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NOTES

RIDING ON A DIAMOND IN THE SKY:¹ THE DBS SET- ASIDE PROVISIONS OF THE 1992 CABLE ACT

As with all communications technology utilizing the electromagnetic spectrum, Direct Broadcast Satellite (DBS) systems have fallen under the watchful eyes of Congress and the Federal Communications Commission (FCC). Despite being the most successful consumer electronics product ever introduced,² DBS has been unable to escape the "public trustee" status that has shackled traditional broadcasting systems for decades. Section twenty-five of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which Congress incorporated into the Telecommunications Act of 1996 ("1996 Act") as section 335,³ placed a series of obligations on DBS operators designed to foster access to the DBS platform.⁴ Among these obligations, the requirement that operators set aside four to seven percent of their carriage capacity for noncommercial, educational, or informational programming⁵ is at best a dubious application of the public interest mandate. DBS programmers challenged the set-aside requirement as soon as Congress enacted it, but a significantly divided panel of the U.S. Court of Appeals for the District

1. The title of this Note is taken in part from the Dave Matthews Band song "Satellite" ("Like a diamond in the sky, how I wonder . . ."). DAVE MATTHEWS BAND, *Satellite*, on *UNDER THE TABLE AND DREAMING* (RCA Records 1994).

2. See Paul Farhi, *Dishing Out the Competition to Cable TV*, WASH. POST, Oct. 12, 1996, at H1 ("In terms of speed of sales . . . DBS [is] the most successful new consumer electronics product ever marketed.").

3. Telecommunications Act of 1996 § 335, 47 U.S.C. § 531 (Supp. II 1996).

4. See Cable Television Consumer Protection and Competition Act of 1992 § 25, 47 U.S.C. § 335 (1994).

5. See *id.* § 25(b)(1), 47 U.S.C. § 335(b).

of Columbia Circuit ultimately upheld the obligation in *Time Warner Entertainment Co. v. FCC*.⁶ In November 1998, after a delay of nearly six years, the FCC finally adopted regulations to implement the set-aside requirements of the 1992 Cable Act.⁷

This Note explores the rationale for imposing a set-aside requirement on the fledgling DBS technology. The first section provides a brief history of the DBS industry, including an overview of DBS technology, a survey of current DBS providers, a comparison of DBS to competing video programming services, and an examination of the relevant statutory and judicial provisions governing the DBS industry. The second section discusses judicial treatment of mass media regulation by examining the foundational cases that first supported the principle of programming in the public interest. Against this backdrop, this Note then explores the courts' attempts to apply such principles to the DBS public interest requirement in *Daniels Cablevision, Inc. v. United States*⁸ and *Time Warner*. The third section discusses the regulations released by the FCC in late 1998. Finally, the fourth section offers a critique of the rationale behind the imposition of public interest programming requirements on DBS providers. This section disputes the applicability of the models developed in *Red Lion Broad. Co. v. FCC*⁹ and *FCC v. Pacifica*¹⁰ to this new technology, and argues for an alternative view of DBS's obligation to the public interest—one that would better account for DBS's unique attributes and role in the mass media marketplace.

6. 105 F.3d 723, 723 (D.C. Cir. 1997) (denying rehearing en banc and thereby upholding panel decision in *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996), that the set-aside requirements do not violate DBS providers' First Amendment rights).

7. See *In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Direct Broadcast Satellite Public Interest Obligations Report and Order, MM Docket 93-25 para. 1 (FCC Nov. 19, 1998), available in 1998 WL 814482 [hereinafter DBS Public Interest Obligations Report and Order].

8. 835 F. Supp. 1 (D.D.C. 1993).

9. 395 U.S. 367 (1969).

10. 438 U.S. 726 (1978).

THE BUSINESS OF DIAMONDS IN THE SKY

The Game and Its Players

Once the subject of science fiction,¹¹ DBS technology has existed for almost two decades.¹² Although the FCC first authorized DBS service on an interim basis in 1982,¹³ full-scale commercial service did not begin until June 1994.¹⁴ DBS works by transmitting programs from the Earth to satellites positioned in specific geostationary orbital "slots,"¹⁵ which then disseminate

11. British science fiction writer Arthur C. Clarke first proposed the idea of a global communications system using satellites in geostationary orbit in 1945. See 2 DANIEL L. BRENNER ET AL., *CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY* § 15.02, at 15-4 (1998) (citing Arthur C. Clarke, *Extra-Terrestrial Relays—Can Rocket Stations Give World-Wide Radio Coverage?*, WIRELESS WORLD, Oct. 1945, at 305).

12. On December 17, 1980, Satellite Television Corporation submitted to the FCC the first formal application for the construction of satellites for "a satellite-to-home video broadcasting system." See *In re Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C.2d 676, 677 (1982) (discussing a 1980 Notice of Inquiry issued by the FCC on DBS regulatory policy).

13. See *id.* For a brief description of the fates of the original DBS permittees, see 2 BRENNER ET AL., *supra* note 11, § 15.04[3], at 15-17 to -19.

14. See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 F.C.C.R. 4358, 4377-78 para. 40 (1997) [hereinafter Third Annual Report]; see also 2 BRENNER ET AL., *supra* note 11, § 15.03[1], at 15-7 to -8 ("[L]ack of capital and a relatively tight grip on the subscription television market by cable . . . delayed DBS.").

15. These "slots" derived from an international agreement forged at the 1983 Region II Administrative Radio Conference ("RARC-83"), which allocated 500MHz of broadcast spectrum for DBS. The United States received eight orbital "slots," with 32 DBS "channels" available at each slot. See *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 F.C.C.2d 250, 251 (1983); 2 BRENNER ET AL., *supra* note 11, § 15.02[1], at 15-4 to -5. Only satellites positioned in the 101, 110, and 119 degree west latitude slots are capable of delivering programming to the entire continental United States—these are known as "CONUS" slots. See *id.* § 15.02[1], at 15-5. Four of the remaining five satellite slots are able to transmit only to the western United States—those at 148, 157, 166, and 175 west latitude, respectively. See *id.* The remaining slot—61.5 degrees west latitude—is capable of hosting a satellite to serve the Eastern United States. See *id.* Using current digital compression technology, one DBS channel can actually transmit five to seven video programs simultaneously. See *DirecTV, Inc. v. FCC*, 110 F.3d 816, 821 (D.C. Cir. 1997). Upon completion of the RARC-83 proceedings, the FCC reassigned these orbital slots to private commercial entities. See generally 2 BRENNER ET AL., *supra* note 11, §§ 15.02[2]-03[1], at 15-5 to -6 (describing FCC licensing of orbital slots to pri-

the programs directly to customers who pay to receive the service.¹⁶ Unlike traditional C-Band satellite dishes designed to capture low-powered signals from a multitude of orbiting satellites, the newer DBS systems use mid-to high-power signals transmitted in the Ku-band.¹⁷ As a result, DBS dishes need not be the size of roadside billboards: the high-powered services DirecTV/USSB and EchoStar use eighteen to twenty-four inch dishes, while the mid-powered service Primestar uses thirty-six inch dishes.¹⁸

The public's response to this new media technology has been remarkable. The DBS market grew from 1.7 million subscribers in September 1995 to over 10.2 million subscribers by November 1998,¹⁹ establishing DBS as the fastest growing consumer electronics product of all time.²⁰ DirecTV, owned by Hughes Communications,²¹ remains the industry leader, capable of delivering over 200 channels of video and audio programming to its four million subscribers.²² Primestar, a joint venture of several cable

vate entities both before and after RARC-83).

16. See *DirecTV*, 110 F.3d at 821.

17. See Third Annual Report, *supra* note 14, at 4376 para. 37. It should be noted that only DirecTV/USSB and EchoStar transmit programming at the high-powered frequencies allocated for DBS service by the FCC. See *id.* Primestar, although transmitting in the Ku-band, does so at the mid-powered frequencies originally allocated to Fixed Satellite Services. See *id.* Although it is technically not DBS technology, consumers and industry participants regard Primestar as a full member of the DBS family. See *id.*

18. See *id.* at 4378 para. 41.

19. Compare *DTH Subscribers, November 1997-November 1998* (visited Mar. 24, 1999) <http://www.skyreport.com/dth_us.htm> [hereinafter *DTH Subscribers*] (stating the number of DBS users in November 1998), with *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 F.C.C.R. 2060, 2065 para. 9 (1995) (stating the number of DBS users in September 1995).

20. See Farhi, *supra* note 2, at H1; see also Third Annual Report, *supra* note 14, at 4378 para. 40 (noting that "DBS services have grown at a rate making DBS receiving equipment one of the most successful new consumer electronics product introductions in history").

21. See *DirecTV*, 110 F.3d at 822.

22. See *DTH Subscribers, supra* note 19; see also *In re Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Fifth Annual Report, CS Docket No. 98-102, para. 61 (FCC Dec. 23, 1998), available in 1998 WL 892964 [hereinafter Fifth Annual Report] (noting over 200 available channels on DirecTV). United States Satellite Broadcasting (USSB), a service often

programmers,²³ provides its 2.2 million subscribers with 160 channels transmitted at mid-power.²⁴ EchoStar, the only "independent" DBS provider,²⁵ offers 240 video and audio channels to

"ordered in concert with" DirecTV, offers an additional 20 premium movie channels as well as access to various pay-per-view events. *See id.* Originally an independent DBS provider, USSB appears to be on the verge of selling its assets to DirecTV's parent company, Hughes Communications. *See id.* at para. 77.

23. Ownership and operation of Primestar has been fluid, to say the least. In February 1998, the major Primestar partners included Time Warner, Comcast Corp., Cox Communications, Inc., TCI Satellite Entertainment, US West Media Group's MediaOne, Inc., GE American Communications, Inc., and American Sky Broadcasting, a partnership of Rupert Murdoch's News Corp and MCI Communications. *See* Deni Kasrel, *Primestar Catches Eye of Mogul Murdoch*, PHILA. BUS. J., Feb. 27, 1998, at 818, available in 1998 WL 10311050. By September 1998, NewsCorp and TCI's United Video Satellite Group were attempting to buy-out the remaining cable-based shareholders (Time Warner, Cox Communications, Comcast, and MediaOne Group). *See* John M. Higgins, *News Corp., TCI Close in on Primestar*, BROADCASTING & CABLE, Sept. 7, 1998, at 7. By October 1998, the NewsCorp-Primestar deal was dead, felled in part by an aggressive antitrust prosecution by the Department of Justice. *See* Paul Farhi & Mike Mills, *Murdoch Satellite TV Deal Folds Under U.S. Pressure*, WASH. POST, Oct. 15, 1998, at C1; John Lippman, *Primestar Inc., News Corp. End Satellite Accord*, WALL ST. J., Oct. 15, 1998, at B14.

Originally, each Primestar partner served those Primestar subscribers in its respective cable territory. *See* Kasrel, *supra*, at 818. With the completion of a corporate restructuring in early April 1998, Primestar became a stand-alone national company. *See* Price Colman, *Primestar All Rolled Up*, BROADCASTING & CABLE, Apr. 6, 1998, at 150. Primestar is now on the verge of being acquired by Hughes Electronics, parent company of rival DBS provider DirecTV. *See* Judith Evans, *DirecTV Agrees to Buy Rival Primestar Inc.: \$1.8 Billion Deal Likely to Face Scrutiny*, WASH. POST, Jan. 23, 1999, at E1. *But see* Price Colman, *A High Card in Primestar Deal*, BROADCASTING & CABLE, Mar. 1, 1999, at 10 [hereinafter Colman, *High Card*] (noting the ability of EchoStar, as a minority bondholder in Primestar, to kill the Primestar/DirecTV deal). Such a deal, if it actually occurs, likely would result in the eventual demise of Primestar and conversion of its customers to DirecTV's high powered system, leaving DirecTV and EchoStar as the only two DBS providers in the United States. *See, e.g.,* Price Colman, *DirecTV Bags Primestar*, BROADCASTING & CABLE, Jan. 25, 1999, at 1.

24. *See* Fifth Annual Report, *supra* note 22, at para. 61; *DTH Subscribers*, *supra* note 19. Primestar had planned to provide high-power DBS service "within three to four years." Donna Petrozzello, *EchoStar Tops Analysts' Lists*, BROADCASTING & CABLE, Sept. 21, 1998, at 83 (quoting Primestar Chairman Carl Vogel). Such hopes most likely evaporated with the collapse of the NewsCorp merger deal. *See* Farhi & Mills, *supra* note 23, at C1; Lippman, *supra* note 23, at B14.

25. EchoStar's independent status made it an attractive takeover candidate for those desiring to enter the nascent DBS market. An early merger deal with Rupert Murdoch's News Corporation fell apart in June 1997, leaving EchoStar in questionable financial shape. *See* News Corp. *Sells Satellite Unit for 31% Stake in Primestar*,

about 1.8 million subscribers under the name "DISH Network."²⁶ A fourth DBS provider, mid-powered AlphaStar, filed for bankruptcy in May 1997 and dissolved after reaching a peak of roughly 50,000 subscribers.²⁷ Other entities are in a position to enter the fray in the next few years.²⁸

BOSTON GLOBE, June 12, 1997, at C2, available in 1997 WL 6257256 [hereinafter *News Corp. Sells Satellite*]. EchoStar rebounded, however, and has since entered into an agreement to acquire News Corp's DBS assets (pending FCC approval of the deal). See Paul Farhi, *EchoStar to Buy News Corp., MCI Satellite TV Assets*, WASH. POST, Dec. 1, 1998, at D1.

26. See Fifth Annual Report, *supra* note 22, at para. 61; *DTH Subscribers*, *supra* note 19. As a result of its recent acquisition of NewsCorp's DBS assets, EchoStar expects to be able to offer 500 channels of programming by Fall 1999. See Farhi, *supra* note 25, at D1.

27. See *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 F.C.C.R. 1034, 1070 n.184 (1998) [hereinafter Fourth Annual Report]. AlphaStar ceased transmission in August 1997. See *id.* It should be noted, however, that AlphaStar fared better than Advanced Communications Corporation (ACC). Granted a construction permit in 1984, and assigned a total of 51 DBS channels at two orbital locations by April 1991, ACC nevertheless failed to meet its obligation to "proceed with due diligence toward construction and operation of [a] DBS system." See *In re Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 F.C.C.R. 1297, 1300 paras. 6-8 (1995). As a result, the FCC stripped ACC of its channels. See *id.* at 1299-1300 para. 8.

28. The FCC has issued DBS licenses to Continental Satellite Corporation and Dominion Video Satellite, Inc., but the two companies have not yet launched any satellites. Tempo, originally a subsidiary of TCI Satellite Entertainment, launched a satellite in March 1996, and is authorized to provide 11 channels of DBS service. See Fourth Annual Report, *supra* note 27, at 1077 para. 67 & n.239. Shortly after gaining approval to provide DBS service, however, Tempo became part of Primestar, thereby eliminating it from the ranks of potential new entrants to the DBS market. See James McConville, *TCI Satellite Group to be Spun Off*, BROADCASTING & CABLE, Nov. 18, 1996, at 104; see also Colman, *High Card*, *supra* note 23, at 1 (noting DirecTV and EchoStar bids for the Tempo assets held by Primestar).

The only entity with a full-CONUS slot not providing DBS service is MCI Worldcom/News Corp, which bid \$682.5 million at a 1996 FCC auction for the 110 degree west slot. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996). As indicated previously, however, MCI Worldcom/News Corp. recently scrapped plans to provide its own service and sold its assets to EchoStar in return for \$1.25 billion in stock and an agreement to carry various Fox channels. See Farhi, *supra* note 25, at D1; see also *supra* notes 25-26 (describing the EchoStar System).

