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ARTICLE

BROADCASTING LICENSES: OWNERSHIP RIGHTS  
AND THE SPECTRUM RATIONALIZATION  
CHALLENGE†

J. Armand Musey\*

*This Article examines the showdown between television broadcasters and the government in light of the FCC's plan to reallocate currently licensed broadcast spectrum to significantly higher value mobile broadband use. The government seeks to do so in an economically, socially and legally efficient manner, and has indicated that it seeks a reallocation process that is voluntary for broadcasters. Nonetheless, any spectrum reallocation proceeding raises the question of whether, and to what extent, television broadcasters ultimately possess rights to licensed spectrum, and what type of compensation, if any, they would be owed if the FCC takes their spectrum licenses involuntarily.*

*This Article finds that broadcasters have a very weak property rights claim over their spectrum licenses. However, broadcasters may be entitled to due process before their licenses can be taken involuntarily; they are almost certainly entitled to seek judicial review of any adverse*

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\*J. Armand Musey is president and founder of Summit Ridge Group, LLC where he provides valuation and strategic advisory services to companies and investors in the media, telecom and satellite industries. He is a graduate of Northwestern University's School of Law and its Kellogg Graduate School of Management. Additionally, Mr. Musey holds an M.A. from Columbia University and an A.B. from the University of Chicago. He is also a Chartered Financial Analyst (CFA). Special thanks to Prof. James Speta of Northwestern University Law School for his guidance in writing this Article, as well as to attorneys Patrick S. Campbell (Paul Weiss), John K. Hane (Pillsbury Law), Jeffrey H. Olson (St. Ledger-Roty Neuman & Olson LLP) and Brian D. Weimer (Sheppard Mullin) for their advice and feedback on drafts of this Article and to Elizabeth Opper Kraemer for her expert legal editing assistance. The views in this Article and any remaining errors or omissions are entirely my own.

*FCC decisions. Such review would extend the already lengthy FCC rulemaking and adjudication process, and further delay spectrum reassignment. For practical political reasons, including maximizing revenue from future spectrum auctions, the most expedient way to reallocate spectrum is to incentivize the broadcasters to voluntarily participate in a reallocation plan by providing compensation beyond the legally required minimum.*

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## INTRODUCTION

The FCC’s plan to reallocate large amounts of spectrum from television broadcasting use to mobile broadband use portends a major showdown between the FCC and television broadcasters. Demand for mobile broadband applications is soaring, and the FCC, which licenses spectrum for specific applications, believes that more spectrum should be allocated for this purpose.<sup>1</sup> This conclusion is widely supported by industry observers.<sup>2</sup> As part of the recently released National Broadband Plan, the FCC is seeking to reallocate 300 MHz of spectrum to mobile broadband applications over the next five years and 500 MHz by 2020.<sup>3</sup> Some industry observers advocate the reallocation of even larger amounts of spectrum.<sup>4</sup> The value of this spectrum goes beyond its market price—

1. David Gardner, *FCC Chair Cites ‘Spectrum Crisis’*, InformationWeek, Oct. 7, 2009, <http://www.informationweek.com/news/government/mobile/showArticle.jhtml?articleID=220301552>.

2. See, e.g., David Goldman, *Sorry America, Your wireless airwaves are full*, CNN-Money (Feb. 21, 2012), [http://money.cnn.com/2012/02/21/technology/spectrum\\_crunch/index.htm](http://money.cnn.com/2012/02/21/technology/spectrum_crunch/index.htm); Stacey Higginbotham, *Spectrum Shortage Will Strike in 2013*, GigaOM (Feb. 17, 2010), <http://gigaom.com/2010/02/17/analyst-spectrum-shortage-will-strike-in-2013/>.

3. Federal Communications Commission, *Connecting America: The National Broadband Plan 84* (2010) [hereinafter *National Broadband Plan*], available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

4. See CTIA, *Comments of CTIA – The Wireless Association NBP Public Notice #6* at 2 (Oct. 23, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=7020143314> (suggesting that 800 MHz is needed). The CTIA comments were filed in response to the FCC’s inquiry on whether current spectrum allocations are sufficient to support wireless broadband demands. See *Comment Sought on Spectrum for Broadband – NBP Public Notice #6*, Public Notice, 24 FCC Rcd. 12032 (2009), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-09-2100A1\\_Rcd.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-2100A1_Rcd.pdf).

many economists point to a multiplier effect where the social and economic benefits of broadband deployment are many times the value of the project itself.<sup>5</sup> Nonetheless, the television broadcasting industry is fiercely resisting this move. Much of the battle has been fought by lobbyists and lawyers behind closed doors.<sup>6</sup> However, as the FCC moves towards its objective, the battle has spilled into the public forum.<sup>7</sup> Major broadcasting associations have repeatedly voiced opposition to the government's planned spectrum reallocation.<sup>8</sup>

The National Broadband Plan warns that if the U.S. does not address the spectrum availability issues, our nation will face "higher prices, poor service quality, an inability for the U.S. to compete internationally, depressed demand and, ultimately, a drag on innovation."<sup>9</sup> One of the largest challenges in accomplishing spectrum reallocation is to determine how to divert spectrum from current applications and how (or whether) to compensate current users of that spectrum.

Regulators find the potential reallocation of broadcast television spectrum appealing because this spectrum is relatively inefficiently used. Numerous studies have documented the current inefficient allocation of electromagnetic spectrum in the United States. Nationwide, only about 17% of the available channel capacity in

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5. See, e.g., Thomas W. Hazlett & Roberto E. Munoz, *A Welfare Analysis of Spectrum Allocation Policies*, Geo. Mason L. & Econ. Res. Paper No. 06-28 at 2 (Jan. 19, 2008), available at <http://ssrn.com/abstract=908717> (arguing that total social welfare benefits produced in public spectrum auctions are dominant over auction revenues).

6. See, e.g., Edward Wyatt, *A Clash Over the Airwaves*, N.Y. Times, Apr. 21, 2011, <http://www.nytimes.com/2011/04/22/business/media/22spectrum.html> (describing broadcasters' resistance to giving up bandwidth).

7. See, e.g., Joe Flint, *FCC Chairman Genachowski and Top Lobbyist for Broadcasters Clash Over the Need for a Spectrum Auction*, L.A. Times (Apr. 12, 2011), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/04/fcc-chairman-genachowski-and-nab-ceo-smith-trade-punches-over-spectrum.html> (recounting public debate between FCC Chairman Julius Genachowski and National Association of Broadcasters President Gordon Smith on broadcast spectrum reallocation).

8. See, e.g., Juliana Gruenwald, *FCC Chairman Warns Against Delay in Spectrum Reallocation*, Nextgov (Apr. 13, 2011), [http://www.nextgov.com/nextgov/ng\\_20110413\\_5477.php](http://www.nextgov.com/nextgov/ng_20110413_5477.php) ("NAB [National Association of Broadcasters] President Gordon Smith made clear that broadcasters are ready to fight proposals they believe will undermine their industry's core business. 'We're in full battle mode to protect broadcasters from being forced to give up spectrum in any way that is involuntary.'").

9. *National Broadband Plan*, *supra* note 3, at 73, 77.

the current allocation of 294 MHz of VHF<sup>10</sup> and UHF<sup>11,12</sup> spectrum to television broadcasters is used for television broadcasting.<sup>13</sup> Moreover, over 90% of consumers do not receive their broadcast television programming through the broadcast spectrum but instead from cable, satellite systems, or an increasing variety of Internet-based services, leaving less than 10% of viewers watching over-the-air television broadcasts. Thus, 294 MHz of valuable dedicated spectrum is being significantly underutilized—only 17% of the available channel capacity is being used, and merely by 10% of the population.<sup>14,15</sup>

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10. VHF television broadcasting frequencies: 54–72 MHz (channels 2–4); 77–88 MHz (channels 5–6); 174–216 MHz (channels 7–13).

11. UHF television broadcasting frequencies: 470–698 MHz (channels 14–69; except channel 37 between 608–614 MHz which is reserved for radio astronomy use). Prior to June 2009, when television broadcasters converted to digital broadcasting and the channels were “repacked,” the UHF band extended from 608 to 800 MHz. The frequencies 698 to 800 MHz were used for channels 52–69. The 698–800 MHz spectrum was auctioned in 2008–2009 in an auction dubbed “The 700MHz Auction” officially known as “Auction 73.” Until the 1980s, channels 70 through 83 existed and utilized 806–884 MHz.

