concludes that both Bell Atlantic and NYNEX were potential competitors, and was prepared to decline the application for merger. However, the parties agreed to voluntary undertake “a series of commitments” that would condition the approval of the merger. Id. at paras. 7-12.
\item[209] The 1992 Merger Guidelines note that a merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market. Mergers that neither significantly increase concentration nor result in a concentrated market ordinarily require no further analysis. 1992 Merger Guidelines, supra note 193 at § 1.0.
\item[210] See Comments of Ameritech to \textit{In re} Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 8 (April 6, 1998); and Comments of DirecTV, supra note 173 at 6-7; Comments of EchoStar Communications Corp. to \textit{In re} Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 6 (April 6, 1998)[hereinafter Comments of EchoStar]; Comments of the NCTA, supra note 136 at 9; but cf. Comments of the Wireless Cable Association to \textit{In re} Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 at 5 (April 6, 1998).
\item[211] Query whether this definition includes the non-contiguous Unites States. In this same proceeding, one of the other contested proposals was to strengthen requirements that DBS operators serve Alaska and Hawaii. Both states comment that they do not receive the DBS service and are not likely to in the future. See Comments of the State of Alaska to \textit{In re} Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 (April 6, 1998); and Comments of the State of Hawaii to \textit{In re} Policies and Rules for the Direct Broadcast Satellite Service, FCC 98-26 (April 6, 1998) This is due to technical constraints. The orbital position of the satellite dictates how much of the country can be “viewed” by the satellite. After a distance, the curvature of the earth causes some places to be below the horizon of the satellite. In the case of Alaska and Hawaii, their distance from the mainland places those states past the horizon of the CONUS orbital positions. Id.; and 47 C.F.R. § 100.53 (1998).
\item[212] See Bell Atlantic/NYNEX Order, supra note 193 at 138.
\item[213] See 1992 Merger Guidelines, supra note 193 at § 1.5. The doctrine asks five questions. First, whether the market is highly concentrated. See 5 PHILLIP AREEDA AND DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPALS AND THEIR APPLICATION ¶ 1119 (1980 & Supp. 1997)[hereinafter Antitrust Law]. Second, the doctrine analyzes whether the few other potential entrants are equivalent to the company that proposes to enter the market by merger. Third, the doctrine asks whether “but for” the merger the company would have been reasonably likely to enter the market in absence of the merger. Fourth, the analysis asks whether the merging company would have had another feasible means of entry. See 1992 Merger Guidelines, supra note 193 at § 5; and Antitrust Law, supra at ¶ 1124. Finally the analysis considers whether the other alternative means of entry would have had a substantial likelihood of producing market de-concentration or other pro-competitive effects. See Bell Atlantic/NYNEX Order, supra note 193 at para. 138
\item[214] See id. at para. 136.
\item[215] See Bell Atlantic/NYNEX Order, supra note 193 at para. 199 (stating that because the Commission is determining whether Bell Atlantic has carried the burden of demonstrating that the merger is in the public interest as opposed to violat-
\end{itemize}
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The Commission’s analysis of the potential harms of the transaction also includes an analysis of the potential benefits. According to the 1992 Merger Guidelines, an agency should consider only efficiencies that would unlikely occur absent the transaction. These efficiencies must also be weighed against the potential harms and the benefits to the public interest must increase as the harms to the public become greater and more certain.

The benefits of cable ownership of DBS are not clear. There is no evidence that reduced prices will devolve to the consumer. It is quite possible that a cable interest would use leverage derived from market concentration and a DBS license to achieve an advantage against the existing competitors. Cable rates after deregulation have risen and there is no reason to believe that they will decrease after cable entry into DBS.

It is also unlikely that a cable-affiliated licensee would bring competitive benefits that another market entrant could not. Although faced in the 1995 DBS Action Order with ambiguous evidence of the effects of cable participation, the Commission rejected the imposition of cable/DBS restrictions. Under this analysis, a cable applicant’s DBS license would be denied unless it could demonstrate concrete pro-competitive results.

C. Advantages of the Bell Atlantic/Nynex Analysis.

1. The Analysis is not Over or Under-Inclusive.

The analysis has many advantages. First it is not over-inclusive. It weeds out the potentially harmful transactions while permitting the beneficial transactions. Financing available to the DBS industry would only be limited by excluding transactions that would most likely result in anti-competitive behavior. Transactions involving a cable interest with a minor national market share would still move forward and allow DBS access to greater financial resources and provide a cable entity the opportunity to compete against larger MVPD entities.

The use of this heightened transaction analysis also avoids the potential of future under-inclusiveness. While cable interests will maintain an overwhelming percentage of the MVPD market into the foreseeable future, it would be a futile exercise to predict that future technological developments will not eliminate or significantly reduce cable’s dominance. If cable is replaced by a new dominant technology, it is not impossible to imagine that the new technological giant would pose the problems and raise the same issues that cable participation in DBS currently presents.