Rivals to DBS in the Video Marketplace

As a relatively new multi-channel video programming distributor (MVPD), DBS providers must establish and preserve their market share in the fiercely competitive atmosphere that characterizes the video programming industry in the twilight of the twentieth century. The primary rival is clear: cable television. Now available to 97.1% of all television households in the United States, cable dominates the MVPD marketplace.²⁹ DBS continues to challenge cable television's lock on program delivery.³⁰ In enacting the 1996 Telecommunications Act, Congress intentionally encouraged such direct competition for similar services that could result in lower rates and better service for consumers of both technologies.³¹ Although cable remains the undisputed "big kid on the block," DBS is proving to be a strong competitor, often offering far more channels and better picture quality than otherwise available through conventional cable television.³² Cable television, however, has a major competitive advantage—it

29. See Fourth Annual Report, *supra* note 27, at 1049 para. 14. By the end of the first half of 1997, 64.2 million households had subscribed to cable, and 68.2% of all homes "passed" by cable subscribed to at least the basic tier. See *id.* at 1049-50 para. 15.

30. See generally Fifth Annual Report, *supra* note 22, at para. 62 ("DBS continues to represent the single largest competitor to cable."); Fourth Annual Report, *supra* note 27, at 1040-41 para. 11 (noting that DBS service is widely available and constitutes a significant alternative to cable).

31. See Third Annual Report, *supra* note 14, at 4362 para. 4 ("[S]ome cable system operators appear to be taking steps to improve their service offerings in response to the availability of DBS service."); see also Fifth Annual Report, *supra* note 22, at para. 63 (noting that "DBS subscribers continue to report higher levels of customer satisfaction," a factor that has spurred the development of digital cable services); Alicia Mundy & Jim Cooper, *Cable Rate Battle Brews*, MEDIA WEEK, Mar. 2, 1998, at 6 (noting Rep. Billy Tauzin's (R-La.) preference for "competition with DBS as a way to counter [cable] rate hikes"). But see Stephen Labaton, *Cable Rates Rising As Industry Nears End of Regulation*, N.Y. TIMES, Mar. 8, 1999, at A1 (noting that cable rates have increased 22 percent since the passage of the 1996 Act and that DBS has not yet provided the level of competition Congress envisioned).

32. See Fifth Annual Report, *supra* note 22, at para. 63 (noting "superior channel capacity . . . digital quality picture, CD-quality sound, and specialized programming" as the main advantages cited by subscribers of DBS over cable); Fourth Annual Report, *supra* note 27, at 1062 para. 42 ("DBS digital quality picture and sound are superior to analog cable transmission.").

retransmits local broadcast television signals,³³ a feature that DBS providers currently are unable to offer on a large scale.³⁴

There are several forms of MVPD systems. Multi-channel multipoint distribution services (MMDS), also known as "wireless cable" systems, use microwave frequencies to distribute programming to rooftop antennas of subscribers.³⁵ By July 1997,

33. See Stephen R. Effros, *Content Regulation: Broadcast Signal Carriage and Obscenity/Indecency—A Year of Preliminary Skirmishes Leading Up to the Final Rounds*, in CABLE TELEVISION LAW 1997, at 7, 10 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. G4-3993, 1997) (noting that "localism is seen as a marketing advantage for cable systems" in the multi-channel marketplace). The DBS industry recognizes this advantage, and has taken steps to begin carrying local channels through "spot beaming" technology. See Fourth Annual Report, *supra* note 27, at 1160 n.823. EchoStar is the industry leader in this regard, spot-beaming local network affiliates to otherwise unserved subscribers in 13 large urban markets. See Fifth Annual Report, *supra* note 22, at para. 67. Although the technological capability to spot beam exists, copyright laws have not kept pace with technology. See Cynthia Littleton, *DBS Chiefs Powwow in LA*, BROADCAST & CABLE, Feb. 10, 1997, at 46; see also Heather Fleming, *Sky Goes to Capitol Hill for Quick Copyright Fix*, BROADCAST & CABLE, Mar. 17, 1997, at 35 (discussing Sky DBS's lobbying efforts in Congress to change copyright law with respect to local broadcast signals). Under the Satellite Home Viewer Act of 1988, EchoStar is only permitted to provide local service to those customers who are currently "unserved" by local television stations. See 17 U.S.C. § 119(2) (1994). "[A]n unserved subscriber is one who cannot receive a Grade-B strength signal over the air 50% of the time when using a rooftop antenna." Paige Albiniak, *EchoStar Gets Local OK*, BROADCASTING & CABLE, Aug. 31, 1998, at 17; see also 17 U.S.C. § 119(d)(10)(A-B) (setting forth the limit on DBS provision of local service).

34. See Glen O. Robinson, *The New Video Competition: Dances with Regulators*, 97 COLUM. L. REV. 1016, 1041-42 & n.82 (1997). The DBS industry's interest in local broadcast programming may have opened the mass media equivalent of a Pandora's Box: must-carry regulation. Originally applied to the cable television arena, the extension of must-carry regulation to DBS would mandate that each DBS provider "offer all local signals in all local markets they choose to serve as soon as they enter that market." Paige Albiniak, *Satellite Rewrite Stalled by Must-Carry Debate; Broadcasters, DBS Spar over Requirements for Local-into-Local*, BROADCASTING & CABLE, May 4, 1998, at 20 (emphasis added). Currently, EchoStar only carries local network affiliate stations, electing not to carry independent local stations. See *Top 25 Dish Network Programming Questions: 4. How Do I Get My Local Networks?* (visited Mar. 24, 1999) <<http://www.dishnetwork.com/service/questions/programming.htm#aq107>>. Must-carry could force DBS providers to add independent local stations, which traditionally attract smaller audiences than national networks. Such a development could demand the allocation of satellite space that otherwise could be utilized for more profitable national programming.

35. See Third Annual Report, *supra* note 14, at 4386 n.152. Analog MMDS Systems currently provide up to 33 channels, and require a "line of sight" path between the transmitter and receiving antenna. See Fifth Annual Report, *supra* note 22, at

approximately 252 wireless cable systems were in operation, serving about 1.1 million subscribers.³⁶ Satellite Master Antenna Television (SMATV) systems essentially function as private cable systems, transmitting programming from a single "headend" through the airwaves to rooftop antennas on commonly owned buildings.³⁷ Programming is then relayed throughout each building using traditional cable wiring.³⁸

Local telephone companies were at one time thought to be the best potential rival to traditional cable services.³⁹ The 1996 Act allowed telephone companies to provide cable service,⁴⁰ and with an extensive existing network of wires in place, such a feat would—at least, theoretically—be relatively simple. Theory, though, is often far removed from reality, and the telephone companies have yet to obtain a significant foothold in the cable industry.⁴¹

Other nascent MVPD alternatives are on the horizon, but simply are not players in the current MVPD marketplace. Internet video service, which is already available on a limited basis, is one of these alternatives.⁴² By either "downloading" a

para. 81. In July 1996, however, the FCC authorized digital MMDS. *See* Fourth Annual Report, *supra* note 27, at 1079 para. 72. With current digital compression technology, the number of available channels could be increased as much as six-fold. *See id.* at 1079-80 para. 72 & n.261.

36. *See* Fourth Annual Report, *supra* note 27, at 1080-82 paras. 73-75.

37. *See* Third Annual Report, *supra* note 14, at 4403 para. 80.

38. *See id.*; *see also* Fifth Annual Report, *supra* note 22, at paras. 88-94 (discussing the technology and current status of SMATV in the MVPD marketplace).

39. *See generally* Fourth Annual Report, *supra* note 27, at 1099-104 paras. 108-17 (discussing the potential entry of local exchange carriers ("LECs") into the MVPD market in the wake of the 1996 Act). Recently, Bell Atlantic abandoned a plan to deliver cable service through its lines in the Washington D.C. area, opting instead to sell DBS service to its customers. *See* Mike Mills, *Dial T for Television; Bell Atlantic Challenges the Cable Industry by Offering Direct-Broadcast Satellite Service*, WASH. POST, Sept. 14, 1998, at F10. In a nutshell, "video over phone lines proved too expensive to be offered profitably by Bell Atlantic or other local phone companies" at this time. *Id.* Advances in Internet video, however, may allow local phone companies to provide their own video services at some point in the future.

40. *See* 47 U.S.C. § 571(a) (Supp. II 1996).

41. *See generally* Fourth Annual Report, *supra* note 27, at 1099 para. 108 (explaining that LECs do not yet have a "national presence in the MVPD market").

42. *See id.* at 1094-96 paras. 97-102. Although the Internet is a promising alternative to broadcasting, the FCC notes that current problems with limited bandwidth and transmission delays inherent in the Internet inhibit development of Internet video

video programming file or visiting a web-site with "streaming" capabilities, users are able to receive video and audio programming directly through their personal computers.⁴³ With an estimated 132.3 million Americans using the Internet by the year 2000,⁴⁴ Internet video service represents a logical transmission method for the wide-ranging delivery of mass programming.⁴⁵ Indeed, the DBS industry has recognized the Internet's potential and has moved to capitalize on the revolution by instigating high-speed Internet access as part of its subscription service.⁴⁶

Traditional broadcast television interests remain noncompetitors; for now, the relationship between DBS and broadcast television is symbiotic.⁴⁷ Network programs are still far and away the most popular programs on television, regardless of the transmission method.⁴⁸ As such, network broadcast programs are

as a full-fledged video program delivery system. *See id.* at 1094 para. 97; *see also* Richard Tedesco, *Video Streaming: The Not Ready for Prime Time Medium*, BROADCASTING & CABLE, May 25, 1998, at 22 (noting the lack of bandwidth on the Internet). *But see* Kevin Maney, *The Next Big Bang: Communications*, USA TODAY, Oct. 8, 1998, at 1B (forecasting a "bandwidth explosion" likely to occur within the next few years).

43. *See* Fourth Annual Report, *supra* note 27, at 1095 paras. 99-101. "Downloading" is currently the most common method of receiving video programming from the Web: one simply visits the webpage where the programming is located, saves it, and plays it back at his or her convenience. *See id.* at 1095 para. 100. "Streaming" involves real-time transmission of programming directly to the recipient, but often requires the purchase and installation of special software. *See id.* at 1095 para. 101. More modern methods of streaming technology—that employed by WebTV, for example—require only that a user visit the site to receive the programming. *See id.* at 1095-96 para. 102.

44. *See* Computer Industry Almanac, Inc., *Over 300 Million Internet Users in Year 2000* (visited Feb. 18, 1998) <<http://www.c-i-a.com/199809.ivhtm>> (estimating world Internet usage by the top 15 countries).

45. Currently, it is estimated that some 30,000 websites (including the sites of 30 television stations) regularly stream video. *See* Tedesco, *supra* note 42, at 22. Some of these entities—notably C-SPAN and Fox News Channel—already are streaming their programming on the Internet as they send it out over cable feeds. *See id.*

46. *See* Fifth Annual Report, *supra* note 22, at para. 75 (noting DirectTV's "DirectDUO" satellite-delivered, high-speed Internet service and similar efforts by EchoStar).

47. *See* Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage,"* 97 COLUM. L. REV. 1048, 1077 (1997) (noting that, by not carrying local television stations, "DBS . . . creates, at least for now, a market niche and incentive for local broadcasting at the same time it increases competition for general audience broadcasting").

48. *See* Fifth Annual Report, *supra* note 22, at para. 96 ("During the 1997-98 tele-

highly desirable candidates for inclusion on any MVPD, including DBS, and such carriage potentially benefits both entities. Broadcast television also is the primary method of receiving local signals for those using DBS systems—though intense pressure from the industry to allow carriage of local signals on DBS systems may result in the necessary alterations to copyright law to allow carriage of local broadcast signals on DBS.⁴⁹

Perhaps underscoring the immense fluidity of the video programming marketplace, some broadcasters recently indicated that they may attempt to convert the spectrum allocated to them by the FCC for the creation of High Definition Television (HDTV) service into small subscription television services.⁵⁰ This tactic—known as “multicasting”—has received intense criticism from Congress and other MVPDs, and is unlikely to materialize anytime soon.⁵¹

vision season, the four major networks . . . accounted for a combined 55% share of prime time viewing among all television households . . . ; UPN and WB, the two newest networks, achieved a combined 9% share of prime time viewing . . .”).

49. Under 17 U.S.C. § 119(a)(2)(B) (1994), DBS operators are allowed to offer broadcast network service only to households located in “unserved” areas. See Third Annual Report, *supra* note 14, at 4408 n.292. The DBS industry consistently has lobbied for revision of this statute. See, e.g., *Copyright Issues and Primestar's Future Top Busy DBS Agenda*, COMM. TODAY, Feb. 9, 1998, available in 1998 WL 5264687; Fleming, *supra* note 33, at 35. The industry's efforts soon may bear fruit: In August 1997, the United States Copyright Office recommended that Congress amend the Satellite Home Viewer Act (SHVA) to eliminate the Grade-B signal strength standard, and in 1998 two bills were introduced in Congress to amend SHVA. See Fifth Annual Report, *supra* note 22, at paras. 65-66. Although neither bill passed, both indicate a willingness on the part of members of Congress to reexamine this area. See *id.*; see also *supra* notes 33-34 and accompanying text (discussing the competitive advantage enjoyed by cable operators providing local programming).

50. See generally John M. Higgins, *Making Sense of Multicasting*, BROADCASTING & CABLE, Sept. 8, 1997, at 14, 14-17 (discussing the networks' move away from HDTV to multicasting). Essentially, broadcasters would use the HDTV spectrum to broadcast several channels of pay television instead of the one HDTV channel for which the FCC originally allocated the spectrum. Two plans have been suggested: the ABC plan, which calls for creating three or four subscription channels from the spectrum and using them to either compete with cable or bolster various MSOs; and the Sinclair Broadcasting plan, which calls for several local broadcasters to pool their spare digital channels to create wireless cable systems. See *id.*

51. See *id.* Rep. Billy Tauzin (R-La.), Chairman of the House Telecommunications Subcommittee, has threatened “serious new obligations—both financial and public interest” if broadcasters attempt to use their HDTV spectrum for multicasting. *Id.* at 16. Cable industry lobbyists also have been quick to point out that the 1996 Act

The Rules of the Game

The 1996 Act, although extensively overhauling several aspects of telecommunications regulation, did relatively little to alter the rules of the DBS game. The governing provisions for DBS were established primarily with the Satellite Home Viewer Acts of 1988 ("1988 SHVA")⁵² and 1994 ("1994 SHVA"),⁵³ and the 1992 Cable Act.⁵⁴ These earlier acts—especially the 1992 Cable Act—were the first to reflect congressional response to the revolutionary changes occurring in the previously separate realms of common carrier telephone service, computers, broadcasting, and cable television. The provisions of these acts relevant to DBS emerged unscathed from the 1996 Act drafting process, and remain in effect today.

The need for major alterations in the regulatory schemes for these various telecommunications media became evident as a result of the "technological convergence" phenomenon.⁵⁵ As Professors Krattenmaker and Powe observed, "[N]either producers nor purchasers of audio or video information should find much use, in the near future, for such terms as 'television,' 'computer,' 'telephone,' or 'radio.' These objects are no longer distinct

does not allow broadcasters to take advantage of the program access rules that allow DBS, wireless cable, and telco video to carry cable programming. *See id.* Such opposition from cable is not surprising: "Even a single broadcaster's three-or-four channel package could hurt if it included CNN, HBO and ESPN for considerably less than the \$35 most cable subscribers pay." *Id.*

52. Pub. L. No. 100-667, 102 Stat. 3949 (1988) (codified in scattered sections of 17 & 47 U.S.C. (1994)).

53. Pub. L. No. 103-368, 108 Stat. 3477 (1994) (codified in scattered sections of 17 U.S.C. (1994)). The 1994 SHVA is no longer in force; the 1988 Act is still good law on the topic of syndicated exclusivity and various copyright matters. *See* 17 U.S.C. § 119 (1994) (regarding copyright matters); 47 U.S.C. § 612 (1994) (regarding syndicated exclusivity); *see also infra* notes 61-66 and accompanying text (discussing the 1988 SHVA). Otherwise, the major controlling statutory provisions come from the 1992 Cable Act.

54. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C. (1994)).

55. *See generally* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1719-20 (1995) (noting that "telecommunications technologies and media are converging" and arguing that convergence has rendered current regulations hopelessly out of date).

devices⁵⁶ Technologies that used to “carry” only programming or data supplied by other parties—cable television and telephones—now supply their own programming on their own systems.⁵⁷ The vast bulk of those receiving programs produced by “broadcasters,” on the other hand, now receive those programs over cable wires, telephone wires, or other subscription services.⁵⁸

DBS presents the quintessential example of what has happened in the world of telecommunications:

DBS . . . is capable of sending both addressed signals and public transmissions receivable by anyone with the proper equipment On the one hand, DBS is simply broadcast from a taller mast; on the other hand, DBS operators can lease capacity on their transponders to independent information service providers, programmers, and packagers . . . that merely want carriage of their signals to viewers.⁵⁹

With this blurring of the broadcast/carriage distinction, Congress and the FCC had to fashion new rules to encompass both facets of this MVPD system.⁶⁰

The 1988 SHVA was notable for two reasons: it authorized the FCC to initiate rulemaking proceedings on syndicated exclusivity (“syndex”)⁶¹ and the secondary transmission of superstations and network stations.⁶² The syndex rules for satellites function much like their counterparts for cable—they allow a supplier of

56. *Id.* at 1719.

57. *See, e.g.,* Marc Levinson, *Will They Pay More?*, NEWSWEEK, June 26, 1995, at 38-39.

58. *See* Fourth Annual Report, *supra* note 27, at 1039 para. 11. “Broadcasters” generally are defined as those entities that use their own conduits to indiscriminately transmit their own messages to members of the general public. “Carriers” are those entities that use their own conduits to transmit the messages of other parties to selected private parties. *See* Shelanski, *supra* note 47, at 1048.

59. Shelanski, *supra* note 47, at 1062-63 (citations omitted).

60. The relevant provisions of the 1992 Cable Act and 1996 Telecommunications Act, as well as the FCC’s 1995 DBS regulations, represent the first of what is sure to be a profusion of convergence related rules. *See* Cable Act of 1992 §§ 19, 25, 47 U.S.C. §§ 335, 548 (1994); Telecommunications Act of 1996 § 205, 47 U.S.C. §§ 303(v), 605(e)(4) (Supp. II 1996); FCC Direct Broadcast Satellite Service Rule, 47 C.F.R. § 100 (1997).

61. *See* Satellite Home Viewer Act of 1988 § 203, 47 U.S.C. § 612 (1994).

62. *See id.* § 202(2), 17 U.S.C. § 119 (1994).

syndicated programming to contract with a broadcast television station to be the exclusive presenter of the program in its local broadcast area.⁶³ The secondary transmission requirements subject the DBS provider to statutory licensing when transmitting broadcast network or cable "superstation" signals "to the public" and charge subscribers a fee for that retransmission.⁶⁴ More importantly, they forbid the secondary transmission of primary network television signals "to a subscriber who does not reside in an unserved household"—in essence, statutorily banning the retransmission of local broadcast television signals to those already able to receive those signals over the air.⁶⁵ These provisions have proven frustrating to DBS providers searching for ways to include local programming on their systems.⁶⁶

Although copyright issues bar DBS from carrying most local broadcast programming, DBS is able to carry cable programming as a result of the Primestar Consent Decrees.⁶⁷ The outcome of a Department of Justice suit against Primestar and its cable industry owners, the Primestar Consent Decrees prevented Primestar from acquiring exclusive DBS rights to any of the sixty-one "national video programming services existing as of May 1, 1992," regardless of whether one or more of the Primestar partners controlled the service.⁶⁸ This allowed all DBS service providers an equal shot at acquiring programming from cable programming suppliers.⁶⁹ Furthermore, the Primestar

63. See *United Video, Inc. v. FCC*, 890 F.2d 1173, 1176 (D.C. Cir. 1989). The syndex system helps to prevent overexposure of certain popular programs, thereby fragmenting the viewing audience and diminishing the programs' value to advertisers. For a general primer on the rationale behind syndex rules, see *id.* at 1177-81 (examining the FCC's arguments in favor of the reinstatement of syndex rules for cable providers after an eight-year absence).

64. See 17 U.S.C. §§ 119(a)(1)-(2).

65. *Id.* § 119(a)(5)(A). The regulation mandates several more requirements, including various copyright protection provisions and royalty fee payment arrangements. See *id.* §§ 119(b)-(c).

66. See *supra* note 34 and accompanying text.

67. See David J. Saylor, *Programming Access and Other Competition Regulations of the New Cable Television Law and the Primestar Decrees: A Guided Tour Through the Maze*, 12 CARDOZO ARTS & ENT. L.J. 321, 383-84 (1994).

68. *Id.* at 362-63 (citations omitted).

69. See Neal R. Stoll & Shepard Goldfein, *A Report Card on Enforcement*,

Consent Decrees contained anti-retaliation language, prohibiting "multi-channel distributors like Primestar from retaliating against a programming vendor for failing to provide exclusive rights."⁷⁰

The Cable Acts and Primestar Decrees failed to resolve the issue of public interest programming requirements for DBS programmers. The regulation of DBS services was not the top priority of the 1992 Cable Act; instead, the 1992 Cable Act focused squarely on cable television systems and represented a legislative response to immense inflation in cable rates after Congress deregulated the cable industry in the late 1980s, as well as a response to the convergence trend.⁷¹ The 1992 Act "promulgated regulations governing, among other things, programming access, carriage, and ownership limits."⁷² Despite its predominant focus on cable, however, the 1992 Act formally established regulation of DBS in the public interest for the first time.

With no DBS systems in operation at the time of its enactment, the drafters of the 1992 Cable Act based their decisions regarding DBS regulation on the traditional regulatory schemes designed for other media. Section 25(a) of the Act stated that, "at a minimum," DBS providers would be subject to political access requirements mandated for broadcasters.⁷³ Section 25(a) also instructed the FCC to consider how best to serve the principle of "localism" with DBS satellites.⁷⁴

N.Y.L.J., Aug. 16, 1994, at 3, 7.

70. Saylor, *supra* note 67, at 363 (citations omitted).

71. See Laurence H. Winer, *The Red Lion of Cable and Beyond?* Turner Broadcasting v. FCC, 15 CARDOZO ARTS & ENT. L.J. 1, 11 (1997) (noting that "in the 1992 Cable Act, Congress responded to public complaints about poor cable service at high rates"); Randy Sukow, *Cable Hurdles Tough House Test*, BROADCASTING, Apr. 13, 1992, at 6 (quoting then House Telecommunications Subcommittee Chairman Edward Markey: "[C]able rates rose 250% higher than other goods and services in 1991. In February 1992 alone cable rates rose at five times the rate of inflation. Consumers need relief from these excessive rates.").

72. Saylor, *supra* note 67, at 323.

73. See Cable Television Consumer Protection and Competition Act of 1992 § 25(a), 47 U.S.C. § 335(a) (1994) (mandating the imposition of the access to broadcast time requirement in 47 U.S.C. § 312(a)(7) and the use of facilities requirement in 47 U.S.C. § 315); see also *infra* notes 166-71 (examining political access requirements of the FCC public interest obligations order).

74. See Cable Television Protection and Competition Act of 1992 § 25(a), 47 U.S.C.

Section 25(b)(1) represents the more problematic of the two prongs of DBS service obligations, and is the main focus of this Note. Under the statutory set-aside requirement:

The Commission shall require, as a condition of any provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service providing video programming, that the provider of such service reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.⁷⁵

DBS operators are allowed to utilize any unused channel capacity reserved under this section of the statute until such space is claimed.⁷⁶ Further, DBS operators remain able to implement "reasonable prices, terms, and conditions" when making channel capacity available to eligible program suppliers.⁷⁷ The set-aside requirement does, however, represent a clear loss of editorial control for the system operators.⁷⁸ As editorial control over content represents perhaps the most fundamental of program content decisions, the regulation instantly appeared ripe for a First Amendment challenge.

§ 335(a). Although never firmly defined by Congress or the FCC, the principle of localism, along with diversity and competition, has become a mainstay of government regulation of television programming. See THOMAS G. KRATTENMAKER, *TELECOMMUNICATIONS LAW AND POLICY* 85-87 (2d ed. 1998); Michael W. Maseth, *The Erosion of First Amendment Protections of Speech and Press: The "Must Carry" Provisions of the 1992 Cable Act*, 24 CAP. U. L. REV. 423, 444 (1995) (noting that "Congress has decided that there is an inherent value in local broadcasting which is not present in other types of speech"). "Localism" becomes a difficult concept to quantify when applied to DBS satellites, which leave signal "footprints" hundreds of miles in diameter. See generally JOHN R. BITTNER, *LAW AND REGULATION OF ELECTRONIC MEDIA* 353 (2d ed. 1994) (defining "footprint" as "that area on the earth's surface covered by the satellite's signal"). Although DBS providers can "spot beam" local signals to unserved customers in some local markets, this alone will not cure the fundamental vagueness inherent in the localism principle.

75. 47 U.S.C. § 335(b)(1).

76. See *id.* § 335(b)(2).

77. *Id.* § 335(b)(3).

78. See *id.* ("The provider of direct broadcast satellite service shall not exercise any editorial control over any video programming provided pursuant to this subsection.").

DBS REGULATION AND THE COURTS

History of Judicial Treatment of Telecommunications Regulation

When ruling on challenges to the regulation of telecommunications media, the courts often have treated regulations differently based on the type of media involved.⁷⁹ Print media, including newspapers and magazines, traditionally have received the broadest First Amendment protection.⁸⁰ Accordingly, in *Miami Herald Publishing Co. v. Tornillo*,⁸¹ the Supreme Court held that to mandate a "right of reply" for those criticized by a newspaper would be an impermissible intrusion upon the publisher's editorial freedom.⁸² In contrast, broadcasting historically has received far less protection. In *Red Lion Broadcasting Co. v. FCC*, the Supreme Court noted that "scarcity" of the electromagnetic spectrum justified regulation of the airwaves "in the public interest."⁸³ Because the FCC's grant of a broadcast license gave Red Lion the ability to use this scarce resource for its broadcast in the first place, the Court reasoned that the First Amendment would allow a mandate that the broadcaster "conduct himself as a proxy or fiduciary with obligations" to foster access to various diverse viewpoints.⁸⁴

Other "public interest" precedents grew from the foundation of *Red Lion*, further distancing broadcast from print media. For example, in *FCC v. Pacifica Foundation*, the Court upheld the FCC's power to mandate time restrictions on certain program-

79. See, e.g., *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems.").

80. See generally Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 1 (1976) ("[T]he Supreme Court has accorded the print media virtually complete constitutional protection from attempts by government to impose affirmative controls such as access regulation.").

81. 418 U.S. 241 (1974).

82. See *id.* at 254-58.

83. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380, 396-97 (1969) (citing 1959 amendments to the Communications Act of 1934, codified at 47 U.S.C. § 315(a) (1994)).

84. *Id.* at 389.

ming, reasoning that broadcasting is a "uniquely pervasive" and "uniquely accessible" medium of communication.⁸⁵ Under the *Pacifica* model, broadcasters that are granted exclusive access to a scarce public resource—the electromagnetic spectrum—must consider the public interest when selecting programming.⁸⁶ The ascension of MVPDs presented courts with regulations requiring providers to give up entire stations to the "public interest," even when such stations did not utilize the scarce resource of broadcast spectrum. Cable programmers soon challenged the resulting "must-carry" requirements in *Turner Broadcasting System, Inc. v. FCC*⁸⁷ ("*Turner I*"). In *Turner I*, the Court upheld the must-carry requirements mandated of cable providers on the grounds that they "preserved the benefits of free, over-the-air local broadcast television" and promoted "the widespread dissemination of information from a multiplicity of sources."⁸⁸ Viewed against this backdrop, the DBS public interest requirements presented the problem of trying to graft solutions tailored for older forms of media onto a new form that defied rigid classification. These proposed solutions faced intense judicial scrutiny.

Daniels Cablevision

The DBS set-aside provisions prompted an immediate court challenge—though not from the most likely source. Although DBS providers appeared ready to accept the set-aside without protest, DBS programming suppliers attacked the set-aside

85. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978). This was the beginning of the "intruder" theory of broadcasting, which posits that individuals should be "protected" from confrontation with potentially undesirable material in the privacy of their home. See ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 134 (1983).

86. See *Pacifica*, 438 U.S. at 748-51; see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994) (noting that "the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees"); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 227-28 (1982) (citing *Pacifica* as an example of the "impact" theory for "regulating broadcast content under the public interest standard").

87. 512 U.S. 622 (1994).

88. *Id.* at 662-63.

requirement on the ground that it would reduce the number of channels available on DBS systems for the carriage of their programming.⁸⁹

In *Daniels Cablevision, Inc. v. United States*, the DBS programmers argued that “[t]he DBS service provisions accord a preference to speakers whose ostensible mission is to enlighten rather than to entertain,” thereby favoring such speakers on the basis of their programming content.⁹⁰ The U.S. District Court for the District of Columbia agreed, adding that “[t]here is absolutely no evidence in the record upon which the Court could conclude that regulation of DBS service providers is necessary to serve any significant regulatory or market-balancing interest.”⁹¹ Noting that the government failed to indicate that educational television was “in short supply in the homes of DBS subscribers,” the district court refused to allow any “conscripting [of] DBS channel space” in the absence of “a valid regulatory purpose or some other legitimate government interest.”⁹²

A direct victory for programming suppliers and a tangential windfall for DBS providers, *Daniels Cablevision* ultimately provided little more than a temporary shield against the imposition of the set-aside requirement. *Time Warner Entertainment Co. v. FCC*⁹³ (“*Time Warner I*”), decided August 30, 1996, destroyed that shield when a three-judge panel of the D.C. Circuit filed a per curiam opinion upholding the constitutionality of the set-aside provisions.⁹⁴ Time Warner argued that the set-aside provisions must be subjected to strict scrutiny review.⁹⁵ Unlike in *Daniels Cablevision*, however, the *Time Warner I* court was far less receptive to the programmer’s argument. Despite Time

89. See *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8 (D.D.C. 1993). Although it appears at first glance that the DBS programming suppliers may have had questionable standing to bring suit, U.S. District Judge Thomas Penfield Jackson found that “[t]he asserted injury is traceable to section 25, and it clearly would by [sic] remedied by the declaratory relief the plaintiffs seek.” *Id.* For purposes of this Note, Judge Jackson’s standing determination is assumed to be correct.

90. *Id.* at 8.

91. *Id.*

92. *Id.* at 8-9.

93. 93 F.3d 957 (D.C. Cir. 1996).