12. See generally National Telecommunications and Information Administration Office of Spectrum Management, *United States Frequency Allocations: the Radio Spectrum*, U.S. Department of Commerce, (Aug. 2011), [http://www.ntia.doc.gov/files/ntia/publications/spectrum\\_wall\\_chart\\_aug2011.pdf](http://www.ntia.doc.gov/files/ntia/publications/spectrum_wall_chart_aug2011.pdf) (showing current spectrum allocations for broadcast television).

13. See Thomas W. Hazlett, *Unleashing the DTV Band: A Proposal for an Overlay Auction* 5–6 (Dec. 18, 2009), available at <http://apps.fcc.gov/ecfs/document/view?id=7020353683>. Professor Hazlett’s calculation is based on the fact that 49 channel slots in 210 markets (10,290 available channels) exist, but only 1750 full power television stations are licensed. See also Phil Bellaria, Adam Gerson & Brian Weeks, FCC, *Spectrum Analysis: Option for Broadcast Spectrum*, OBI Technical Paper #3 at 6–7 (June 2010) [hereinafter *Spectrum Analysis*], available at [http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-\(obi\)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf](http://download.broadband.gov/plan/fcc-omnibus-broadband-initiative-(obi)-technical-paper-spectrum-analysis-options-for-broadband-spectrum.pdf) (explaining the allocation of the 294 MHz comprised by the UHF and VHF bands to broadcasters). For comparison, the entire AM radio band occupies 1.2 MHz of spectrum. See Robert M. Rast, *The Dawn of Digital Television*, IEEE Inside Spectrum Technology (Oct. 2005), <http://spectrum.ieee.org/consumer-electronics/audiobvideo/the-dawn-of-digital-tv>.

14. Over-the-air viewers have been estimated at 14–19% of broadcasters’ total audience. However, the widely accepted percentage of households viewing television solely through over-the-air broadcasts is close to 10% or less, which matches a Nielson’s estimate cited by the *National Broadband Plan*. See *National Broadband Plan*, *supra* note 3, at 89 & 102 n.87. The difference seems to be that while only 10% of regular television viewing is off-air, another 5–7% of cable households use off-air television viewing occasionally, perhaps on a television in a secondary location that is not frequently used and not connected to the cable system.

15. This unused “white space” is not contiguous and varies significantly by market. See generally FCC Spectrum Dashboard, <http://reboot.fcc.gov/reform/systems/spectrum-dashboard> (last visited Feb. 26,

In order to use spectrum more efficiently, the government must determine an appropriate mechanism for reallocating the broadcast spectrum to allow it to be used for higher value applications. In so doing, the government must consider the rights of the current spectrum holders and U.S. taxpayers as well as political considerations and implications for long-term government policy.

Given the scarcity of spectrum and the ease of verifying who is using it, many policymakers have argued that spectrum licenses should, as a matter of public policy, be awarded with full explicit property rights to incentivize its most valuable possible use.<sup>16</sup> However, the government has not explicitly granted spectrum holders property rights, and their licenses restrict their use of spectrum to certain applications. If, however, broadcasters are found to have property rights in their spectrum and their licenses are not renewed or revoked, they are entitled to compensation from the government under the Takings Clause of the Fifth Amendment.<sup>17</sup> As a result of the uncertainty of the broadcasters' property rights in their spectrum, there is considerable tension over how (or even if) the current television broadcasters should be compensated for their loss of spectrum rights if and when the spectrum is cleared for mobile broadband use.<sup>18</sup> The uncertainty of broadcasters' property rights clearly complicates the process of spectrum reallocation, as any compensation for broadcasters potentially increases the costs for the U.S. government dramatically. The uncertainty surrounding license rights also impacts the revenue raised for spectrum at future

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2012) (allowing search of spectrum licenses by region and frequency band).

16. The idea that private property-based market allocation of spectrum would yield the most efficient allocation for society has been most notably advocated by Ronald Coase in his seminal article. See Ronald Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1 (Oct. 1959). This idea is not fully accepted and has been rebutted by others including David Moss and Michael Feinn. See, e.g., David Moss & Michael Feinn, *Radio Regulation Revisited: Coase, the FCC, and the Public Interest*, 389 Journal of Pol'y History 15 (2003) (arguing that auctions do not capture the value of "public interests" such as the value of society having universal communication access or the value of improvements to democracy that occur as a result of greater communication, but only capture value that results from profit-making uses). See generally Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 Ill. L. Rev. 275 (2000) (engaging in an expanded discussion of the conditions that often lead to the creation of property rights for regulated items).

17. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.").

18. See, e.g., Sara Jerome, *CBS, NBC Affiliates Say Fair Compensation For Spectrum Harms Might Be "Impossible"*, The Hill (April 13, 2011), <http://thehill.com/blogs/hillicon-valley/technology/155805-cbs-nbc-affiliates-say-fair-compensation-for-spectrum-harms-might-be-impossible> (reporting claims by broadcast executives that the damage of spectrum reallocation to broadcasters may be unquantifiable).

auctions. Without certainty over the rights they are acquiring in an FCC license auction, bidders will surely bid less for the licenses than they would if they had such certainty.

Given the broadcasters' opposition to planned government reallocation of licensed spectrum, a central issue to resolve prior to reallocating the spectrum is to ascertain the extent, if any, to which current license holders have property rights to remain on their currently-licensed spectrum. A finding of such rights could impede the government's plans, and the extent of such rights ultimately sets the bounds within which the broadcasters will have legal leverage over the U.S. government in spectrum reallocation negotiations.

This Article first discusses the central question of whether and to what extent broadcasters hold a property right in broadcast spectrum licenses. Part I argues that courts are unlikely to find that the television broadcasters have property rights to the spectrum they use, even for the currently-licensed lower-value television broadcast use. The FCC grants spectrum licenses to companies for periods of limited duration, usually 5–15 years, with some expectation of renewal, assuming the license holder complies with the terms of the license. The Communications Act of 1934 is clear that spectrum licenses do not confer permanent property rights. Over time, however, the broadcasters' renewal expectations have become stronger due to FCC actions, judicial precedents, and regulatory changes. Broadcasters and their investors have taken significant actions based on the assumption that the licenses will be renewed, including making large investments in their broadcast businesses and regularly selling licenses to third parties for considerable amounts. Part II argues that despite the recent property-like treatment of broadcast spectrum licenses, broadcasters are ultimately unlikely to be able to assert legally protected property interests in their licenses. Supreme Court precedent dealing with regulatory changes and an analogous line of cases dealing with grazing permits demonstrate that any broadcaster's claims for property rights are weak.

The Article then examines the practical consequences of weak property rights in spectrum for broadcast license holders in the current dispute over spectrum reallocation. Part III first discusses ways in which Congress may negate license holders' claims to property rights in broadcast spectrum. Part IV argues that broadcasters' strongest remaining claim for compensation from spectrum reallocation is promissory estoppel, based on their recent investment in digital transmission equipment as part of the digital television conversion in 2009 and the license renewal expectations that were written into the 1996 Act. However, even these arguments would likely fall short under prevailing law. Part V discusses recent legisla-

tion authorizing a voluntary auction process to reallocate television broadcast spectrum, and examines broadcasters' significant due process rights that may nevertheless make the government's reacquisition and reallocation of licensed spectrum highly expensive and time consuming. Finally, Part VI discusses broadcast license holders' ability to attack unfavorable legislation, regulations, and adjudications in the courts.

The Article's analysis finds that recent legislation authorizing voluntary auctions of broadcast spectrum was a predictable step in the broadcast spectrum dispute. In recognition of broadcasters' political power and its own desire to avoid protracted litigation and maximize revenue from upcoming spectrum auctions, the government's more practical and expedient option was to agree to not contest the existence of the broadcasters' property rights. Rather, the government shifted the debate from whether broadcasters possess property rights in the spectrum, to the type and amount of compensation to be awarded to the broadcasters. This may have been the most efficient way to clear the spectrum and maximize the value of future spectrum auctions while satisfying the interests of the broadcasters, the U.S. Treasury, and society as a whole.