...
2. **The Least Intrusive Option**

This analysis also is the least intrusive of the options available to the Commission.\(^{223}\) It does not disturb the current ownership relationships or pose an absolute barrier to market entry at a future date. The *Primestar* applications are still pending before the Commission. Under this analysis they would likely not be granted. However, it would not call for the divestiture of Tempo's authorization because the competitive concerns in that proceeding were addressed and remedied by the imposition of conditions on the grant of authorization.\(^ {224}\)

3. **Preserves the Ability of the DBS Industry to Adapt to Change**

This formal analysis preserves both the industry's ability to respond to change and the Commission's ability to review future transactions on a case-by-case basis.\(^ {225}\) The development of DBS has demonstrated that the industry has benefited from regulatory flexibility.\(^ {226}\) Regulatory flexibility allowed DBS operators to develop and implement preferential technical specifications. DBS service evolved into a strong competitor to cable because if the operators had been bound by FCC standards promulgated at the service's inception, DBS would have been forced into system designs with less channel capacity based on 1980's technology.\(^ {227}\) While concrete benefits of MVPD participation in DBS are far from certain, such presence was not required during the inception of DBS.

4. **Less Serious DBS Competitive Concerns Can Be Addressed Through Conditional Licensing**

If the competitive concerns raised in a particular case are not serious enough to warrant the denial of a license under the analysis, the Commission can make a conditional grant as it did in *Bell Atlantic/NYNEX* and *TEMPO II*.\(^ {228}\) The public interest would be assured not only by the use of the analysis, but also by conditional licensing. The availability of two regulatory tools assures that a party seeking a DBS license transfer or authorization will be bound to a specific agreement to serve the public interest.

5. **The Analysis Adds Predictability and Consistency**

The Commission acknowledged in its NPRM that predictability and consistency in DBS owner-

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\(^{223}\) See 1995 Auction Order, supra note 154 at para. 65. The Commission states that "[w]e share many commenter's [sic] reluctance for regulation of the DBS service, which is why we have sought to implement the least intrusive means possible to further the goals articulated above of fostering competitive rivalry among MVPD's." Id. This is not to say that there are not costs involved. A party to a particular transaction must incur costs to apply for Commission approval, respond to public comments and undergo significant document production. See *Serving Two Masters*, supra note 20 at 206.

\(^{224}\) See *Tempo II*, supra note 181 at para. 12. The situation in the *Primestar* applications poses more serious concerns than that in *Tempo II*. Where Tempo's major MVPD shareholder was TCI Satellite Entertainment ("TCI-SAT"), Primestar is held collectively by five of the major cable system operators. Any anti-competitive conduct by Tempo would involve only one of the major cable system operators, where the conduct of Primestar would involve a collective of the five biggest operators who aggregate control over 50 percent of the cable market.


In testimony to Congress following Commission approval of the *Bell Atlantic/NYNEX* merger, then-Chairman Reed Hundt said that the application of this analysis to that transaction was a landmark decision in describing a detailed flexible public interest analysis. See *Serving Two Masters*, supra note 20 at 203 (citing *The Telecommunications Act: An Antitrust Perspective: Testimony of Reed Hundt, Chairman, FCC, Testimony Before the Senate Judiciary Comm., Subcomm. on Antitrust, Business Rights and Competition*, Sept. 17, 1997, available in LEXIS, Legis Library, Cngtst file).

\(^{226}\) See Comments of Tempo Satellite, *supra* note 130 at 3; and Comments of Primestar, *supra* note 117 at 20; and Comments of DirecTV, *supra* note 173 at 27; *cf. EchoStar Quarterly Report* (stating that the FCC has typically shown flexibility when satellite failures occur).

\(^{227}\) See *Reply Comments of Primestar to In re Policies and Rules for the Direct Broadcast Satellite Service*, FCC 98-26 at 11-12 (April 21, 1998); *Reply Comments of EchoStar*, *supra* note 63 at 11-12.

\(^{228}\) The Commission also imposed conditions when MCI applied for Commission of its proposed merger with British Telecom, a transaction that was not consummated for other reasons. See *Serving Two Masters*, supra note 19 at 204 (citing *In re* The Merger of MCI Comm. Corp. and British Telecomms. PLC, 12 FCC Rcd. 3460 (1997); Proposed Final Judgement and Memorandum in Support of Modification, 2 Fed. Reg. 37594 (1997)).
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ship qualifications offers some desirability. The Commission has been criticized for inconsistent application of economic principles and analysis. Critics have targeted the Commission's unwillingness to use a principled analysis in some situations where policy would not be furthered by its application. This analysis rejects some of the doctrines present in the Department of Justice's Merger Guidelines but it does offer the affected parties a more concrete guide in predicting how the Commission may rule in any particular proceeding.

III. CONCLUSION

The Commission should adopt a formal antitrust analysis when it approaches DBS crossownership issues. A published, structured analysis offers participants and the public a concrete guideline that creates more predictable results than a pure ad hoc approach. Unlike a blanket rule prohibiting cable ownership of DBS, it offers the industry continued flexibility in financing and the ability to form strategic relationships offsetting the costs of implementing a DBS system. At the same time, it preserves the public's interest in affordable, competitive multi-channel video programming. It is an effective compromise, and a logical extension of Commission policy and the deregulatory spirit of the Telecommunications Act of 1996 that will reach into the homes of every American consumer. As Commission Chairman Hundt described the Bell Atlantic/NYNEX Order, this analysis offers the still-evolving DBS service a "flexible and dynamic approach to industry structure."

229 See NPRM, supra note 11 at para. 58.
231 See id. at 460-88.
233 See Serving Two Masters, supra note 20 at 203.