94. See *id.* at 962.

95. See *id.* at 974.

Warner's pleading to the contrary, the court took the unusual step of entertaining an argument that the district court previously had not considered, and in so doing crafted an opinion that used the full force of broadcast television jurisprudence to smash through the *Daniels Cablevision* shield.⁹⁶

Time Warner I and the Spectre of Broadcast Regulation

"Our resolution of the legal issue presented here does not require the consideration of facts not already in the record, and for us to ignore the obvious similarity between DBS and broadcasting would do nothing to preserve the integrity of the judicial process."⁹⁷ With that pronouncement, the D.C. Circuit exercised its discretion to review a critical point of law not contemplated by the earlier panel: Were DBS systems "analogous to broadcast television and therefore subject to no more than heightened scrutiny"?⁹⁸ The *Time Warner I* court found that DBS systems were members of the broadcast family, albeit much more sophisticated ones, and as such shared the same basic technological feature that justified regulation of their siblings—spectrum scarcity.⁹⁹

First propounded in the 1943 *National Broadcasting Co. v. United States* decision,¹⁰⁰ the spectrum scarcity rationale hit its high water mark in *Red Lion*. This regulatory rationale postulates that because electromagnetic spectrum is a "scarce" resource, the government may allocate available frequencies by granting relatively few licenses for broadcasting purposes.¹⁰¹ In

96. *See id.* at 974-75.

97. *Id.* at 975.

98. *Id.* The court cited *Roosevelt v. E.I. du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992), to justify its discretion to consider an issue raised for the first time on appeal that does not "depend on any additional facts not considered by the district court." *Time Warner*, 93 F.3d at 975 (citing *E.I. du Pont de Nemours*, 958 F.2d at 419 & n.5).

99. *See Time Warner*, 93 F.3d at 975.

100. *See National Broad. Co. v. United States*, 319 U.S. 190, 226 (1943) ("[R]adio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.").

101. "Scarce" in this instance essentially means that the FCC hands out less spectrum for free than there are people who want to use the spectrum. It is not technological scarcity—we have far more usable spectrum today than in Marconi's day. *See*,

return for this government grant, the government requires the licensee to "[s]hare his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."¹⁰² As Professors Krattenmaker and Powe argue: "This model allows governments to intervene to promote First Amendment values by mandating a more diverse programming fare than broadcasters might otherwise choose."¹⁰³ *Red Lion* remains the bedrock of broadcast regulation—its scarcity rationale has been attacked and weakened, but it survives nonetheless.¹⁰⁴

Perhaps the strongest feature of the scarcity rationale is its adaptability to changing situations. The original justification for government control of the airwaves was based on interference problems—there were simply too many broadcasters broadcasting over each other on the few frequencies available, and simply not enough licensed frequencies to go around.¹⁰⁵ As the number of alternative mass media systems blossomed, scarcity changed to fit the new communications landscape—the "bottleneck" theory

e.g., Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 926-27 (1997) (arguing that advances in technology led to the expansion of the radio spectrum). Instead, the real issue is one of fundamental economic scarcity—too few dollars available to support the maximum possible number of stations in any given market. This distinction has fueled extensive criticism of the scarcity rationale for public interest obligations. See generally DE SOLA POOL, *supra* note 85, at 151 (noting that "the number of stations depends on the amount of advertising dollars or on other funding sources in the community"); Fowler & Brenner, *supra* note 86, at 223 (same); Hazlett, *supra*, at 926-27 (arguing that physical scarcity is an empty concept and only economic scarcity is meaningful).

102. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969); see also Bollinger, *supra* note 80, at 9 (noting that under this rationale, "when only a few interests control a major avenue of communication, those able to speak can be forced by the government to share").

103. Krattenmaker & Powe, *supra* note 55, at 1721.

104. Scholars and practitioners of telecommunications law regularly call for the dismantling of the scarcity-based system of regulation, and have done so for years. See, e.g., DE SOLA POOL, *supra* note 85, at 151; Fowler & Brenner, *supra* note 86, at 221-26; Hazlett, *supra* note 101, at 926-30; Krattenmaker and Powe, *supra* note 55, at 1740-41; Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1081 n.121 (1994); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1013-20 (1989).

105. See generally DE SOLA POOL, *supra* note 85, at 113-17 (discussing the beginnings of governmental control of broadcast spectrum).

of scarcity arose, positing that access to the public via a particular type of programming delivery system can be defeated by "gatekeepers" at strategic points in the system.¹⁰⁶ Many commentators have unmasked the scarcity rationale as nothing more than economic in nature—frequencies are available, but funding to acquire one and set up a broadcast operation is scarce.¹⁰⁷

Relying on *Red Lion* and its scarcity rationale, the *Time Warner I* court concluded that the use of spectrum by DBS operators is equivalent to the use of spectrum by traditional broadcast media,¹⁰⁸ thereby condemning DBS operators to the fate of traditional television broadcasters. It appears, however, that the court ignored the FCC's own preliminary classification of DBS as a nonbroadcast service: "[w]e think subscription services may properly be classified as point-to-multipoint (nonbroadcast video) services that fall outside the definition of broadcasting."¹⁰⁹ The FCC's justification for differentiating "subscription video" services from regular broadcasting hinged on the system operator's intent:

The dual nature of STV [subscription television] is that while it may be available to the general public, it is intended for

106. "Bottleneck" theory enables the FCC to mandate that cable television, which does not use the broadcast spectrum to deliver programming directly to the homes of its subscribers, nevertheless must allow certain levels of public, educational, and governmental access to its system. See Winer, *supra* note 71, at 47 (criticizing the "gatekeeper control" supposedly exercised by cable companies as grounds for shackling cable with public interest requirements); see also *infra* notes 202-03 and accompanying text (explaining the "bottleneck" scarcity rationale).

107. See, e.g., Fowler & Brenner, *supra* note 86, at 223 (noting that "[t]he scarcity rationale focuses on the wrong scarce resource, megahertz, instead of advertising dollars"); Lively, *supra* note 104, at 1081 n.121 (arguing that a need to meet certain financial qualifications to receive a broadcast license "define[s] an industry to which access is conditioned by affordability").

108. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996).

109. Subscription Video Services, Notice of Proposed Rulemaking, 51 Fed. Reg. 1817, 1818 (1985); see also Subscription Television; Change in Classification, 52 Fed. Reg. 6152, 6153 (1987) ("[T]he definition of 'broadcasting' in the Communication Act turns on the intent [of] the purveyor of a service that its programming be available to the indeterminate public [S]ervices which, through technology, limit access to only paying subscribers may be classified as non-broadcast services.").

the exclusive use of paying subscribers. Availability and use are separate concepts. . . . Mass appeal and mass availability are factors which weigh in favor of finding that a particular activity is broadcasting. However, those factors may be negated by clear, objective evidence that the programming is not intended for the use of the general public.¹¹⁰

Although the general public is invited to partake of a DBS provider's wares, an individual must first subscribe to a DBS service to do so legally. This difference was not appreciated fully by the court, which consequently lumped DBS in with traditional broadcast services.¹¹¹

Once the court misclassified DBS, the rest of the *Time Warner I* opinion quickly fell into place. Recognizing that "the inherent physical limitation on the number of speakers who may use the . . . medium has been thought to require some adjustment in traditional First Amendment analysis,"¹¹² the court applied the same "relaxed standard of scrutiny that . . . the [Supreme] [C]ourt ha[d] applied to the traditional broadcast media."¹¹³ Without the need for a compelling governmental interest to sustain the regulation, the government's policy of promoting "the availability to the public of a diversity of views and information through cable television and other video distribution media" presented a sufficient governmental interest to justify the "hardly onerous" burden placed on DBS operators.¹¹⁴ The court noted that the government conceded to Time Warner's assertion that the FCC had made no findings regarding the need for the DBS set-aside, but quickly added that any findings would be unnecessary¹¹⁵ and impossible.¹¹⁶

110. Subscription Video Services, 51 Fed. Reg. at 1820; see also Shelanski, *supra* note 47, at 1066 (analyzing the revision of the STV rules).

111. See *Time Warner*, 93 F.3d at 976 (noting that the set-aside is simply "a new application of a well-settled government policy . . . as a condition of their being allowed to use a scarce public commodity").

112. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638 (1994) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

113. *Time Warner*, 93 F.3d at 975.

114. *Id.* at 976 (quoting Cable Television Consumer Protection and Competition Act of 1992 § 2(b)(1), Pub. L. No. 102-385, 106 Stat. 1460, 1463 (1992)).

115. See *id.* ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial

With that background established, the *Time Warner I* court's next step was inevitable: "Section 25, then, represents nothing more than a new application of a well-settled government policy of ensuring public access to non-commercial programming."¹¹⁷ Looking for a final pillar of support, the panel then associated cable's "must carry" rules with the DBS set-aside and turned to the language of *Turner I*: "The rules . . . do not require or prohibit the carriage of particular ideas or points of view."¹¹⁸

Almost as a throw-away point, the court noted that "the overriding objective in enacting must carry was . . . to preserve access to free television programming Section 25 serves a similar objective; its purpose and effect is to promote speech, not to restrict it."¹¹⁹ This rationale—preservation of free television programming—seems inappropriately stolen from cable television. While cable television systems carry local broadcast television signals, DBS systems do not.¹²⁰ DBS subscribers depend on local broadcast stations to provide information in the same way as those who do not subscribe to any type of MVPD systems. There simply is no direct competition present between DBS systems and local, free broadcast television.

The Time Warner II Dissent: Scarcity Under Fire

Within six months, the D.C. Circuit handed down yet another opinion on the matter. Upon consideration of Time Warner's Suggestions for Rehearing En Banc, a majority of the judges denied a rehearing of *Time Warner I* without issuing an opinion on the merits.¹²¹ The five dissenting judges were not so reticent. Writing for his dissenting colleagues, Circuit Judge Stephen

review." (quoting *Turner*, 512 U.S. at 666)).

116. See *id.* ("Congress could not have made DBS-specific findings for the simple reason that no DBS system was in operation at the time the 1992 Act was enacted. Congress had to base its decision to require set-asides on its long experience with the broadcast media.").

117. *Id.*

118. *Id.* at 977 (quoting *Turner*, 512 U.S. at 647).

119. *Id.*

120. See *supra* notes 33-34 and accompanying text.

121. See *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 (D.C. Cir. 1997).

Williams professed a "genuine uncertainty about the correct outcome" of the case had it been reheard.¹²² Citing "fatal defects" in the earlier panel's legal theory,¹²³ he strenuously objected to the use of scarcity as the legal theory with which to uphold the set-aside.¹²⁴ Indeed, Judge Williams even took a swipe at the continued validity of *Red Lion* itself.¹²⁵

Acknowledging the differences between DBS and traditional broadcasting, Judge Williams noted that "[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting."¹²⁶ The dissent then followed the lower panel's lead, equating DBS with cable television.¹²⁷ Where the lower panel used *Turner I* to support the imposition of scarcity-combatting regulations on DBS, the dissenters in *Time Warner II* distinguished DBS's large capacity from normal broadcasting, arguing to limit the reach of the spectrum scarcity doctrine in the process.¹²⁸

122. *Id.* at 724 (Williams, J., dissenting).

123. *See id.* (Williams, J., dissenting) ("I believe there were fatal defects in the panel's legal theory for upholding the 1992 Cable Act's requirement that direct broadcast satellite . . . providers set aside several channels for noncommercial programming of an educational or informational nature." (citing *Time Warner*, 93 F.3d at 973-77)).

124. *See id.* (Williams, J., dissenting) ("DBS is not subject to anything remotely approaching the 'scarcity' that the court found in conventional broadcast in 1969.").

125. *See id.* at 724 n.2 (Williams, J., dissenting). Judge Williams wrote:

Red Lion has been the subject of intense criticism. Partly this rests on the perception that the "scarcity" rationale never made sense . . . [a]nd partly the criticism rests on the growing number of available broadcast channels. . . . While *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death, we can think twice before extending it to another medium.

Id. (Williams, J., dissenting).

126. *Id.* at 724 (Williams, J., dissenting). Judge Williams also pointed out that "DBS provides a given market with four times as many channels as cable, which (even without predicted increases in compression) offers about 10 times as many channels as broadcast. Accordingly, *Red Lion*'s factual predicate—scarcity of channels—is absent here." *Id.* at 725 (Williams, J., dissenting).

127. *See id.* at 725 (Williams, J., dissenting) ("[T]o the extent that *Turner I* distinguishes *Red Lion* on grounds of lack of scarcity in cable . . . DBS falls on the cable rather than the broadcast side of the line.").

128. *See id.* (Williams, J., dissenting) ("Broadcast regulation rests upon the unique physical limitations of the broadcast medium." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994))).

Next, the dissent confronted the content specific nature of the set-aside regulation, and once again tied its argument to an issue explored in *Turner I*. In *Turner I*, the issue was "must-carry"—a scheme designed to facilitate access to cable systems by local broadcast television stations.¹²⁹ The *Turner I* court found those rules to be content-neutral,¹³⁰ a conclusion that supported the original *Time Warner I* panel opinion.¹³¹ The dissent drew a sharp distinction between the DBS set-aside and *Turner I*'s must-carry provisions: "Whereas the must-carry provisions reviewed in *Turner* mandate access for particular stations regardless of their programming content, the DBS provision speaks directly to content, creating an obligation framed in terms of 'noncommercial programming of an educational or informational nature.'"¹³² The dissenters found this statutory intent to "advance one particular type of programming" unacceptable, concluding that "as a simple government regulation of content, the DBS requirement would have to fall."¹³³

Despite the seemingly anti-set-aside fervor mustered by Judge Williams and his dissenting colleagues, the dissent offered a possible foundation for the set-aside not considered by the prior panel—the possibility of a conditional governmental grant or subsidy to the DBS providers.¹³⁴ The dissenting judges noted that under *Rust v. Sullivan*,¹³⁵ "[t]he government may subsidize some activities and not others."¹³⁶ They then considered the government's argument that it has the "power to retain control

129. See *Turner*, 512 U.S. at 646 (citing Cable Television Consumer Protection and Competition Act of 1992 § 2, Pub. L. No. 102-385, 106 Stat. 1460, 1463 (1992)).

130. See *id.* at 643-46.

131. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) ("[T]he government does not dictate the specific content of the programming that DBS operators are required to carry.").

132. *Time Warner*, 105 F.3d at 726 (Williams, J., dissenting) (quoting 47 U.S.C. § 335(b)(1) (1994)).

133. *Id.* (Williams, J., dissenting).

134. See *id.* at 727 (Williams, J., dissenting).

135. 500 U.S. 173 (1991).

136. *Time Warner*, 105 F.3d at 726 (Williams, J., dissenting) (citing *Rust v. Sullivan*, 500 U.S. at 193-96).

over the 'public domain'¹³⁷ as a rationale for reserving four to seven percent of the spectrum.¹³⁸ The dissent ultimately rejected this theory, however, pointing out that "the [Supreme] Court has not clearly committed itself to treating spectrum licenses as conditioned grants."¹³⁹

IMPLEMENTATION OF THE SET-ASIDE: THE DBS PUBLIC INTEREST REGULATIONS

After the *Daniels Cablevision/Time Warner* challenges to the set-aside were resolved, the FCC was able to complete the rulemaking process it began half a decade earlier when it issued a Second Notice of Proposed Rulemaking.¹⁴⁰ Heralding its regulations as "ensur[ing] real benefits for the American consumer, while creating workable rules for the industry,"¹⁴¹ the FCC endeavored to temper imposition of the set-aside mandate.

As a preliminary matter, the FCC concluded that all DBS satellite licensees were required to comply with the public service obligations in section 335.¹⁴² This finding included Primestar: despite its formal status as a medium powered fixed satellite service,¹⁴³ Primestar was unable to escape the DBS public interest obligations placed on its high-powered brethren also found to be covered by the statute.¹⁴⁴

137. *Id.* at 727 (Williams, J., dissenting).

138. *See id.* (Williams, J., dissenting).

139. *Id.* (Williams, J., dissenting). Of note, the *Time Warner I* panel failed to cite *Rust v. Sullivan* in support of its holding.