#### I. CLAIMS THAT FCC LICENSES CONFER PROPERTY RIGHTS ARE WEAK

The broadcasters' rights to control their spectrum are elaborated in the Communications Act of 1934 ("1934 Act")<sup>19</sup> and in the Telecommunications Act of 1996 ("1996 Act").<sup>20</sup> While FCC licenses do not explicitly give television broadcasters property rights in the spectrum they use, a plain reading of the statute is not dispositive. These statutes can be more thoroughly interpreted by analyzing: (1) the text of the statutes; (2) the relevant legislative history; and (3) the way the statutes have been applied in certain contexts (e.g., bankruptcy cases) in light of public policy considerations. Under the first two methods of interpretation, the broadcasters do not have any material claim to property rights that would entitle them to compensation for non-renewal. However, under the final method of interpretation, broadcasters may have some legitimate (and growing) expectation of property rights.

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19. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in 47 U.S.C. §§ 151-621 (1994)) (amended 1996).

20. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

*A. Text of the Communications Act of 1934 Denies Property Rights;  
1996 Act Does Not Alter 1934 Act's Denial of Property Rights*

The text of the licenses issued pursuant to the Communications Act of 1934 explicitly denies property rights to license holders. In fact, the Act bans private ownership of radio spectrum:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such licenses shall be construed to create any such right, beyond the terms, conditions and period of the license.<sup>21</sup>

Moreover, the statute requires a waiver of renewal expectation rights in the licenses. Applicants must waive “any claim to the use of any particular frequency or of the electromagnetic spectrum . . . because of previous use of the same.”<sup>22</sup> This plain text prevents license holders from claiming that they “own” their spectrum or have a “right” to indefinite renewal. The text on its face provides a strong presumption against any claim of property or renewal rights made by spectrum licensees.

The text of the 1996 Act, however, is more ambiguous about the extent to which television broadcasters have property rights in licensed spectrum. Section 201 of the 1996 Act introduces spectrum use flexibility for broadcasters, section 202 reduces station ownership limitations, and section 203 extends license terms to 8 years. Perhaps most significantly, section 204 strongly implies that licenses will be renewed absent violation of terms:

STANDARDS FOR RENEWAL – If the licensee of a broadcast station submits an application to the Commission for renewal of such license, the Commission shall grant the application if it finds, with respect to that station, during the preceding term of its license--

(A) the station has served the *public interest, convenience, and necessity*;

(B) there have been no serious violations by the licensee of this Act or the rules and regulations of the Commission; and

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21. 47 U.S.C. § 301 (2006).

22. 47 U.S.C. § 304 (2006).

(C) there have been no other violations by the licensee of this Act or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.<sup>23</sup>

The language, “the Commission shall grant,” hints that the broadcasters may have some presumptive license renewal rights.

Moreover, in making renewal decisions, the FCC is not permitted to consider potential for competitors to use the spectrum in a superior manner than the existing licensee:

COMPETITOR CONSIDERATION PROHIBITED - In making the [license denial renewal decisions], the Commission shall not consider whether the *public interest, convenience, and necessity* might be served by the grant of a license to a person other than the renewal applicant.<sup>24</sup>

Initially, it may seem these renewal safeguards create a potential opening for broadcasters to argue that they have a right to hold their licenses indefinitely assuming they are in compliance with its terms of use. However, such a reading is inconsistent with the text of the 1934 Act prohibiting private ownership of spectrum. A more coherent reading of section 204 is that the FCC has discretion to determine if a broadcaster’s use of the spectrum is in the public interest, but it cannot use a simple comparison to another applicant to inform this decision. While there is little judicial precedent on this issue, this interpretation is consistent with a recent FCC Report and Order, which clarifies the FCC’s broad discretion in licensing decisions, stating that:

In considering whether to grant a license to use spectrum, therefore, the Commission must “determine . . . whether the public interest, convenience, and necessity will be served by the granting of such application.” Likewise, when identifying classes of licenses to be awarded by auction and the characteristics of those licenses, the Commission “shall include safeguards to protect the public interest” and must seek to promote a number of goals, including “the development and rapid deployment of new technologies, products, and services.” Even after licenses are awarded, the Commission may change the license terms “if in the judgment of the Commission such action will promote the public interest, convenience, and necessity.” The Commission may exercise this authority on a license-by-license basis or

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23. 47 U.S.C. § 309(k)(1) (2006) (emphasis added). This language was added as part of the 1996 Act, Section 204(a)(1).

24. 47 U.S.C. § 309(k)(4) (2006) (emphasis added). This language was added as part of the 1996 Act, Section 204(k)(4).

through a rulemaking, even if the affected licenses were awarded at auction.<sup>25</sup>

While not directly addressing comparative use, this statement makes the Commission's view clear that it has ongoing authority to significantly impact licensees use of spectrum for the public benefit. The proximity of this statement to its prior conclusion that the FCC must seek to promote rapid deployment of new technologies, presumably including wireless broadband, suggests that promoting such deployment is part of, or at least closely related to, the public interest.

Nonetheless, to deny a renewal pursuant to the 1996 Act without running afoul of the clear text of section 204, the FCC must first find that the broadcaster is not using the spectrum in the "public interest, convenience, and necessity." The FCC must make this determination and deny the renewal before seeking an alternative party to use the spectrum. Despite the more favorable wording of the 1996 Act, it does not overturn the plain language of the 1934 Act, which makes clear that broadcasters do not have property interests in their spectrum licenses. The 1996 Act does not change this presumption.

*B. Legislative History of the 1934 Act Does Not Imply Property Rights*

The legislative history of the 1934 Act also makes clear that Congress considered the airwaves to be national property to be available for the benefit of everyone, and did not intend for licenses to be a transfer of property. The idea of governmental stewardship of spectrum for public benefit developed well prior to the 1934 Act. In his seminal book on the legislative history of the Communications Act of 1934, Max Paglin notes that "the 1923 [National Radio] conference . . . embraced the idea [of public service obligation for broadcasters] by recommending that radio communication be considered a public utility and regulated as such 'in the public interest.'"<sup>26</sup> Paglin explains that the Fourth National Radio Conference in 1925 "endorsed the public interest concept, and recom-

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25. *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905, 17978 (2010) [hereinafter *Open Internet Order*] (citations omitted), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf).

26. Glen O. Robinson, *Title I: The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in *A Legislative History of the Communications Act of 1934* 1, 9 (Max D. Paglin ed., Oxford Univ. Press 1989) [hereinafter *Legislative History*]. The National Radio Conference was a government committee established under the Commerce Department to manage radio spectrum and a predecessor to the FCC established in the 1934 Act.

mended legislation incorporating it, though they disowned the recommendation of the first conference that broadcast licenses be treated as public utilities.<sup>27</sup> Moreover, then-Secretary of Commerce Herbert Hoover strongly supported the idea of broadcasters as purveyors of public benefit.<sup>28</sup> These conferences led to the Radio Act of 1927, the predecessor to the Communications Act of 1934. The 1927 Act required that licensees waive claims to any particular spectrum,<sup>29</sup> a feature that was carried into the 1934 Act.<sup>30</sup> The explicit denial of property rights in the Communications Act of 1934 therefore reflected a deeply ingrained legislative belief that the airwaves were public property.

The direct legislative history of the Communications Act of 1934 also supports the conclusion that broadcasting licenses were not intended to convey ownership rights. The June 4, 1934 Conference Report indicates that:

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by the Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.<sup>31</sup>

This language, which appeared in the text of the statute, unequivocally indicates that the committee did not intend for spectrum licenses to convey property interests. The report further discusses limits on alien ownership<sup>32</sup> and the government's right to commandeer the spectrum for national emergency.<sup>33</sup> These provisions highlight the government's interest in the airwaves. The government's perception of broadcast spectrum as a matter of national interest, Congress' unequivocal assertion of ownership over that spectrum, and the FCC's refusal to relinquish future con-

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27. *Id.* at 9–10.

28. *Id.* at 9.

29. J. Roger Wollenberg, *Title III: The FCC as Arbiter of "The Public Interest, Convenience, and Necessity"*, in *Legislative History*, *supra* note 26, at 61, 66.

30. *Id.* at 76.

31. H.R. Rep. No. 73-1918, at 18 (1934) (Conf. Rep.) *reprinted in Legislative History*, *supra* note 26, at 750.

32. *See id.* at 23.

33. *See id.* at 43. *See also* Kenneth A. Cox & William J. Byrnes, *Title II: The Common Carrier Provisions—A Product of Evolutionary Development*, in *Legislative History*, *supra* note 26, at 25, 43.

trol of licensing right are all inconsistent with claims of private ownership by broadcasters.<sup>34</sup>

*C. Legislative History of the 1996 Act Does Not Imply Property Rights*

Interpreting section 204 of the 1996 Act as effectively granting broadcasters indefinite use of the spectrum is inconsistent with the legislative history and industry environment at the time the Amendment was adopted. Although the formal legislative history of section 204 is minimal, the House Report characterizes the renewal provision as a procedural change with limited impact.<sup>35</sup> Moreover, the history of the FCC's renewal issues with broadcasters in the 30 years prior to the 1996 Act makes clear that the renewal assurances in section 204 were not intended to give broadcasters indefinite rights to their spectrum and thereby limit the ability of the FCC to reacquire spectrum. Rather, section 204 was designed to deal with the growing issue of renewal objections that created extensive problems for existing licensees. Specifically, incumbent license holders were concerned about the growing number of new competitor applicants for the same licenses who applied to use them for the same purpose (television broadcasting). In particular, some of the licensees were concerned that new applicants having higher priority, due to minority status or other preferences, would supplant their existing claim to licensed spectrum when their licenses were up for renewal.

The broadcasters were also concerned about the time and legal costs spent fending off objections to their license renewal by various citizens' groups. By 1966, citizens' groups were permitted to be

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34. On the other hand, it can be argued that history, politics, and administrative procedure have come together to effectively give the broadcasters economic expectations akin to having some property rights. The view of Glen O. Robinson, a contributor to *Legislative History*, is that the regulatory scheme (as of *Legislative History's* 1989 publication) is one of "a limited property rights scheme. Licenses do not in legal theory convey property rights; in economic reality they do." See Robinson, *supra* note 26, at 10. Within this quote, Robinson references *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), noting that "[t]he absence of a property right has not prevented the FCC and courts from recognizing an 'expectancy' of license renewal, an expectancy that as a practical matter is contingent only on good behavior of the licensee." See Robinson, *supra* note 26, at 10. For a more detailed discussion of this topic, see *infra* Part I.D.

35. See H.R. Rep. No. 104-204, pt. 1, at 123 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 91 ("The Committee notes that subsection (k) does not alter the standard of renewal employed by the Commission and does not jeopardize the ability of the public to participate actively in the renewal process through the use of petitions-to-deny and informal complaints. Further, this section in no way limits the ability of the Commission to act sua sponte in enforcing the Act or Commission rules.").

heard in the FCC license renewal process as a result of the holding in *Office of Communication of the United Church of Christ v. FCC*. In this case, the Court noted:

Unless the listeners – the broadcasting consumers – can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner. By process of elimination those ‘consumers’ willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones ‘having a sufficient interest’ to challenge a renewal application. . . . [O]n a renewal application the ‘campaign pledges’ of applicants must be open to comparison with the ‘performance in office’ aided by a limited number of responsible representatives of the listening public when such representatives seek participation.<sup>36</sup>

After this ruling, it became common for citizens’ groups to file competing applications for a broadcast license and/or protests to a broadcaster’s license renewal in an attempt to force a “Comparative Hearing Process” whereby the FCC considers the broadcaster’s renewal application and compares its merits to the proposed use of the competing applicant(s). Citizens’ groups would often back an alternative group seeking the broadcaster’s license. The incumbent license holders were particularly concerned about challenges from minority owned and operated applicants, which would get preference and theoretically win a tie against a non-minority incumbent in a comparative hearing process analysis. Thus, comparative hearings gave an opening for citizens’ groups to strategically impact the license granting process, by backing a minority-owned and operated group seeking a broadcaster’s license in order to force programming or operational changes by the renewal applicant, or extract a monetary settlement from them.<sup>37</sup>

While the broadcasters’ licenses were almost always ultimately renewed for broadcasters in good standing, the process of addressing obstacles posed by citizens’ groups and competing applicants was expensive from a litigation perspective.<sup>38</sup> These challenges

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36. *Office of Commc’n of the United Church of Christ v. FCC*, 359 F.2d 994, 1004–05 (D.C. Cir. 1966).

37. See generally Jarred L. Burden, *Tying the Victim’s Hands: Curbing Citizen Group Abuse of the Broadcasting License Process*, 39 Fed. Comm. L.J. 259 (1987) (providing a detailed background and analysis of citizen groups’ strategies in challenging FCC spectrum licensing decisions).

38. Kurt A. Wimmer engages in a spirited defense of the comparative renewal process and payoffs for competing applicants to withdraw their competing applications. See Kurt A. Wimmer, *The Future of Minority Advocacy Before the*

often resulted in the broadcaster paying the competing applicant and/or citizens' group to withdraw its application and/or opposition to renewal, thus incurring significant settlement costs, legal fees, and delays in their license renewal.<sup>39</sup> In addition to financial settlements, broadcasters often promised other actions, such as content changes, in exchange for the group's promise to withdraw its complaint or competing application.

Not only were broadcasters displeased with the involvement of citizens' groups and competitor applicants, the FCC itself was concerned about these groups' ability to extract settlements from broadcasters in exchange for withdrawing their opposition to a broadcaster's renewal.<sup>40</sup> The FCC saw this process as interfering with financial efficiency of the industry.<sup>41</sup> To ameliorate this situation, the FCC issued a policy statement in 1970 giving incumbent license holders preference in comparative renewal cases.<sup>42</sup> The D.C. Circuit Court, however, invalidated that policy statement in *Citizens Communication Center v. FCC*.<sup>43</sup> In *Citizens Communication Center*, the court sided with a license applicant who complained that giving preference to an existing license holder at renewal was unfair and that comparative hearings should be unbiased towards competing applicants.<sup>44</sup> Despite this decision, the FCC's opposition to this comparative hearing continued, as indicated in a 1988 rulemaking proposal:

[T]he term 'abuse' is a broad concept but, as used herein, it generally means the use of settlement agreements, petitions to deny, or similar mechanisms by persons to extract con-

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*FCC: Using Market Place Rhetoric to Urge Policy Changes*, 41 Fed. Comm. L.J. 133 (1989).

39. See Christopher H. Sterling, *Transformation: The 1996 Act Reshapes Radio*, 58 Fed. Comm. L.J. 593, 595 (2006).

40. See generally Christopher H. Sterling, *Billions in Licenses, Millions in Fees: Comparative Renewals and the RKO Mess*, 2 Gannett Ctr. J. 43 (1988) (providing a detailed analysis of a particularly protracted comparative renewal process).

41. See *Formulation and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 FCC Rcd. 5179, 5186-88 (1988) [hereinafter *Broadcast Renewal Applicants*].

42. *In re Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, Public Notice, 22 F.C.C.2d 424, 425 (1970) ("[I]f the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted.") (emphasis added).

43. *Citizens Comm'n Center v. FCC*, 447 F.2d 1201, 1214 (D.C. Cir. 1971).

44. *Id.*

cessions from applicants in the form of money or other consideration that are unrelated to the accomplishment of public interest goals or aims under the Communications Act. Such abuses disserve the public interest because they strike at the overall ends sought to be achieved by the Commission's processes – expeditious and efficient service to the public – by increasing the costs to existing licensees, other applicants and petitioners to deny, as well as the Commission, and the public in general.<sup>45</sup>

This rulemaking proposal was consistent with former FCC Chairman Mark Fowler's blistering criticism of the process as one in which:

[P]eople stare down or shake down broadcast applicants before this agency through citizen agreements where they ask for program additions and withdraw for dollars, or where people file a series of applicants but never build and they settle, always for dollars.<sup>46</sup>

In addition to the issue of waste caused by financial payoffs to renewal opponents, settlements for programming changes raised public policy concerns about private groups extracting management and content changes from broadcasters. In some ways, these demands rendered the private groups “back door” regulators with no accountability to the FCC or the general public. The FCC often interpreted its rules to disallow agreements that required management and content changes in exchange for a private group's withdrawal of its opposition to a broadcaster's license renewal; however, the FCC seemed to apply the standards used to interpret these rules unevenly.<sup>47</sup> Broadcasters were thus uncertain which agreements would be upheld and which ones would not.