140. *See, e.g., In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 F.C.C.R. 1589 (1993).

141. *Commission Implements Public Interest Obligations for Direct Broadcast Satellite Service*, FCC News Release, Nov. 19, 1998 (visited Mar. 24, 1999) <http://www.fcc.gov/Bureaus/International/News_Releases/1998?nrin8038.html>.

142. *See* DBS Public Interest Obligations Report and Order, *supra* note 7, at para. 21.

143. *See* Fourth Annual Report, *supra* note 27, at 1070 para. 54 & n.185.

144. *See* DBS Public Interest Obligations Report and Order, *supra* note 7, at paras. 6, 14, 18-28 (noting, in part, the FCC's proposal to streamline and consolidate rules for DTH-FSS in Part 25 with those in Part 100 governing DBS service).

Definition of National Educational Programming Suppliers

Section 335(b)(3) mandates that DBS reserve public interest channels for "national educational programming suppliers."¹⁴⁵ Under the statute, this term includes "any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."¹⁴⁶ As no definition of this term existed in section 335 itself, the FCC examined the rest of the statute for some indication of congressional intent.

It found part of its definition in section 397(6), a provision that defines the term "noncommercial educational broadcast station."¹⁴⁷ The FCC applied this language, and defined a noncommercial educational television station as

a television or radio broadcast station that (i) "is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association," or (ii) "is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes."¹⁴⁸

In defining "public or private educational institutions," the FCC noted that Congress provided no definition in the 1996 Act, and adopted a definition of its own creation from another setting: Instructional Television Fixed Stations (ITFS).¹⁴⁹ Under this definition, a "public or private educational institution[]" must be "an accredited institution or governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations."¹⁵⁰

145. 47 U.S.C. § 335(b)(3) (1994).

146. DBS Public Interest Obligation Report and Order, *supra* note 7, at para. 76 (quoting 47 U.S.C. § 335(b)(5)(B)).

147. 47 U.S.C. § 397(6).

148. DBS Public Interest Obligations Report and Order, *supra* note 7, at para. 78 (quoting 47 U.S.C. § 397(6)).

149. *See id.* at para. 80. ITFS stations primarily provide programming to students enrolled in accredited public or private learning institutions. *See id.*

150. *Id.*

As to the term "national," the FCC again noted the absence of guidance in the statute or its legislative history.¹⁵¹ In this instance, it interpreted the term broadly, and included "local, regional, or national domestic nonprofit entities that qualify . . . and produce noncommercial programming designed for a national audience."¹⁵² It indicated, however, a belief that Congress "intended to limit eligibility to entities that share the same essential characteristics as those listed," and rejected the possibility that a commercial entity with an educational mission could qualify for the set-aside.¹⁵³

The FCC also allowed for joint ventures with commercial entities in instances in which the participants could demonstrate that the venture itself is noncommercial and has an educational mission.¹⁵⁴ Having defined eligible providers of national educational programming, the FCC elected not to provide any guidance on defining the statutory requirement for "educational or informational" programming, insisting that no elaboration on the term was needed.¹⁵⁵

The Selection of a Four Percent Set-Aside

With some flexibility to set the level of the set-aside, the FCC solicited comment on the appropriate percentage of channel capacity to dedicate to educational and informational purposes.¹⁵⁶ Those entities in favor of a seven percent set-aside cited growth of the capacity of DBS systems during the six years since the 1992 Act, as well as the ample supply of programming available to program that level of channels.¹⁵⁷ The DBS industry, in favor of a four percent set-aside (only because an argument for a

151. *See id.* at para. 92.

152. *Id.*

153. *Id.* at para. 85. The FCC added that it would use the Internal Revenue Code's definition of nonprofit as the default definition to determine if an entity qualified as an eligible national educational programming supplier, though it reserved the right to deviate from the default definition for those entities that may not lend themselves to such rigid classification. *See id.* at para. 87.

154. *See id.* at para. 89.

155. *See id.* at para. 94.

156. *See id.* at para. 72.

157. *See id.* at para. 73.

lower percentage was not an option) argued that the supply of eligible programming was limited and that it was still too soon to shackle the industry with a large public interest requirement.¹⁵⁸

To the likely relief of the DBS industry, the FCC adopted the lowest level of set-aside available—four percent of channel capacity, rounded upwards in the event the calculation produces a fraction.¹⁵⁹ This mandate reflected a clear understanding of the unique position of DBS in the MVPD market:

We [the Commission] choose four percent, instead of a higher number, because we find it in the public interest to put the minimum burden on this industry that currently has relatively little market power. We find that imposing the maximum set-aside percentage now might hinder DBS in developing as a viable competitor in the MVPD market and that this factor outweighs possible benefits in establishing a higher percentage.¹⁶⁰

The FCC indicated its desire that providers broadcast educational and informational programming as soon as possible following enactment of the regulations, and stated that it would monitor compliance with the regulation.¹⁶¹ The FCC also set limits on how to determine the number of available channels for purposes of computing the set-aside. The FCC excluded audio-only channels—a fixture on DBS systems—from the total channel count due to the FCC's belief that Congress intended only those channels providing video programming to be included in any determination of "total channel capacity" under section 335(b).¹⁶²

Additionally, the FCC stated that the four percent set-aside would apply without regard to any existing programming contracts.¹⁶³ In other words, DBS systems would have to provide the

158. *See id.*

159. *See id.* at para. 74.

160. *Id.*

161. *See id.*

162. *See id.* at paras. 69-70; *see also id.* at para. 71 (mandating quarterly calculation of the total number of channels available for video programming by each DBS licensee).

163. *See id.* at para. 75.

channels regardless of whether the set-aside would require the DBS providers to terminate existing channels.¹⁶⁴ It also limited qualified programmers to one initial channel per system, stating that such a limit would increase opportunities for other qualified entities to gain access.¹⁶⁵

Political Access Requirements

In addition to the set-aside, the 1992 Act imposed political access requirements on DBS providers.¹⁶⁶ In formulating regulations for political access, the FCC evinced a clear appreciation for the status of DBS as a national MVPD.¹⁶⁷ While indicating that section 312(a)(7) intended to guarantee access for presidential and vice-presidential candidates, the FCC acknowledged the potential technical and financial burdens involved in providing access for candidates for the House of Representatives and Senate, and declined to issue firm guidelines on when and under what circumstances such access must be granted to congressional candidates.¹⁶⁸

Instead, the FCC adopted a reasonableness test for political access to the DBS platform.¹⁶⁹ Noting that determinations of reasonableness would be made on a case-by-case basis, the FCC provided a list of factors it would consider in making such determinations.¹⁷⁰ Most importantly for those DBS systems carrying terrestrial broadcast signals, however, the FCC gave DBS services an out: "where DBS providers carry the programming of a terrestrial broadcast television station, it is the responsibility of the terrestrial broadcaster and not the DBS provider to satisfy the political broadcasting requirements of Sections 312(a)(7)."¹⁷¹

164. *See id.*

165. *See id.* at paras. 116-17.

166. *See* 47 U.S.C. § 312(a)(7) (1994) (requiring provider to furnish reasonable access to "a legally qualified candidate for Federal elective office").

167. *See* DBS Public Interest Obligations Report and Order, *supra* note 7, at para. 38.

168. *See id.*

169. *See id.* at para. 41.

170. *See id.* Factors include the amount of time requested, the number of candidates in the race, possible programming disruption, technical difficulties of providing access, and availability of reasonable alternatives. *See id.*

171. *Id.* at para. 42.

Editorial Control

Many commentators argued that in demanding a set-aside, Congress also intended to prohibit DBS providers from selecting among qualified programmers vying for set-aside spots.¹⁷² The FCC rejected this argument, finding instead that the statute banned editorial control over individual programming carried on the reserved channels.¹⁷³ In the words of the FCC, "we see no reason to conclude that allowing the DBS provider to select the programmer would contravene the fundamental Congressional purpose of making noncommercial educational or informational programming available."¹⁷⁴ To that end, the FCC allowed DBS providers to select from among qualified programmers in the event that demand exceeded capacity on the system.¹⁷⁵ Furthermore, the FCC stated its belief that DBS providers could consider factors relating to programming in selecting from among qualified programmers—they just could not exercise control over the programming itself.¹⁷⁶ This differed from the FCC's traditional view of the leased access provisions governing the reservation of a portion of a cable system's channel capacity for public interest—a difference the FCC believed appropriate in light of the unique attributes of each of the two MVPDs.¹⁷⁷ The FCC also reserved to DBS providers the right to "take action to ensure that only qualified programs are carried on the reserved channels."¹⁷⁸

Localism

The FCC effectively ducked the question of the appropriateness of additional requirements that realized the FCC's longstanding interest in localism. Noting that the statute provided no guidance in applying the concept of localism to DBS sys-

172. *See id.* at para. 99.

173. *See id.*

174. *Id.* at para. 100.

175. *See id.* at para. 114.

176. *See id.* at para. 102.

177. *See id.* at paras. 103-06.

178. *Id.* at para. 110.

tems,¹⁷⁹ the FCC sided with DBS providers, and acknowledged the overwhelming technological and economic obstacles preventing national DBS services from providing local programming service.¹⁸⁰ The FCC also noted a legal barrier to imposition of a localism requirement on DBS providers: the 1988 Satellite Home Viewer Act.¹⁸¹ Consistent with these findings, the FCC elected not to impose a localism requirement on DBS services.¹⁸²

Rejection of Additional Public Interest Requirements

The cable television industry pushed for the application of public interest obligations beyond the set-aside, arguing that the FCC should interpret the language of the statute to include must-carry obligations, program access rules, PEG channel requirements, and cross-ownership prohibitions, among others.¹⁸³ Further, the cable industry insisted that the FCC provide a "level, competitive playing field" for all MVPDs.¹⁸⁴ Naturally, the DBS industry opposed the imposition of these requirements, and cited differences between its service and cable.¹⁸⁵

The FCC agreed with the DBS providers that DBS is a "separate and distinct" service, and "a relatively new entrant attempting to compete with an established, financially stable cable industry."¹⁸⁶ Citing the "disparity in market power" between DBS providers and cable operators, the FCC rejected the cable industry's request for "regulatory parity."¹⁸⁷ Although the FCC heard demands for additional requirements, it cited the relative youth of the DBS industry and deferred imposing such requirements on DBS at this point in its development.¹⁸⁸

179. *See id.* at para. 53.

180. *See id.* at paras. 49-54.

181. *See id.* at para. 53.

182. *See id.* at para. 54. The Commission did, however, state its willingness to revisit this issue if the economic and technical impediments to providing local service were resolved in the future. *See id.*

183. *See id.* at para. 56 (noting National Cable Television Association comments).

184. *Id.*

185. *See id.* at para. 58.

186. *Id.* at paras. 59-60.

187. *Id.* at para. 60.

188. *See id.* at paras. 63-64.

FORCING THE OLD TO FIT THE NEW—A CRITIQUE OF
THE SET-ASIDE

As drafted by Congress and implemented by the FCC, the set-aside requirement is vulnerable to attack on several fronts. The criticisms this Note presents derive from the following simple truth: The justifications for public interest programming have failed to keep pace with the technological and marketplace realities of video programming distribution at the dawn of the twenty-first century.

The Inapplicability of the Scarcity Model to DBS

As modern technology expands the number of mass media systems and offerings, the chorus of *Red Lion* detractors grows, calling into question the spectrum scarcity rationale for broadcast regulation that seemed so secure only a decade ago. The rationale lingers on, however, far overstaying its welcome. Indeed, half of the D.C. Circuit believed that the spectrum scarcity concept had enough merit left to apply to DBS providers.¹⁸⁹

Scarcity of the spectrum itself has become a relative term.¹⁹⁰ In the 1950s, there was only one programming delivery system for the famous "Lucy Does a TV Commercial" episode of "I Love Lucy"—broadcast television.¹⁹¹ To date, there are at least ten different video programming delivery systems that could carry a specific half-hour episode of "Seinfeld" into the home.¹⁹² Many UHF and VHF broadcast frequencies remain unallocated in all but the largest markets.¹⁹³ As posited by the *Time Warner II*

189. See *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 (D.C. Cir. 1997).

190. As Mark Fowler and Daniel Brenner noted, "Technology is an independent variable that makes scarcity a relative concept." Fowler & Brenner, *supra* note 86, at 222.

191. This episode was first broadcast on May 5, 1952. See *100 Greatest Episodes of All Time*, TV GUIDE, June 28 - July 4, 1997, at 67.

192. Available systems include: broadcast television, cable television, DBS satellite television, C-Band satellite interception of network feeds, MMDS, LMDS, Internet Video (streaming or downloaded), videocassette tape, videodisc (laserdisc or DVD), and computer CD-Rom. See, e.g., Fourth Annual Report, *supra* note 27, at 1048-98 paras. 12-106.

193. See, e.g., Third Annual Report, *supra* note 14, at 4408 n.293 (noting that

dissent, "DBS provides a given market with four times as many channels as cable, which . . . offers about ten times as many channels as broadcast."¹⁹⁴ The opinion proceeded to calculate that, in theory, a total of 480 DBS channels were available on the east coast and 840 DBS channels were available on the west coast by February 1997.¹⁹⁵ Evidently, then, there are actually numerous avenues available to those wishing to bring their message to the public through the mass media. The only true scarcity involved is a scarcity of economic resources necessary to purchase carriage of one's message on a media system using the spectrum.

To be a valid rationale for public interest regulation of DBS systems, a scarcity theory would need to be grounded in a resource that is actually scarce. One possible application of the spectrum scarcity rationale would be to limit its focus to the only truly scarce feature of the DBS system—the satellite slots themselves. There are only three CONUS slots assigned to the United States from which a DBS satellite can transmit programming to the entire country.¹⁹⁶ Much like a grant to use a radio frequency in the 1940s, a grant to use one of these slots carries with it the implication that no one else will be able to control that slot.¹⁹⁷ The majority in *Time Warner I* adopted this ratio-

while the top 20 television markets average 15.5 broadcast stations, markets 101-211 average only 4.75). Spectrum scarcity is not the problem in these smaller markets. Economic scarcity is to blame: Local businesses simply cannot supply enough advertising dollars to sustain a higher number of broadcast stations. See, e.g., Fowler & Brenner, *supra* note 86, at 223 (arguing that "the number of stations depends on the amount of advertising dollars or on other funding sources in the community. Except in the largest cities . . . advertising support or subscriber dollars restrict broadcast opportunities more than does the number of channels").

194. *Time Warner*, 105 F.3d at 725 (Williams, J., dissenting).

195. See *id.* at 725 (Williams, J., dissenting). The dissent added that "DBS compression is expected to increase the number of channels fivefold by the year 2000." *Id.* (Williams, J., dissenting).

196. As indicated previously, these CONUS slots are complemented by additional positions capable of beaming programming to either the eastern or western half of the country. See *supra* note 15. Even so, the fact remains that there are a very limited number of positions available for DBS satellites. See 2 BRENNER ET AL., *supra* note 11, § 15.02[1], at 15-5. Note also, however, that Primestar remains a valid national service despite its lack of any CONUS-DBS slots—it transmits exclusively from satellites operating in the fixed satellite service band. See Fifth Annual Report, *supra* note 22, at para. 61.