The 1996 Act addressed the problems of comparative hearings. It was meant to give television broadcast license holders greater certainty against loss from competing television broadcasting applicants. As Christopher Sterling notes, “[w]ith a sweep of its legislative hand, Congress removed all [the comparative renewal problems] with a new subsection (k) added to section 309 of the 1934 Act [via section 204 of the 1996 Act]. . . . Put simply, the ‘comparative’ aspect of renewals was eliminated.”<sup>48</sup> Further, as Lili Levi notes, “Congress replaced the comparative renewal procedure with

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45. See *Broadcast Renewal Applicants*, *supra* note 41, at 54.

46. *Deregulation's Architect Finds the Structure Sturdy*, *Broadcasting*, Dec. 23, 1985, at 44, 54.

47. Burden, *supra* note 37, at 275.

48. Sterling, *supra* note 39, at 595-96.

a significant amount of substantive FCC discretion.”<sup>49</sup> The FCC has exercised its vast discretion and maintained its right to change license terms and even move licensees to different frequency allocation.<sup>50</sup> These powers are certainly inconsistent with any broadcaster’s claim to indefinite rights to specific spectrum. As such, any interpretation of the 1996 Act as giving property rights to broadcasters is unfounded based on both the lack of legislative history that would normally accompany such a monumental policy shift and the fact that section 204 was clearly designed to address the historical problems related to comparative renewal in the broadcast industry.

*D. Practical Application of the 1934 Act and 1996 Act May Imply  
Some Property Rights*

Despite the text of the statute and its legislative history, the application of the 1934 Act suggests that FCC licenses may confer property rights. Historically, FCC licenses have been renewed regularly, and holders have come to expect such renewals. Howard Shelanski and Peter Huber trace the historical evolution of FCC spectrum license rights, demonstrating that during the middle of the 20<sup>th</sup> century these rights evolved into a “dense web of rules governing license retention and alienability, transmission and programming rights, and signal privacy and exclusivity.”<sup>51</sup> Their analysis suggests that, over time, the manner in which FCC licenses were administered has caused them to mimic property rights.

Starting in the 1970s, the FCC established a variety of regulatory reforms that “have in fact created substantial property rights for spectrum licensees, the language of the 1934 Act notwithstanding.”<sup>52</sup> The major change was in 1970 when the Commission committed to a policy of an expectation of renewal “so long as [the applicant’s] performance was more than ‘minimal,’ even if challengers were superior under some criteria set forth in the 1965 Policy Statement.”<sup>53</sup> The idea behind this shift was to give license

49. Lili Levi, *Not With a Bang But a Whimper: Broadcast License Renewal and the Telecommunications Act of 1996*, 29 Conn. L. Rev. 243, 248 (1996).

50. See, e.g., Douglas W. Webbink, *Radio License and Frequency Spectrum Use Property Rights*, 9 Comm. & L. 3, 8 (1987) (describing unilateral FCC policy changes during the VHF/UHF conversion); Thomas W. Hazlett, *Optimal Abolition of FCC Spectrum Allocation*, 22 J. Econ. Persp. 103, 111 (2008) (describing FCC mandates for the switch from analog to digital television).

51. Howard Shelanski & Peter Huber, *Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & Econ. 581, 582 (1998).

52. *Id.* at 582

53. *Id.* at 587; see also *In re Cowles Florida Broad. Inc.*, 60 F.C.C.2d 372, 423 (1976) (allowing license renewal despite preference for a challenger on diversification).

holders certainty and thus the incentive to invest in the development of the spectrum and the launching of new services. Also in the 1970s, the FCC made the renewal process easier and less expensive by eliminating many of the logs and other bookkeeping requirements necessary for renewal.<sup>54</sup> The increased ease of renewal suggests the process was becoming more of a formality and bolsters the argument that spectrum holders could expect to have long-term rights to the spectrum.

Subsequent changes in the spectrum licensing regime also suggest an increasing expectation of license renewal. In 1981, license terms were increased from three to five years for television and from five to seven for radio.<sup>55</sup> In 1989, the FCC adopted additional changes that made third party challenges to renewal more difficult.<sup>56</sup> Many of these reforms were codified in the 1996 Act which, in addition to extending license periods to eight years, provided broadcasters an expectation of a renewal so long as the broadcaster is reasonably compliant with the license rules and has been serving the “public interest, convenience, and necessity.”<sup>57</sup> This change gives the broadcasters some leverage in blocking administrative changes by the FCC that would eliminate their interests in their licenses. Moreover, as Krystilyn Corbett argues, although the change in the renewal policy was couched in language of public interest, it more likely represents a shift toward a private market model of regulation designed to encourage license holders to invest in their businesses.<sup>58</sup> The essence of this argument parallels that of Prof. Shelanski and Mr. Huber, in that it contends there has been a progressive movement towards privatization of spectrum rights over time, motivated by a government desire to encourage investment in the communications industry. This move represents a shift from a public trust model for spectrum whereby “certain property [is] to be used for public benefit”<sup>59</sup> to a private market model whereby “[i]nstead, spectrum users and the FCC operate as if spectrum licensees are private parties with interests in a valuable, scarce resource.”<sup>60</sup>

Currently, all FCC license holders expect that their licenses will be renewed absent an egregious violation of the license terms. Corbett goes so far as to say that this expectation has gone so far as to

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54. Shelanski & Huber, *supra* note 51, at 587–88.

55. *Id.* at 588.

56. *Id.*

57. Telecommunications Act of 1996, Pub. L. No. 104-104, § 204(a)(1), 110 Stat. 56, 112–113 (codified as amended at 47 U.S.C. § 309(k)(1)(A) (2006)).

58. Krystilyn Corbett, *The Rise of Private Property Rights in the Broadcast Spectrum*, 46 Duke L.J. 611 (1996).

59. *Id.* at 615.

60. *Id.* at 634.

create an implicit guarantee: “[T]he relationship between broadcasters and their regulators seems in fact to have created an implicit guarantee that broadcasters’ licenses will not easily be revoked by the government.”<sup>61</sup> Evidence for this “implicit guarantee” has been inferred from statements made by various government officials including FCC Commissioners,<sup>62</sup> FCC Technical Papers,<sup>63</sup> and even members of the executive branch.<sup>64</sup>

In addition to renewal expectations, the broadcasters’ increased ability to transfer licenses suggests that the broadcasters may possess property interests in them. In 1951, Congress amended the 1934 Act to prevent “consideration of whether transfer to a party other than the proposed transferee would better serve the public interest.”<sup>65</sup> In 1981, the Supreme Court ruled that the FCC had the discretion not to condition transfers on programming issues.<sup>66</sup> The FCC has also backed away from a bar on “trafficking” licenses and now insists on a retention period of only one year before a licensee

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61. *Id.* at 636.

62. See, e.g., *McDowell Backs Voluntary Broadcast Spectrum Transfers, Seeks Advice*, Broadcast Engineering (July 1, 2010, 1:10 PM), <http://broadcastengineering.com/RF/robert-mcdowell-voluntary-broadcast-spectrum-0701> (“Speaking to a group of broadcasters . . . FCC commissioner Robert McDowell said he favors ‘exploring the possibilities’ of voluntary transfer of some broadcast spectrum for wireless broadband use ‘as long as it is truly voluntary.’”); Scott M. Fulton, III, *Oh Really? NAB Head Suggests to Congress FCC’s Broadband Plan is ‘Voluntary’*, BetaNews (Apr. 29, 2010, 1:41 PM), <http://www.betanews.com/article/Oh-really-NAB-head-suggests-to-Congress-FCCs-Broadband-Plan-is-voluntary/1272562494> (“The [National Broadband Plan], as [FCC Chair] Genachowski described to the NAB, ‘proposes voluntary incentive auctions -- a process for sharing with broadcasters a meaningful part of the billions of dollars of value that would be unlocked if some broadcast spectrum was converted to mobile broadband.’”).

63. *Spectrum Analysis*, *supra* note 13, at 2 (“Though we recognize the uncertainty inherent in predicting the outcome of this process [to allocate spectrum to increase mobile broadband spectrum], we are confident that the analysis in this paper and the tools under development at the FCC could enable the FCC, with extensive public input throughout a rulemaking proceeding, to establish a voluntary process that recovers a significant amount of spectrum from the broadcast TV bands while preserving consumer reception of, and public interest served by, [over-the-air] television.”).