197. See *National Broad. Co. v. United States*, 319 U.S. 190, 226 (1943) ("Unlike

nale: "Because the United States has only a finite number of satellite positions available for DBS use, the opportunity to provide such services will necessarily be limited."¹⁹⁸

The problem with the court's analysis is that it simply is not that easy to translate scarcity of *spectrum* into scarcity of *space* while maintaining the same regulatory rationale. Although it is true that no one else can use exactly the same broadcast frequency in the same local area without causing interference,¹⁹⁹ this situation does not exist with satellite slots. With a satellite in a given slot, several people can make use of that slot simultaneously—DBS satellite owners may lease transponder space to independent programming distributors.²⁰⁰ In short, it is not just one entity providing programming from a particular satellite slot, it is dozens of entities. This brings DBS more in line with cable television, as noted by the *Time Warner II* dissent.²⁰¹ Cable television systems, of course, possess a scarce resource in the network of cables passing by the homes and businesses in their service areas. Usually, only one cable system exists in any given local market.²⁰² This creates the "bottleneck" scarcity rationale: anyone wanting to provide programming service to a community via cable television must deal with the local cable franchise to get their programs through that bottleneck.²⁰³

other modes of expression, radio inherently is not available to all. That is its unique characteristic. . . . Because it cannot be used by all, some who wish to use it must be denied.").

198. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996); see also 2 BRENNER ET AL., *supra* note 11, § 15.02[1], at 15-5 (noting the allotment of only three CONUS slots and eight total slots to the United States).

199. See *Time Warner*, 105 F.3d at 725 (Williams, J., dissenting).

200. See Shelanski, *supra* note 47, at 1063 ("DBS operators can lease capacity on their transponders to independent information service providers, programmers, and packagers . . . that merely want carriage of their signal to viewers.").

201. See *Time Warner*, 105 F.3d at 725 (Williams, J., dissenting) ("DBS falls on the cable rather than the broadcast side of the line.").

202. For an excellent discussion of the law governing the establishment and modification of cable franchises, see 1 BRENNER ET AL., *supra* note 11, §§ 3.01-08, at 3-8 to -84. Although exclusive franchises are prohibited by the 1992 Cable Act, there is little incentive to "overbuild" a second system of cables in a given service area. See *id.* § 3.06[5][a], at 3-54 to -55. Brenner notes that out of approximately 7,000 cable systems, there are only about three dozen "overbuilds." See *id.*

203. See, e.g., Lively, *supra* note 104, at 1076 ("Because franchising requirements and capital costs have conspired toward establishing monopolistic conditions in the

The bottleneck argument falls apart, however, when applied to DBS. While a local cable system has the power to bottleneck all programming traveling down its network of land-based wires, no single DBS provider can monopolize DBS delivery of programming to any local area because each provider has two DBS rivals and, most likely, a local cable system with which to compete.²⁰⁴ Unlike cable systems, which almost always have a de facto local monopoly, DBS systems must vie amongst themselves for programming and viewers. A programmer's inability to gain carriage on one DBS service does not bar it from access to the entire medium of communication in its community, as there are rival providers that could provide the desired access. For this reason, a bottleneck rationale for regulation seems inappropriate when applied to DBS providers.

The Inapplicability of the Localism Principle and the Unfounded Concern for Local Broadcast Television

The scarcity rationale itself comports with one of the FCC's most frequently stated "public interest" goals—the preservation of free, over-the-air television. Indeed, to preserve the carriage of free, over-the-air television service, Congress and the FCC have required carriage of local television stations on cable systems.²⁰⁵ This is the foundation of the "must-carry" rationale for cable television: it gives local broadcasters exposure to customers on cable television systems, thereby continuing their commercial viability.²⁰⁶

cable industry, Congress determined that "market position gives cable operators the power and incentive to harm broadcast competitors." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 633 (1994))).

204. See *supra* notes 21-26 and accompanying text (discussing the three DBS providers currently offering service); *supra* note 29 and accompanying text (discussing cable television); see also Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 347 (1998) ("DBS is not a bottleneck multi-channel provider like cable").

205. See Cable Television Consumer Protection and Competition Act of 1992 § 4, 47 U.S.C. § 534(b) (1994).

206. For a brief discussion of the history and rationale behind must-carry rules, see 1 BRENNER ET AL., *supra* note 11, at §6.06[1] at 6-59 to -61; see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 224-25 (1997) (upholding the validity of a must-carry regulation against a First Amendment challenge).

Although few would argue that the profusion of new media technology has reached the point at which broadcast television can be eliminated entirely, the FCC's "free" television mantra nevertheless shows signs of being more myth than reality. Although viewers pay no fee to receive programming over broadcast television stations, they must pay for the equipment itself—a television and antenna. Advertising finances the cost of programming, thus creating "free" television programming but raising the cost of all products and services advertised on television.²⁰⁷ Although harder to compute in dollar impact, social costs such as decreased attendance at community functions and decreased membership in fraternal organizations arguably lead to reduced societal productivity and involvement.²⁰⁸

Moreover, free television is an anomaly in the world of mass media. As Laurence Winer notes, "[a]ll other forms of mass media are not free and no one expects them to be."²⁰⁹ Only broadcast radio joins over-the-air television as a mass media system where the only consumer investment required is the purchase of a receiving device.²¹⁰

207. See *In re Review of the Commission's Regulations Governing Television Broad., Television Satellite Stations Review of Policy and Rules, Further Notice of Proposed Rule Making*, 10 F.C.C.R. 3524, 3553 n.91 (1995) ("Viewers may be said to pay for over-the-air television through their purchase of advertised products, a portion of the price of which reflects the cost of advertising . . . "); Winer, *supra* note 71, at 41.

208. Robert Putnam is perhaps the best known advocate of the position that television is responsible for a decline in social involvement and our civic culture. See Robert Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65; see also Thomas B. Edsall, *TV Tattered Nation's Social Fabric, Political Scientist Contends*, WASH. POST, Sept. 3, 1995, at A5 (noting Putnam's suggestion that "television has profoundly undermined the nation's civic culture"). As the title of his article indicates, Putnam examined the decreased participation in bowling leagues, fraternal organizations, choral groups, and other civic or social groups over the years, and notes a negative correlation among the hours of television watched per day and the level of civic involvement and social trust. See Edsall, *supra*, at A5.

209. Winer, *supra* note 71, at 39.

210. It also should be noted that the Internet has the potential to be such a system. The "receiving" device is the computer and a modem. In order to gain access to the Internet, however, one must purchase a software package and pay a fee to an Internet service provider. This "subscription" element prevents most Internet access from being considered "free."

Both the scarcity and free television theories underlying public interest become almost entirely untenable when examining the transition from the traditional NTSC television broadcast signal to the HDTV signal.²¹¹ Rather than expand the limited number of speakers on the airwaves, the FCC gave huge chunks of new spectrum to an industry that already possessed a large portion of spectrum—the incumbent broadcast television operators.²¹² Moreover, instead of preserving a service that the poor can receive on their current television sets, the FCC mandated the phasing out of conventional television broadcasting,²¹³ a mandate that, while gradual, will nevertheless force all consumers to invest in new receiving equipment costing thousands of

211. HDTV (also known as “Digital Television” (“DTV”) or “Advanced Television” (“ATV”)) transmissions offer higher picture quality and CD-quality sound. *See* Fourth Annual Report, *supra* note 27, at 1092-93 nn.346 & 348. A HDTV television set is required to receive the signals. *See id.* at 1093 n.348.

212. *See In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 F.C.C.R. 14,588, 14,593-94 para. 8 (1997) (limiting initial eligibility for digital television licenses to “persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station or both”). The FCC’s rationale for this action was that such largess would speed the delivery of HDTV programming to the public without interfering with the provision of standard television service. *See id.* at 14,595 para. 11 (noting that such a method of allocation would “promote an orderly transition to the new service”); Harry A. Jessell, *FCC’S New Licensing Plan: Members Only*, BROADCASTING & CABLE, Aug. 26, 1991, at 50-51.

213. The FCC has set the year 2006 as a deadline for the cessation of analog television service. *See* *Advanced Television Systems*, 62 Fed. Reg. 26,966, 26,981 (1997). In order to accomplish the transition with minimal disruption to the viewing public, the FCC issued DTV licenses to incumbent broadcasters, *see supra* notes 211-12 and accompanying text, and implemented a timetable for construction and activation of DTV systems in various markets. *See* *Digital Television Broadcasting Stations*, 47 C.F.R. § 73.624(d) (1998) (ordering construction of DTV facilities by network affiliates in the ten largest markets by May 1, 1999, and construction of DTV facilities by all commercial broadcasters by May 1, 2002). For a time, licensees will broadcast in analog and digital, *see id.* § 73.624(b), allowing the public a grace period in which to acquire the HDTV sets (or set-top converter boxes) that will be necessary to receive television signals after 2006, *see* *Advanced Television Systems*, 62 Fed. Reg. at 26,981 (noting the FCC’s desire to “eas[e] the introduction of digital services”). By 2003, licensees must begin phasing out their analog broadcasting operations by simulcasting 50% of the video programming of the analog station on the DTV channel; by 2005, stations must simulcast their entire programming lineup. *See* 47 C.F.R. §§ 73.624(f)(i), (iii). On December 31, 2006, analog television will become part of history as the last analog licenses expire. *See* Fifth Annual Report, *supra* note 22, at para. 97.

dollars.²¹⁴ This alone undercuts the FCC's "preserve free TV"²¹⁵ mantra, and severely compromises the FCC's credibility as a defender of "access" to the machinery of mass communication.

This criticism aside, the FCC properly appraised the role of DBS in local video programming marketplaces: because DBS serves a national market, it was not appropriate to subject DBS to public interest requirements deriving from the localism principle.²¹⁶ Local stations have not been denied access to DBS subscribers—those subscribers still must view local television stations to obtain local information. Consequently, there is no direct threat to local broadcasters from DBS, and DBS subscribers remain able to get local news and information from their local broadcasters.

The Inapplicability of the Intruder Rationale

One of the rationales the Court offered in *Pacifica* was that the "uniquely pervasive" and "uniquely accessible" broadcast media may allow messages to enter the homes of potential viewers who do not wish to be exposed to the message.²¹⁷ This "intruder" theory often is used to justify content-based regulation of indecency, a type of programming that could be unwelcome by parents and damaging to children.²¹⁸ Accordingly, broadcasters bound by a duty to act as fiduciaries "in the public interest" must avoid airing such content at certain times. Subscription television services, however, function as "invitees"—subscribers join the service with an awareness of the type of programming available on the service.²¹⁹ Additionally, several MVPDs—includ-

214. The HDTV sets currently on the market cost several thousands of dollars. See Joel Brinkley, *Survey Shows Viewers Want Interactive Options*, N.Y. TIMES, Mar. 8, 1999, at C1 (noting that the cost of an HDTV set is \$3,000-\$12,000); Rob Pegoraro, *Placing Bets on Digital Bits*, WASH. POST, Jan. 15, 1999, at N62. In 1998, a mere 13,176 HDTV sets were sold, and HDTV programming remained "spotty at best." *Id.*

215. See, e.g., Advanced Television Systems, 62 Fed. Reg. at 26,967 (noting the FCC's desire to "promote and preserve free, universally available, local broadcast television").

216. See DBS Public Interest Obligations Report and Order, *supra* note 7, at paras. 49-54.

217. See FCC v. *Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

218. See generally *id.* (describing the intruder theory).

219. See, e.g., Maseth, *supra* note 74, at 448 (noting, in the context of cable televi-

ing DirecTV and EchoStar—offer “blocking” technology to combat the potential intrusion of undesirable programming into the home.²²⁰

As a subscription service, DBS cannot be described accurately as an “intruder.” Like the telephone services at issue in *Sable Communications, Inc. v. FCC*,²²¹ and the cable services at issue in *Denver Area Educational Telecommunications Consortium v. FCC*,²²² a service received only after the recipient takes affirmative steps to receive the programming is more accurately termed an “invitee” into the home.²²³ In light of the “intruding” characteristics of traditional broadcast television, the imposition of a public interest “toll” for entrance into American households is arguably a reasonable method of guaranteeing that at least a minimum level of public interest programming will reach broadcast television viewers. That same toll imposed on an “invitee,” however, smacks of protectionism for the intruders. Essentially, section 335 requires that a paid “invitee” into the home carry along a host of educational and informational materials, despite the “uniquely pervasive” presence of “intruders” who are obligated to provide much of the same material.

Inapplicability of Other Paternalistic Concerns

The intruder theory is not the only paternalistic rationale used to support the imposition of a public interest mandate on DBS. First, proponents of the set-aside contend that DBS should carry public interest programming because it is good for Ameri-

sion, that a system that “does not invade an individual’s home without the individual’s consent” should not be subjected to regulations based on concerns for unwelcome intrusion).

220. See, e.g., DirecTV, *Questions and Answers* (visited Mar. 24, 1999) <http://www.directv.com/sales/answer_service.html#locks> (advertising DirecTV’s “Locks and Limits” feature); Dish Network, *Top 25 Dish Network Programming Questions: 5. When Are You Going to Add Adult Programming* (visited Mar. 24, 1999) <<http://www.dishnetwork.com/service/questions/programming.htm>> (advertising “Parental Control lockout feature”).

221. 492 U.S. 115 (1989).

222. 518 U.S. 727 (1996).

223. See Lively, *supra* note 104, at 1075 (arguing that the pervasiveness rationale is inapplicable to cable, a medium that shares with DBS the need for “affirmative acts of engagement” on the part of the subscriber in order to receive programming).

cans.²²⁴ This argument presupposes that Americans would not support educational programming if the set-aside were not in place. This is simply not borne out by the facts: DBS subscribers have chosen to subscribe with full knowledge of the programming content available on their respective systems. Many potential subscribers would agree with the FCC's assessment of educational television as something of value, and likely would incorporate such a consideration into their choice of an MVPD system.

An additional flaw of this argument is the arrogance with which its supporters presume to suppose just what type of programming is "good" for Americans. Professors Krattenmaker and Powe best express the shortcoming of this rationale: "In short, the public interest is whatever the people who enforce it want it to be. In defining the public interest, enforcers tend to be motivated by partisan political goals and by their own program preferences."²²⁵ The assertion that public interest programming is valuable most likely is correct; the contention that the same type of programming is as valuable to every citizen as it is to members of the FCC and Congress is, however, a more tenuous conclusion.

Further, some critics argue that DBS should carry public interest programming because all other broadcasters carry public interest programming.²²⁶ This argument underappreciates the unique attributes of the DBS platform: it has far more outlets for diverse viewpoints than any other MVPD, and subscribers

224. See generally Krattenmaker & Powe, *supra* note 55, at 1725 n.28 (defining such programming as "merit programming"—"programming deemed so valuable that broadcasters [are] required to air it, even if few (if any) viewers or listeners wished to tune it in").

225. THOMAS G. KRATTENMAKER & LUCAS A. POWE, *REGULATING BROADCAST PROGRAMMING* 144 (1994); see also Krattenmaker & Powe, *supra* note 55, at 1725 ("When regulators conclude that viewers and listeners are not tuning in to what the consumers need, regulators tend to counter by attempting to make the merit programming available everywhere. In this fashion, all viewers and listeners . . . should, at least occasionally, encounter and benefit from good programming.")

226. In a 1996 speech, then-FCC Chairman Reed Hundt noted that "all media have typically been party to some sort of social compact." See Reed Hundt, *Speech at Broadcasting & Cable Interface Conference* (Sept. 24, 1996), *Reinventing the Social Compact*, ¶ 29 (visited Mar. 24, 1999) <<http://www.fcc.gov/Speeches/Hundt/spreh637.txt>>.

must default to broadcast television, with all its attendant public interest requirements, in order to view local channels. That "everyone else" needs a public interest mandate to stimulate the creation of educational and informational programming does not warrant requiring the same mandate for DBS. DBS has a need to fill its immense channel capacity with a variety of programming, including informational and educational programming. With more channels splitting the same viewership pie, DBS has an incentive to target smaller audiences.²²⁷ This "narrowcasting" allows DBS to target those who wish to view educational and informational programming on a scale never before achieved by any other media system. This fact cuts against the initial reaction that DBS should be treated like all other forms of broadcasting.