64. Lawrence Summers, director of the National Economic Council, is quoted as saying in a speech at the New America Foundation on June 29, 2010, “Our plan [to reallocate spectrum to mobile broadband] will allow all stations that currently broadcast the right to continue to broadcast. . . . It is based on the principal [sic] of voluntarism.” See *Summers Emphasizes Voluntary Return of Broadcast Spectrum*, TVTechnology (June 28, 2010, 1:00 PM), <http://www.televisionbroadcast.com/article/102670>.

65. Shelanski & Huber, *supra* note 51, at 589–90.

66. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596–97 (1981) (overturning *WNCN Listeners Guild v. FCC*, 60 F.2d 838 (D.C. Cir. 1979)).

can transfer the license to another entity.<sup>67</sup> Although the FCC has barred subdividing and transferring blocks of the broadcast spectrum to third parties,<sup>68</sup> it has also “reduced limits on subdivision and classified time brokering as a ‘joint venture’ that would generally be approved.”<sup>69</sup> Shelanski and Huber also note that, in cellular telephony and satellite television, the FCC has been increasingly flexible in allowing license holders to shape and slice the spectrum.<sup>70</sup> Most FCC license holders now view their FCC licenses as commodities they can sell, and perceive approval of license transfers as a formality absent significant policy (e.g., antitrust) concerns.<sup>71</sup>

However, despite renewal expectations and the increased ability to transfer licenses, other language in the 1996 Act suggests that licensees still do not possess property rights. Specifically, while the Amendment permits the FCC to change a broadcaster’s rights considerably upon renewal, Lili Levi notes that, “in changing the renewal procedure, [the FCC] did not eliminate [its] discretion and the possibility of more direct FCC impact on broadcaster conduct via the renewal mechanism.”<sup>72</sup> For example, the FCC could significantly reduce a broadcaster’s current spectrum allocation of 6 MHz and/or move it to a less desirable part of the frequency band. Thus, the FCC could effectively reduce and/or eliminate any property rights potentially given by the renewal expectations. The FCC’s discretion to make these changes upon renewal suggests that the government has retained significant control with respect to licensed spectrum. In addition, television broadcasters have limits to their discretion in dividing their spectrum, albeit reduced from prior levels, and face substantial regulation of the content they can broadcast.<sup>73</sup> As such, the continuing government control of the

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67. Shelanski & Huber, *supra* note 51, at 590-91.

68. *Id.* at 592.

69. *Id.* at 593 (citing *Revision of Radio Rules and Policies*, Report and Order, 7 F.C.C.R. 2755, 2784 (1992)). Shelanski & Huber note, additionally, that “[j]oint ventures between separately owned stations allow efficient joint advertising sales, shared technical facilities, and joint programming arrangements, that is, ‘time brokerage.’” *Id.*

70. Shelanski & Huber, *supra* note 51, at 593.

71. While the FCC must approve each spectrum license assignment, FCC licenses, along with the businesses associated with them, are regularly bought and sold in merger and acquisition transactions. Anecdotal evidence suggests that these assignments are rarely blocked by the FCC absent significant public policy concerns. Moreover, the FCC has taken significant steps to facilitate secondary markets for spectrum. See Wireless Communications Bureau, *Secondary Markets Initiative*, FCC, [http://wireless.fcc.gov/licensing/index.htm?job=secondary\\_markets](http://wireless.fcc.gov/licensing/index.htm?job=secondary_markets) (last updated Aug. 13, 2008).

72. Levi, *supra* note 49, at 278.

73. Shelanski & Huber, *supra* note 51, at 596-97.

broadcasting spectrum through its determination of the terms of renewal and use restrictions undermine the broadcasters' claim of property rights. The ability to control and limit access to claimed property is a fundamental aspect of ownership, which the broadcasters simply do not have.<sup>74</sup>

*E. Bankruptcy Precedent Does Not Support Spectrum Property Rights.*

Bankruptcy precedent also suggests that broadcasters do not possess spectrum property rights. In a 1996 FCC auction, NextWave successfully bid for spectrum licenses at a total price of nearly \$5 billion, and was required to make installment payments to the government for the licenses on a promissory note.<sup>75</sup> In order to secure the government's interest in future payments, the FCC both executed an agreement with NextWave for a lien and security interest in the licenses, and conditioned NextWave's rights in the license on timely payments in accordance with the note and agreement.<sup>76</sup> Eventually, NextWave failed to make timely payments on the note and chose to declare bankruptcy, precipitating a lengthy litigation process that clarified the status of spectrum licenses in bankruptcy.<sup>77</sup>

The first major decision in the NextWave dispute clearly established that NextWave could not assert property rights in spectrum licenses in a bankruptcy proceeding.<sup>78</sup> In *In re NextWave Pers. Communications*, the Second Circuit soundly rejected NextWave's argument that spectrum licenses acquired in auction should be treated as property, as it would be in a "simple bankruptcy case."<sup>79</sup> The court

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74. The FCC's use limitations on television broadcasters inflict a considerable social cost because these limits constrain the spectrum from being used for its most valuable applications. See Shelanski & Huber, *supra* note 51, at 600. Moreover, broadcasters are not allowed to charge for their transmissions, nor are they able to control who receives their transmissions. See *id.* at 601. This severely restricts their business model options. For example, they cannot use any form of a subscription model. There is, however, some movement to allow broadcasters more flexibility. The Telecommunications Act has been interpreted to allow subscription programming by broadcasters in some limited circumstances. See 47 U.S.C. § 605 (2006). However, this has typically applied to newer technologies as opposed to television broadcasting. See Shelanski & Huber, *supra* note 51 at 603.

75. *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 296-97 (2003).

76. *Id.*

77. For a full history of the extensive NextWave litigation, see John A. Rogovin & Rodger D. Citron, *Lessons from the NextWave Saga: The Federal Communications Commission, the Courts, and the Use of Market Forms to Perform Public Functions*, 57 Admin. L. Rev. 687, 696-707 (2005).

78. *In re NextWave Pers. Commc'ns, Inc.*, 200 F.3d 43, 51 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000).

79. *In re NextWave*, 200 F.3d at 54.

overruled the lower court, holding that the dispute was outside the jurisdiction of the bankruptcy courts, and concerned an essentially regulatory decision by the FCC to revoke spectrum licenses.<sup>80</sup> In holding that the issue far exceeded a debtor-creditor relationship between the FCC and NextWave, the Second Circuit reaffirmed the lack of traditional property rights in FCC spectrum licenses.<sup>81</sup>

While the FCC lost the Supreme Court case, *FCC v. NextWave Commc'ns, Inc.*, it did not challenge the Second Circuit ruling that spectrum licenses are not property. The court found that the FCC could not cancel NextWave's spectrum licenses due to non-payment of auction payments while NextWave was in bankruptcy.<sup>82</sup> Although the decision had the same effect as if spectrum licenses were considered property of the NextWave estate, the Court's decision turned instead on a plain reading of bankruptcy and administrative law. The court held that the FCC's decision to revoke NextWave's spectrum license was a government action against a debtor prohibited by § 525 of the Bankruptcy Act.<sup>83</sup> In *NextWave*, the court did not need to consider the validity of the FCC's security interest in the license, or whether the licenses were property of the bankruptcy estate. Neither did the FCC attempt to enforce its purported lien.

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80. *Id.* at 54–55 (“The FCC's auction rules . . . have primarily a regulatory purpose . . . . The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor, any more than it turns an FCC license won at auction into a property estate in spectrum. *Nothing about putting spectrum licenses up for auction rendered them anything other than licenses*, and the sole responsibility for the allocation of licenses lies with the FCC . . . .”) (emphasis added).