The Overlooked Value of Existing Informational and Educational Programming

The immense channel capacity of DBS and other MVPDs has stimulated the development of many educational and informational channels. The presence of these existing services exposes an inherent flaw in the term "national educational programming supplier."²²⁸ Although the FCC has done an excellent job of implementing a working definition of the term, it cannot correct Congress's disregard for the value of for-profit educational and informational programming. The set-aside provisions of the 1992 Cable Act and 1996 Act deny access to a chorus of voices who have as much to offer as those who qualify under these provisions, and virtually guarantee that access will be denied to those without the financial clout to set up a station.

A number of channels on DBS systems provide the "diversity of voices"²²⁹ that regulators sought to achieve through public interest licensing. Carriage of *CNN* and *MSNBC*, for example,

227. This trend has been labeled the "demassification" of the mass media. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1842-43 (1995) (citing ALVIN TOFFER, *THE THIRD WAVE* 171-83 (1980)).

228. Cable Television Consumer Protection Act of 1992 § 25(b)(5)(B), 47 U.S.C. § 335(b)(5)(B) (1994).

229. Hazlett, *supra* note 101, at 932.

provide subscribers with up-to-the-minute news and information.²³⁰ These services thrive today because their creators saw an untapped market. Section 335(b)(5)(B), however, denies "educational" status to these entities because they are commercial stations—products of the video programming marketplace, sponsored by advertisers.²³¹ Likewise, the *Discovery Channel* presents some of the most detailed, thoughtful, and enlightening programs about the natural world aired on television.²³² The *History Channel* is an additional example, as is *Home and Garden Television*, the *Learning Channel*, and the *TV Food* network.²³³ Section 335 would give preference, though, to a noncommercial outlet, regardless of the resources or quality of the end product.

In each of these examples, the market for educational and informational programming created a demand upon which private, for-profit entrepreneurs capitalized. To assume that a subscriber to a pay television service did not first evaluate its level of educational and informational programming is to assume that he or she simply does not care about such offerings.²³⁴ If that is truly the case, it is unreasonable to assume that non-commercial educational programmers will be able to gain any viewership at all.²³⁵ If, however, we assume that the video pro-

230. See generally, e.g., Carlo G. D'Agostino, Comment, *Cable News Network v. Video Monitoring Systems: Justice or Injunctive Relief Against Copyright Protection?*, 5 DEPAUL BUS. L.J. 335, 344 (1993) (detailing the scope of CNN's news coverage).

231. See 47 U.S.C. § 335(b)(5)(B).

232. See, e.g., Jane Hall, *Company Town BBC, Discovery to Co-Produce Shows*, L.A. TIMES, Mar. 20, 1998, at D4 (describing the partnership between Discovery Communications and the British Broadcasting Corporation (BBC) that gives Discovery right of first refusal on BBC programming in science, nature, and history that might have otherwise been shown on PBS).

233. Each of these stations is available on DirecTV. See *Programming Channel Descriptions* (visited Mar. 24, 1999) <<http://www.directv.com/programming/channels/html>>. PrimeStar and EchoStar offer the same or similar channels, each one providing some type of informational or educational programming. Offerings include *The Weather Channel*, *Animal Planet*, *CNNfn* (the CNN financial news network), and the *Travel Channel*. See *Channel Lineup* (visited Mar. 24, 1999) <<http://www.dishnetwork.com/programming/lineup/index.html>>; *Easy to Watch PrimeStar Picks* (visited Mar. 24, 1999) <<http://www.primestar.com/ezwatch/picks/ezwatch2-f.htm>>.

234. Indeed, as Professors Krattenmaker and Powe note, "when given the option of watching exactly what a regulator or critic prefers, viewers often watch something else." Krattenmaker & Powe, *supra* note 55, at 1725.

235. As former ABC News analyst Jeff Greenfield wryly points out, "when you no

gramming marketplace consumer is thoughtful, it follows that he or she most likely examined all available programming options to determine the best selection for his or her viewing needs. It is, therefore, entirely appropriate to credit DBS providers for their existing commercial, educational, and informational channels in determining how much (if any) additional programming is necessary to satisfy the public interest.

Failure to Resolve Conflicts with Preceding Statutes and Rules

Section 335 and the regulations fail to account for conflicts with other controlling authority. An excellent example occurs in relation to *PBS*: Perhaps the ideal candidate for a set-aside slot, the "public telecommunications entity" section of the definition seems tailor-made for *PBS*. *PBS*, however, would need copyright laws altered to be able to provide programming to most DBS subscribers—such transmissions would intrude on the local signals of its own affiliates, which would be unacceptable under the 1988 Act.²³⁶

Home shopping channels present an additional issue. Although these channels are usually for-profit entities, the FCC nevertheless has held that home-shopping broadcast stations are in the public interest, and has granted such stations must-carry privileges on cable television systems.²³⁷ Those same stations would be ineligible for a set-aside slot under section 335 and the FCC's rules. Such discrepancies undermine the legitimacy of the current DBS public interest mandate.

longer need the skills of a safecracker to find PBS in most markets, you have to realize that the reason people aren't watching is that they don't want to." *Id.* at 1729 (quoting Jeff Greenfield).

236. See 17 U.S.C. § 119(a)(5)(A) (1994) (stating that "[t]he willful . . . secondary transmission . . . of a primary transmission made by a network station . . . to a subscriber who does not reside in an unserved household is actionable"). In short, PBS as a network cannot transgress on the turf of any of its local affiliates.

237. See *In re* Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992: Home Shopping Station Issues, Report and Order, MM Docket No. 93-8, 8 F.C.C.R. 5321 (1993); see also 1 BRENNER ET AL., *supra* note 11, § 6.06[2][a][iv], at 6-64 (explaining that the FCC voted that home-shopping stations did serve the public interest).

Failure to Insist on High Quality Programming

Beyond granting access, of course, section 335 does nothing to ensure the quality or accuracy of educational programming. It leaves unresolved the issue of funding public interest programming—"simply put, it takes money to produce high quality educational programming."²³⁸ For example, the Children's Television Endowment, an organization created by statute to support high quality, educational programming, asked Congress for \$24 million to accomplish this task in 1994.²³⁹ Such sums are the reality of providing high quality programming.

The FCC should be applauded for allowing the creation of joint ventures with for-profit entities to supply programming to those entities receiving reserved channels on DBS systems.²⁴⁰ This, however, is far from a perfect solution, and does little to mitigate the congressional assumption that the public will tune in to lesser quality programming simply because of its "noncommercial" status. Such a belief assumes that the public has no interest in the quality of the programming at all.

The Unconstitutionality of the Set-Aside

Arguably, the biggest criticism of the DBS set-aside mandate is its preference of one type of programming content over all others. As noted by the *Time Warner II* dissenters, the DBS set-aside is hardly content-neutral: "[T]he DBS provision speaks directly to content, creating an obligation framed in terms of 'noncommercial programming of an educational or informational nature.'"²⁴¹ Under section 335 and the regulations, programming that does not conform to the regulators' definition of "edu-

238. Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2129 (1997) (book review).

239. See NEWTON N. MINOW & CRAIG L. LAMAY, ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT 160 (1995). The Endowment received a mere \$1 million in 1994, and only \$2.5 million in 1995. See *id.*

240. See DBS Public Interest Obligations Report and Order, *supra* note 7, at paras. 88-89.

241. *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997) (Williams, J., dissenting) (quoting 47 U.S.C. § 335(b)(1) (1994)).

cational or informational" is ineligible for a set-aside channel.²⁴² Such decisions are made on the basis of programming content, and preclude other speakers from gaining access to those channels based entirely on the perceived deficiency of their message.

The Supreme Court has clearly stated its disdain for content-based regulations in a variety of contexts.²⁴³ As noted in *Rosenberger v. Rectors and Visitors of University of Virginia*, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional."²⁴⁴ Traditionally, content-based regulations are subject to strict scrutiny: such regulations must be supported by a compelling government interest and designed to further that interest using the least restrictive means available.²⁴⁵ For example, in *Sable Communications*, the Court held unconstitutional a statute banning indecent telephone communications, on the ground that although the government had shown a compelling interest, it had failed to show that it used the least restrictive means to address the issue.²⁴⁶

242. Cf. Winer, *supra* note 71, at 29 (noting, in relation to must-carry rules for cable, that "the legislation favors certain classes of speakers over others based on the subject matter of their programming. This is content based regulation by any 'common sense' meaning of that term.").

243. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional the Communications Decency Act as an impermissible, content-based blanket restriction on speech occurring on the Internet); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1994) (holding unconstitutional a university's denial of funds to a religiously-oriented student newspaper); *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1991) (holding unconstitutional a hate crimes ordinance that penalized only that speech which insulted or provoked violence "on the basis of race, color, creed, religion, or gender"); *Boos v. Barry*, 485 U.S. 312 (1988) (holding unconstitutional a statute banning displays of signs critical of foreign governments near the governments' Washington, D.C. embassies, as an impermissible content-based restriction).

244. 515 U.S. at 828 (citations omitted); see also *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid.").

245. See *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989); see also RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 4:1-4:3, at 4-2 to -3 (1998) (noting that strict scrutiny is the default test for examining all content-based regulation of speech).

246. See *Sable Communications*, 492 U.S. at 126, 131.

The *Time Warner* panel skirted the issue of whether or not the DBS set-aside was content-based by analogizing DBS to broadcasting—because it used the same “scarce” spectrum, it must be analyzed under “the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media.”²⁴⁷ Such a conception of DBS is flawed, however; as noted by the *Time Warner II* dissenters, the “scarcity” rationale underlying *Red Lion* is not applicable to DBS.²⁴⁸ This fact alone calls into doubt the decision to apply “relaxed scrutiny” to the DBS set-aside requirement.

As additional support for its view that strict scrutiny was not required, the *Time Warner I* panel analogized the DBS set-aside requirement to must-carry regulations imposed on cable television systems.²⁴⁹ Citing to *Turner I*, the court stated that “[t]he rules . . . do not require or prohibit the carriage of particular ideas or points of view. They do not penalize [DBS] operators or programmers because of the content of their programming.”²⁵⁰ This may be true for must-carry regulations, which demand carriage of local broadcast stations regardless of the content of the programming they air,²⁵¹ but analogizing the set-aside to must-carry misses the mark.

As noted by the *Time Warner II* dissenters, the must-carry provisions at issue in *Turner I* mandated access for particular stations, whereas the DBS provision “speaks directly to content,”²⁵² and as such should be subject to strict scrutiny.²⁵³ Furthermore, in *Turner I* and *Turner II*, the Court took great pains to state that the must-carry provisions did not regulate the content of speech placed on cable systems.²⁵⁴ The set-aside explicitly

247. *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996).

248. See *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 725 (D.C. Cir. 1997) (Williams, J., dissenting).

249. See *Time Warner*, 93 F.3d at 977.

250. *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994)).

251. See *Turner*, 512 U.S. at 630-32 (describing the must-carry mandate).

252. *Time Warner*, 105 F.3d at 726 (emphasis added) (Williams, J., dissenting).

253. See *id.* (Williams, J., dissenting) (noting that the set-aside mandate “explicitly seeks to advance one particular type of programming,” that is, “noncommercial programming of an educational or informational nature”).

254. See *Turner*, 512 U.S. at 649 (“[I]n our view . . . Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable

seeks to promote one particular type of speech—that which is noncommercial and of an educational or informational nature.²⁵⁵ In short, must-carry mandates access for particular speakers, regardless of the content of their message; the set-aside demands a specific type of content, regardless of the speaker endeavoring to deliver the message. Such a regulation is content-based, and as such should be held unconstitutional. The *Time Warner II* dissent noted the likely end result of such an analysis: “[A]s a simple government regulation of content, the DBS requirement would have to fall.”²⁵⁶

EDUCATIONAL AND INFORMATIONAL PROGRAMMING FOR THE NEXT MILLENNIUM: PRINCIPLES FOR THE COMMISSION TO FOLLOW

This Note asserts that the *Time Warner II* dissenters properly analyzed the DBS set-aside issue, and that the set-aside should be held unconstitutional. Given that such a finding is unlikely in the near future, this section offers several suggestions that would better account for the unique attributes of DBS in the MVPD marketplace.

Abandon the Scarcity Rationale as a Governing Principle

When the Supreme Court decided *Red Lion*, only a limited number of channels were available in any given market.²⁵⁷ In 1969, broadcast television represented the entire video programming universe; cable had not yet achieved its high level of penetration across the nation, and DBS service, wireless cable, and the World Wide Web were the stuff of science fiction. Although

operators from exploiting their economic power to the detriment of broadcasters”); *id.* at 652 (“[T]he must-carry provisions are not designed to favor or disadvantage speech of any particular content.”); *see also* *Turner Broad. Sys., Inc., v. FCC*, 520 U.S. 180, 224 (1997) (upholding a must-carry regulation as a valid, content-neutral regulation, designed to preserve the viability of local broadcast television).

255. *See* 47 U.S.C. § 335(b)(1) (1994).

256. *Time Warner*, 105 F.3d at 726 (Williams, J., dissenting).

257. *See, e.g., supra* note 193; *see also* *Time Warner*, 105 F.3d at 725 (Williams, J., dissenting) (noting that over 50% of the conventional broadcast markets receive fewer than five commercial broadcast channels, including UHF channels). What has changed in the video marketplace, of course, is the breadth and reach of alternative media technologies.

the "peculiarly relaxed First Amendment regime"²⁵⁸ crafted in *Red Lion* may have been appropriate for the technology of broadcast television in the late 1960s, it is becoming increasingly antiquated as the twentieth century draws to a close.

The scarcity rationale supporting *Red Lion* and the majority of public interest regulation imposed on broadcasters has outlived its usefulness. Calls for its demise in the broadcasting arena are numerous;²⁵⁹ extending it to advanced technologies that do not share the same "scarcity" problem is ill-advised. To put it simply, the scarcity rationale was devised to apply to broadcast television—a forum in which each licensee controlled one station—in a local market that, at most, offered about fifteen rival broadcast television stations.²⁶⁰ As of this writing, a single DBS licensee can offer at least ten times as many stations over its portion of the spectrum.²⁶¹ Concern over the "scarcity" of the electromagnetic spectrum necessarily evaporates in the face of a technology that mines this resource so effectively. Perhaps the *Red Lion* court said it best: "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."²⁶² DBS is just such a new media technology, and its unique attributes should be considered fully by Congress and the FCC when imposing public interest guidelines. Surely, regulators can do better than to look to a thirty-year-old Supreme Court case decided when DBS was not even thought of as technologically feasible.

Appreciate Alternative Outlets

Unquestionably, public interest programming has immense value. As Eugene Volokh has noted, "part of the value of the

258. *Time Warner*, 105 F.3d at 724.

259. See *DE SOLA POOL*, *supra* note 85, at 151; *Fowler & Brenner*, *supra* note 86, at 221-26; *Hazlett*, *supra* note 101, at 926-30; *Krattenmaker & Powe*, *supra* note 55, at 1740-41; see also *supra* notes 189-203 (questioning the continued validity of the scarcity rationale).

260. See *supra* note 193 (noting that an average of 15.5 stations are available in each of the largest 20 television markets).

261. See *supra* notes 22, 24, 26 and accompanying text (discussing channel capacity of DirecTV, Primestar, and EchoStar, respectively).

262. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

mass media is that they expose readers to topics and viewpoints the readers didn't select."²⁶³ *C-SPAN* presents the classic case for imposing a public interest requirement on MVPD's: it provides viewers with a glimpse into the workings of American democracy at its highest level.²⁶⁴ Surely, mandating carriage of such a station on DBS would be "in the public interest." Such an argument, however, fails to appreciate the presence of alternative sources of the same information: for-profit all-news networks report news of congressional initiatives and activities;²⁶⁵ the various speeches given on the floor of both Houses are recorded in the *Congressional Record*; and various Internet webpages carry text of speeches and bills.²⁶⁶ Furthermore, the fact that *C-SPAN* exists successfully on cable provides an incentive for DBS providers to offer similar stations.²⁶⁷ In short, the video programming marketplace has reached a point at which various MVPDs are willing to transmit programming to smaller audiences in order to entice them to subscribe to their services.

What has made this all possible, of course, is the presence of real competition in the MVPD marketplace. This was not always the case—only a few years ago, the only MVPD available to

263. Volokh, *supra* note 227, at 1834. Volokh also postulates that the mass media gives viewers a "shared base of information" with which to interact, thereby creating common ground and strengthening social cohesion. *Id.* at 1835-36.

264. Since 1979, *C-SPAN* has televised the proceedings of the House of Representatives; it added *C-SPAN2* in 1986 to provide coverage of the Senate. See Patricia Brennan, *C-SPAN: America's Town Hall, Marking 10 Years*, WASH. POST, Apr. 2, 1989, at Y5. It is funded almost entirely by the industry, and run as a nonprofit cooperative. See *id.*

265. Underscoring the validity of these for-profit stations as providing acceptable alternatives is the decision by many cable companies to drop *C-SPAN* and/or *C-SPAN2* to make room for such commercial entities. See Paige Albinak, *C-SPAN's Loss is Fox News' Gain*, BROADCASTING & CABLE, Jan. 13, 1997, at 128. Note, however, that part of this large scale dumping of *C-SPAN* is attributable to *Fox News Channel's* \$10-\$11 per subscriber offer to cable systems that carry its channel. See *id.*

266. See, e.g., *United States Legislative Branch* (visited Mar. 25, 1999) <<http://lcweb.loc.gov/global/legislative/Congress.html>>; *U.S. House of Representatives*, (visited Mar. 23, 1999) <<http://www.house.gov>>.

267. Not to be outdone by cable (or each other), all three DBS providers have elected to carry *C-SPAN* and *C-SPAN2*. See, e.g., *Channel Line-up* (visited Mar. 23, 1999) <www.dishnetwork.com/programming/lineup/index.html>; *DirectTV Channel Line-up* (visited Mar. 23 1999) <www.directv.com/programming/listing.html>; *Easy to Get: Prime Value* (visited Mar. 23, 1999) <www.primestar.com/ezget/ezget-f.htm>.

most of the public was the local cable television system.²⁶⁸ As noted by the FCC and several commentators, there are now alternative avenues of communication available to anyone who wishes to disseminate their speech in the video marketplace.²⁶⁹ As a result, every station owner is catering to a smaller portion of the potential audience, creating a desperate need for programming to fill all the available stations in the MVPD universe.²⁷⁰

This need for programming extends to educational and informational programming. In a fragmented marketplace, where many players are angling for smaller and smaller portions of the potential audience, such programming can create a valuable market niche for programming providers.²⁷¹ Such is the case with the *Discovery Channel*, which has become such an attractive commodity on cable and DBS systems that it now has the third largest MVPD distribution network in the United States.²⁷² The *Discovery Channel* demonstrates the power of identifying a market niche and tailoring programming to fit that target audience.²⁷³ More importantly, it shows that the commercial marketplace can and will generate high quality educational and informational programming in response to marketplace forces. Although such a result may not have been attainable in the past when only fifteen television stations were available in the market, it has been achieved in the multiple MVPD marketplace of

268. See, e.g., Maseth, *supra* note 74, at 430 (noting that "without the presence of another multichannel video programming distributor, a cable system faces no local competition")

269. See, e.g., DBS Public Interest Obligations Report and Order, *supra* note 7, at para. 2 (noting the potential of DBS "to provide significant competition in the market for multichannel video programming distribution"); Fourth Annual Report, *supra* note 27, at 1048-99 paras. 12-107 (discussing competitors in the markets for the delivery of video programming); Fowler & Brenner, *supra* note 86, at 225-26.

270. This need is partially responsible for the profusion of network television series reruns seen on many independent local broadcast stations and cable networks. See Paul Farhi, *Cable Undercuts Networks by Rerunning Current Hits; Competition Altering Economics of TV*, WASH. POST, Feb. 3, 1999, at A1.

271. See Fowler & Brenner, *supra* note 86, at 210, 234 (arguing that in the pre-DBS era broadcasters are marketplace competitors, and should be regulated as such).

272. See John Carmody, *The TV Column*, WASH. POST, May 12, 1997, at B6. The Discovery Channel currently is available in over 71 million homes. See *id.*

273. For additional examples of successful for-profit educational and informational stations, see *supra* note 233 and accompanying text.

the 1990s.²⁷⁴ Any attempt to impose public interest regulation on new media technologies like DBS therefore should carefully examine alternative distribution outlets—both on and off such systems—to accurately determine if the public interest demands a set-aside mandate.

Create a Noncontent-Based Set-aside

Congress and the FCC seemingly are giving preference to a particular type of speech—noncommercial, educational, or informational—based solely on its content.²⁷⁵ This conscription of DBS channel space in favor of a certain type of speech occurs to the detriment of other speakers with potentially important messages who may wish to gain carriage on a DBS system. To properly support a set-aside, Congress and the FCC should adopt a method of selecting programmers that functions independent of the content of a programmer's message.

One option would be to implement a leased access or public access set-aside. Originally designed for cable television systems,²⁷⁶ either option would enable individuals who wanted to gain carriage on a DBS platform to do so by creating their own programming. Public access channels are those set aside by a cable franchise for the use of members of the general public, usually on a first-come, first-served basis and at minimal cost.²⁷⁷ Leased access channels are designated for the use of commercial programmers not affiliated with the cable company, usually at a greater cost than public access channels.²⁷⁸ DBS licensees could

274. Further diversity is on the horizon: with over 132 million users predicted by the year 2000, *see supra* note 44 and accompanying text, the Internet continues to grow at an astonishing rate. Furthermore, the Internet is in a better position than any other media technology to fulfill the dream of video on demand, the ability for the public "to choose from home—at any time convenient to them—any TV show or movie they want." Volokh, *supra* note 227, at 1831.

275. *See, e.g.,* Krotoszynski, *supra* note 238, at 2129 ("[P]ermitting government to pick and choose among speakers, in order to weed out undesirable or unworthy speakers, would present a threat of broad-based viewpoint-based censorship.").

276. For a brief description of the history of leased access and public access channels, *see* 1 BRENNER ET AL., *supra* note 11, §§ 6.04-05, at 6-32 to -59.

277. *See id.* § 6.04[3][b], at 6-39. Traditional public channels often function as modern day televised soapboxes, carrying short, one time messages by those who reserved a block of time. Alternatively, such channels can carry regularly scheduled programming. *See id.* § 6.04[2] n.5, at 6-33.

278. *See id.* § 6.05, at 6-50; *see also* Denver Area Educ. Telecomm. Consortium,

be required to maintain one or more public access or leased access channels, and select those whose programs would be aired using nondiscriminatory, noncontent-based methods. Such a scheme would help to achieve the goals of access and diversity in the MVPD marketplace, but would not condition such access on the content of one's message.²⁷⁹

Of course, imposition of such a mandate would not be problem-free. Perhaps the most obvious impediment to such a scheme would be the sheer scope of the endeavor: by virtue of DBS's national and regional audience, there likely would be a greater number of applicants for the limited channel space than one would expect to find on a cable system with a local viewing audience. This same problem would doom the creation of governmental access channels from the start. Traditionally reserved for access by the local government that granted cable system its franchise, such a set-aside would be untenable when imposed on an MVPD that serves thousands of local communities.²⁸⁰

Any public or leased access selection process would need to be designed to provide an equal chance of access to all interested persons—a system of first-come, first-served simply may not be up to the task. Additionally, it would be difficult to determine who should be eligible for such access. The point is not that such a solution would be free of problems, but rather that such a solution would be free of content-based regulation and therefore would expand the diversity of voices available on DBS systems. Such a strategy should be the goal of any attempt to set aside channels on DBS or any other MVPD.

Inc. v. FCC, 518 U.S. 727, 734 (1996) ("A 'leased channel' is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties.").

279. See Krattenmaker & Powe, *supra* note 55, at 1727-31 (arguing that government should "foster access by speakers to media" and "foster diversity in the media marketplace" while allowing content-based editorial control to remain with private entities).

280. For a description of government access channels, see 1 BRENNER ET AL., *supra* note 11, § 6.04, at 6-32 to -50; *id.* § 6.04[3][a], at 6-38 (noting that governmental access channels are intended by Congress "to show local government at work").

Acknowledge the Importance of Quality Programming

Educational and informational programming should not be thrust upon individuals by governmental fiat. Instead, programming should earn its way onto a subscription service, based on its merit. This scheme is both realistic and achievable. The market has produced excellent educational programming in response to viewer demand,²⁸¹ and there is no reason to think that such programming will fade from DBS menus as the number of subscribers increases. Nor is there reason to dismiss the validity of for-profit educational messages simply based on their economic sponsorship; quality educational programming does not follow *a priori* from "noncommercial" status.

CNN's "Cold War" documentary provides an example of quality educational television by a for-profit programmer. First aired in September 1998, the documentary produced twenty-four hours of educational and informational television at an estimated cost of \$12 million.²⁸² That a commercial network would bankroll such programming indicates that quality educational television can stand on its own in the commercial marketplace.²⁸³

The counterargument is that the marketplace will not provide an adequate amount or quality of this type of programming to all viewers because of market deficiencies.²⁸⁴ For example, because there is little incentive in the marketplace to produce quality educational programming for children, such program-

281. See *supra* notes 229-33 and accompanying text (discussing examples of educational programming currently available).

282. See Michael Dobbs, *History's Chill Wind; Gargantuan Documentary Revisits the Cold War*, WASH. POST, Sept. 26, 1998, at B1.

283. The proliferation of documentary programs provides further evidence that commercial entities are interested in providing quality educational and informational programs. See John Consoli, *More of Same Is Not So Bad*, MEDIAWEEK, Nov. 30, 1998, available in 1998 WL 19050262.

284. See KRATTENMAKER & POWE, *supra* note 225, at 40 (noting the argument that "regulation of broadcasting in the 'public interest' is necessary to correct errors that would arise from subjecting broadcast programming to the discipline of private markets alone"); MINOW & LAMAY, *supra* note 239, at 11 (arguing that the market has failed to produce adequate children's programming); Krotoszynski, *supra* note 238, at 2132 (noting that "an educational program aimed at very young children will never be aired in prime time" because the opportunity costs involved are too great).

ming simply will not exist outside the confines of non-commercial providers.²⁸⁵ Some have argued that an unregulated commercial marketplace will produce programs strictly designed to entertain children—"talk shows and violent cartoons which are often nothing but thinly disguised commercials."²⁸⁶ In the broadcast arena, such concerns led Congress to pass the Children's Television Act of 1990,²⁸⁷ which required the FCC to consider whether licensees had "served the educational and informational needs of children."²⁸⁸ At first blush, it seems reasonable to assume that some type of regulation is needed to guarantee that such merit programming will be carried on DBS systems.

The imposition of regulation like the Children's Television Act on DBS providers is, at best, premature. As Judge Jackson noted in *Daniels Cablevision*, the FCC has failed "to demonstrate that educational television is presently in short supply in the homes of DBS subscribers."²⁸⁹ Indeed, as noted earlier, the market has produced a remarkable amount of educational and informational programming on DBS systems.²⁹⁰ Cable and DBS carry entire stations dedicated to quality educational and informational programs that have been extremely successful.²⁹¹ Although concerns about a lack of quality educational television on local broadcast television stations may be valid, the dynamics of the multiple MVPD marketplace are far different. Concerns over the deficiencies of the local broadcast television market should not be extended to the multiple MVPD marketplace, which thrives by providing all types of niche programming, including educational and informational programming.²⁹² Simply put, several

285. See KRATTENMAKER & POWE, *supra* note 225, at 81-84.

286. MINOW & LAMAY, *supra* note 239, at 11.

287. Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified as amended in scattered sections of 47 U.S.C. (1994)).

288. *In re Policies and Rules Concerning Children's Television Programming*, Report and Order, 6 F.C.C.R. 2111, 2111 (1991).

289. *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8 (D.D.C. 1993).

290. See *supra* note 229-33 and accompanying text.

291. Two of the three most carried MVPD channels are educational and informational: CNN and the *Discovery Channel*. See Carmody, *supra* note 272, at B6.

292. See, e.g., Krotoszynski, *supra* note 238, at 2133 (noting cable channel's strategy of targeting niche markets); Volokh, *supra* note 227, at 1842-43 (noting that the "individualization" and "demassification" of the media allow for better targeting of viewers than ever before).

for-profit entities have the desire and necessary resources to provide this type of programming. If the end goal is to develop quality programming, any regulation imposed should credit DBS for the carriage of such programming, regardless of the financial status of its source.

CONCLUSION

Programming in the public interest is a laudable goal. Television has immense potential as a device to disseminate information on a wide variety of diverse educational topics. The broadcast standard of public interest programming—kidvid obligations, public service announcements, and the like—has been a part of the television landscape for quite some time and arguably has been very successful in ensuring a minimum level of programming in the public interest. Public interest programming has allowed for the dissemination of diverse viewpoints and has demanded that the providers of broadcast television service take into account the children's educational interests. In the pre-MVPD world of video programming, it was probably the only way Congress and the FCC had to guarantee a measure of diverse and informative programming that broadcasters would not be likely to provide otherwise.

Today's video marketplace, however, is far different. Customers can choose from a myriad of programming service options, each one with uniquely different physical advantages and limitations. To bring all these services under the public interest standard established in *Red Lion* would be equivalent to treating all children of the same family in the same way, regardless of their unique attributes or special needs. In much the same way that overly restrictive parenting likely would stifle the youngest child in the family, that same tactic applied to DBS, the newest member of the MVPD family, unnecessarily reins in a remarkable new technology without appreciating its unique facets.

Based on its huge channel-carrying capacity, DBS per se is providing far more diversity than broadcast television. In addition to their own educational offerings, DBS systems utilize local broadcast television stations, thereby accommodating the entire range of broadcasting public interest requirements to their subscribers. On a more fundamental level, consumers may consider the amount of educational and informational programming

already present on a particular DBS system even before deciding to subscribe to this video technology. Primestar, DISH Network, and DirecTV compete against each other to attract customers who want educational and informational programming, but they also compete against other mass media outlets that offer such programming. As a result, to hold on to their market share, DBS providers must respond to consumer demand for quality educational and informational programming, a fact that Congress and the FCC should consider when imposing a set-aside.

Compelling carriage of unaffiliated programming undercuts the legitimacy of programming already in the marketplace, overlooks the presence of such programming on local broadcast stations, and dismisses the availability of these messages from alternative media technologies. For these reasons, Congress and the FCC should abandon the DBS public interest requirements in the 1996 Act. Given the unlikely chance that Congress will reassess or abandon the 1996 Act anytime in the near future, however, the best resolution would be to revisit the DBS public interest requirements with an appreciation of DBS's position in the market. Specifically, the FCC must place a premium on high quality educational and informational programming. Access for providers should be determined not under a paternalistic judgment of what is good programming, but under fair criteria that appreciate viewpoints and programming that diverge from the mainstream. Lastly, the FCC must properly account for the immense contributions of commercial providers of these services, as well as the de facto presence of local television service and alternative media outlets in the homes of DBS subscribers.

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