81. *See id.* at 51 (“A [spectrum] license *does not convey a property right*; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms.”) (emphasis added). *In re NextWave* is a particularly damaging ruling against the claim that spectrum licenses convey property rights, since the court found that the licenses failed to even qualify as “property of the estate”—a bankruptcy concept that extends beyond common law notions of property. *See* 11 U.S.C. § 541 (2006). While there is considerable controversy as to whether, and the extent to which, spectrum licenses can be considered part of the bankruptcy estate, that debate largely accepts the lack of common law property rights in spectrum licenses. *Cf.* Rafael A. Pardo, Comment, *Bankruptcy Court Jurisdiction and Agency Action: Resolving the NextWave of Conflict*, 76 N.Y.U. L. Rev. 945, 957–58 (2001) (criticizing *In re NextWave* for failing to sufficiently account for Congress's intent for “a broad range of property to be included in the estate[.]” (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983))).

82. *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 301–08 (2003).

83. “[A] governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . .” *Id.* at 300 (quoting 11 U.S.C. § 525(a) (2006)); *see also id.* at 304 (“[S]ince § 525 circumscribes the Commission's permissible action, the revocation of NextWave's licenses is not in accordance with law.”).

While the FCC's attempt to reallocate NextWave's spectrum through license revocation over asserting a purported lien may seem like a mere semantic difference, it is a crucial one in terms of how the courts treat the licenses in a bankruptcy proceeding, and does not disturb the Second Circuit ruling that licenses are not property. Recognition of the lien, on the other hand, would have acknowledged the property element of the licenses.

Another area where bankruptcy courts touch on implications for property is license transfer approval. License transfers are subject to FCC approval. In virtually all bankruptcy cases, the FCC has allowed the bankruptcy court to transfer the FCC license from the licensee to the debtor-in-possession company. However, the FCC retains the power to deny the transfer on regulatory grounds, thus eliminating any value in the license for the license holder.<sup>84</sup> The ability of the FCC to maintain this level of control over transfers further suggests that the licenses have not reached the level of becoming the licensees' property.

In a recent bankruptcy decision, *Sprint Nextel Corp. v. U.S. Bank National Ass'n (In re TerreStar Networks, Inc.)*, the court affirmed the principle that spectrum licenses do not contain a property interest, in holding that creditors cannot have a lien on an FCC spectrum license as it is not property of the debtor's estate.<sup>85</sup> The court sharpens the distinction between a spectrum license and an economic interest in it. TerreStar was a communications company that filed for bankruptcy with a large amount of both secured and unsecured debt. When the estate was sold, Sprint, an unsecured creditor, argued that unsecured creditors—including itself—should be entitled to share the proceeds from the sale of TerreStar's spectrum license. The primary basis of Sprint's argument was that the lien of the secured creditors could not extend to the spectrum license, since applicable federal law does not permit liens on spectrum licenses.<sup>86</sup> While the court upheld the argument that secured creditors cannot have a lien on spectrum licenses as they are not property of the debtor's estate, the court also ruled that secured creditors can claim an economic interest in the proceeds or the economic value of the license when it is sold.<sup>87</sup> While the *TerreStar* court makes a fine distinction about a lien on an FCC spectrum license, which is not permitted, and a lien on the proceeds from the

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84. In order to deny any license transfer, including in bankruptcy cases, the FCC must find that the transfer would not be in the "public interest, convenience, and necessity." See 47 U.S.C. § 310(d) (2006). It is exceedingly rare that license transfers in bankruptcy cases would be found not to satisfy this test.

85. *In re TerreStar Networks, Inc.*, 457 B.R. 254 (Bkrcty. S.D.N.Y. Aug. 19, 2011).

86. *Id.* at 257.

87. *Id.* at 265.

sale of the license, which is permitted, the decision nonetheless upholds the principle that an FCC spectrum license itself cannot be considered property that a creditor can attach.<sup>88</sup>

*F. Tension between 1934 Act and 1996 Act Favors 1934 Act's  
Clear Denial of Property Rights*

There is inherent tension between the text of the 1934 Act, which states that spectrum licensees have no property rights, and the seeming implicit guarantees of renewal and increased ability to transfer in the 1996 Act. Taken as a whole, Shelanski and Corbett convincingly argue that FCC license holders have some expectation of property rights based on the historical administration of the licenses and changes in regulations.<sup>89</sup> This view is supported by decades of policy decisions, both at the FCC and at the Congressional levels. Arguably, nearly 60 years of policy and legislative changes should outweigh the text and legislative history of a 76-year old Act, which was implemented when the communications industry was extraordinarily different from what it is today. The plain text of the Act, however, explicitly states that no such property rights exist.<sup>90</sup> Despite ample opportunity to do so, Congress has never amended this provision. Moreover, the context of the 1996 Act suggests that it was not intended to limit the government's ability to change spectrum licenses or confer additional ownership interests on licensees. Overcoming plainly expressed legislative intent is always a difficult task. Accordingly, despite the modern practice which suggests the FCC licenses may mimic real property, it is likely that any claim that broadcasters possess property rights in their licenses would ultimately fail.

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88. In its holding, the Court relies on the FCC's authority over license assignments under the Telecommunications Act, further circumscribing the extent to which property interests can be claimed in spectrum licenses. *See id.* at 262 (“[T]he right to use the airwaves is a public right granted by the FCC to a licensee that may not be assigned without express FCC permission.”) (citing 47 U.S.C. § 310(d) (2006)).

89. *See supra* Part I.D.

90. *See supra* Part I.A; *see also* 47 U.S.C. § 301 (2006) (“It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and *to provide for the use of such channels, but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority . . . .”) (emphasis added).

II. ANALOGOUS CASES REGARDING RANCHERS'  
GRAZING PERMITS SUGGEST NO PROPERTY RIGHTS FOR  
SPECTRUM LICENSE HOLDERS

Judicial treatment of licenses to use federal land for cattle grazing is instructive in analyzing potential broadcaster claims of property rights in FCC licenses. Grazing rights and broadcasting rights are analogous in that they are both renewable licenses to use government property for a specific period of time, for a specific purpose, and held by a politically powerful industry.

Grazing rights under the Taylor Grazing Act of 1934 (“Taylor Act”) are issuable for up to ten-year periods and are renewable.<sup>91</sup> The Secretary of the Interior has broad latitude to regulate their issuance. Like the Communications Act of 1934, the Taylor Act clearly states that the rights do not constitute property interests: “So far as consistent with the purposes and provisions of this subchapter, grazing privileges . . . shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands.”<sup>92</sup> Subsequent case law has supported the plain meaning interpretation of this statute, holding that grazing permits do not carry property rights to own or use federal lands.<sup>93</sup> This conclusion suggests that spectrum license holders’ claims to property rights in spectrum would be resolved similarly.

*A. Like Spectrum Licenses, Grazing Permits Often Mimic Property  
Interests*

Like broadcasting licenses, grazing permits have slowly assumed the outward appearance of property rights. For example, grazing permits are not only an integral part of the property value of adjoining ranches, but they also can be used as collateral for loans with banks, such as the Farm Credit Bank of Texas, “an arm of the once-public credit system established by Congress to make loans to farmers and ranchers.”<sup>94</sup> Moreover, like property, grazing permits can be passed on to the next owners of ranches and can also be inherited and taxed.<sup>95</sup> Given these precedents, Fredrick

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91. 43 U.S.C. § 315b (2006).

92. *Id.* § 315.

93. *See, e.g., Public Lands Council v. Babbitt*, 529 U.S. 728, 741 (2000) (finding ranchers’ interest in permit stability non-absolute on a plain reading of the statute); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (holding a plain reading of the statute to be the correct one); *United States v. Fuller*, 409 U.S. 488, 494 (1973) (finding no property right created as part of the permit to graze).

94. Jim Nesbitt, *Harvest of Discontent*, *American Cowboy*, June 1996, at 39.

95. *Id.* at 39-40.

Obermiller and other agricultural academics claim that ranchers possess limited property rights to use the federal lands they lease.<sup>96</sup> This right, Obermiller argues, is “an interest roughly akin to fee farming or the old feudal practice of a king granting royal subjects extended use of royal property for farming or herding.”<sup>97</sup> Obermiller goes on to suggest that Congress prevented property rights in grazing permits with the Taylor Act despite history and custom recognizing a property right in grazing land.<sup>98</sup> Taken as a whole, Obermiller’s arguments seem remarkably similar to Shelanski and Huber’s arguments that spectrum licenses may confer property rights.<sup>99</sup> In fact, the argument for grazing permits as property is even stronger than that for broadcasting spectrum licenses. This relative strength is based on the local customs, which allow free use of lands for over a hundred years prior to the passage of the Taylor Act,<sup>100</sup> and the credible argument that the true legislative intent of the 1934 Taylor Grazing Act supported property rights.<sup>101</sup>

### *B. Courts Have Concluded Grazing Permits Are Not Property*

Despite the somewhat convincing arguments suggesting an ownership interest in grazing permits, permit holders were unsuccessful in claiming that their permits conferred property rights. In contrast to broadcasting rights, the Supreme Court has directly addressed the issue of grazing property rights, definitively concluding that grazing permits do not constitute property rights.

96. See Frederick W. Obermiller, *Did Congress Intend to Recognize Grazing Rights? An Alternative Perspective on the Taylor Grazing Act*, 18 *Rangelands* 186 (Oct. 1996).

97. Nesbitt, *supra* note 94, at 40.

98. Obermiller, *supra* note 96, at 186. Obermiller asserts that the original version of the Taylor Act explicitly established grazing rights based on local customs and other criteria, and the provision prohibiting property rights in licensed grazing land was added in an amendment made by an unrecorded mark-up of the bill that was not subject to public debate.

99. Shelanski & Huber, *supra* note 51, at 582.

100. The current federal licensing regime, on the other hand, arose within a matter of years within the first U.S. commercial radio broadcasts. Compare *Public Lands Council v. Babbitt*, 529 U.S. 728, 731–38 (2000) (providing a history of grazing land use prior to the Taylor Act (citing R. White, “It’s Your Misfortune and None of My Own”: A History of the American West 223 (1991))) with Douglas W. Webbink, *Impact of the UHF Promotion: The All-Channel Television Receiver Law*, 34 *L. & Contemp. Probs.* 535, 536–37 (1969) (describing the early history and rapid establishment of the federal spectrum licensing regime following the first commercial radio broadcasts).

101. See Obermiller, *supra* note 96, at 186 (suggesting that the legitimate legislative intent of the Taylor Act runs counter to its text). Cf. *Babbitt*, 529 U.S. at 739–44 (finding that a Taylor Act permit does not create “a ‘right, title, interest or estate’ [and makes clear] that the ranchers’ interest in permit stability cannot be absolute . . .”).

In *United States v. Fuller*, a rancher operated a large-scale ranch in western Arizona on lands consisting of “1,280 acres . . . owned in fee simple . . . , 12,027 acres leased from the State of Arizona, and 31,461 acres of federal domain held under Taylor Grazing Act permits . . . .”<sup>102</sup> The United States condemned 920 acres of the rancher’s fee lands, which bordered the federal land he was using pursuant to the Taylor Grazing Act.<sup>103</sup> The rancher argued that the market value used for compensation under eminent domain should include any “value accruing to the fee lands as a result of their actual or potential use in combination with the Taylor Grazing Act ‘permit’ lands.”<sup>104</sup> The Court ruled that since the rancher had no property interest in the ‘permit’ land, and the government was free to deny renewal of the grazing rights on that land without compensation, it would be inappropriate to consider the ranch’s proximity to federal land for the purposes of determining eminent domain compensation.<sup>105</sup> The court made this ruling even though it acknowledged that a potential buyer might pay more for the property due to its location and the increased possibility of securing grazing rights.<sup>106</sup>

Furthermore, the Supreme Court unanimously reaffirmed the principle that grazing permits do not confer property rights in *Public Lands Council v. Babbitt*.<sup>107</sup> In *Babbitt*, farmers filed suit claiming that recent changes in the grazing permit system violated the Taylor Act and harmed their interests.<sup>108</sup> The Court interpreted the Taylor Act as giving the Secretary of the Interior broad latitude to change the grazing permit system to optimize land use, and to determine which grazing permits should be safeguarded and which should not.<sup>109</sup> The *Babbitt* opinion is also notable for its close textual interpretation of the Taylor Act:

The legislative history to which the ranchers point shows that Congress expected that ordinarily permit holders would be ranchers, who do engage in the livestock business, but does not show any such absolute requirement. . . . Congress could reasonably have written the statute to mandate a preference in the granting of permits to those actively involved in the livestock business, while not absolutely

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102. *United States v. Fuller*, 409 U.S. 488, 489–90 (1973).

103. *Id.* at 490.

104. *Id.*

105. *Id.* at 492–93.

106. *Id.* at 490–91.

107. *Public Lands Council v. Babbitt*, 529 U.S. 728, 741–43 (2000).

108. *Id.* at 738–39.

109. *See id.* at 742 (The Taylor Act grants the Secretary “broad discretionary powers.”).

excluding the possibility of granting permits to others. The Secretary [of the Interior] has not exceeded his powers under the statute [by granting permits to those not in the livestock business].<sup>110</sup>

The Court also cited the history of ranching traditions in using federal land<sup>111</sup> and some of the practical implications in terms of impact on the ranching industry, such as reduced credit availability for ranchers.<sup>112</sup> Ultimately, the Court decided the case based on a clear textual interpretation. It specifically referenced its earlier decision in *United States v. Nordic Village, Inc.*, which called for a strict textual interpretation.<sup>113</sup> In fact, *Babbitt* has been cited in a variety of contexts as a guide to textual analysis of legislation.<sup>114</sup> Finding that FCC licenses confer property rights would require ignoring unambiguous language in the Communications Act of 1934 that denies spectrum licensees property rights in direct conflict with this strict textualism. Accordingly, when applying the *Babbitt* approach to FCC licenses defined in the 1934 Act, a court is unlikely to find that the broadcasters have any property rights in licensed spectrum.

The Tenth Circuit in *Federal Lands Legal Consortium v. United States* also held that grazing rights were not property rights for Due Process Clause purposes.<sup>115</sup> However, the court's reasoning went beyond the text, drawing heavily upon an earlier Supreme Court decision, which addressed the contours of due process property rights. The *Federal Lands Legal Consortium* court explained that the Supreme Court in *Board of Regents of State Colleges v. Roth* had abolished the arbitrary distinctions between licenses and property, and held that fundamental rights determine the existence of any property interest.<sup>116</sup> *Roth* involved a state college instructor whose contract was not renewed. The Court determined that the instructor

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110. *Id.* at 746–47. (citations omitted).

111. *See id.* at 731–33.

112. *See id.* at 744.

113. *Id.* at 746 (“[A] statute must, if possible, be construed in such fashion that every word has some operative effect” (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992))).

114. *See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 942 (7th Cir. 2000) (“[One should not] contradict[] the interpretive principle that every word or provision of a statute must, if possible, be given some effect.” (citing *Babbitt*, 529 U.S. at 746)); *Israeli v. Team Telecom Int'l, Ltd.*, Civ.A.04-CV-4305(PGS), 2006 WL 2883237, at \*4 (D.N.J. Oct. 10, 2006) (“The basic tenets of statutory construction explain that a statute must ‘be construed in such a fashion that every word has some operative effect.’” (citing *Babbitt*, 529 U.S. at 746)).

115. *Fed. Lands Legal Consortium v. United States*, 195 F.3d 1190, 1199–1200 (10th Cir. 1999).

116. *See id.* at 1197 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972)).

was not entitled to any property interest in the contract, and therefore was not owed due process prior to non-renewal. The *Roth* Court did not limit its analysis to the plain wording of the contract (which already explicitly disclaimed any property rights) and explained:

[T]he Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights. The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.<sup>117</sup>

However, despite the language in *Roth* suggesting that courts look beyond mere words, the *Federal Lands Legal Consortium* court concluded that the extent to which government retains discretion with respect to the license or permit is the key indicator of whether a property interest exists.<sup>118</sup> Although the Department of the Interior is required to prioritize certain licensees for renewal, it has discretion in determining the terms of the renewal. The court found that, because the government has maintained sufficient control, ownership has not transferred, the grazing licenses are not property of licensees:

[D]uring the permit renewal process, an applicant has a priority for a permit only ‘[s]o long as . . . the permittee . . . accepts [its] terms or conditions . . .’ The Forest Service, in turn, has discretion to require any change it deems necessary . . . . [E]ven if [the permittee plaintiff]’s priority in some way restrains the Forest Service’s discretion to issue or deny a permit, it does not restrain the Forest Service’s discretion to set the terms or conditions of the permit. Thus, [the permittee plaintiff] would not appear to have a legitimate claim of entitlement to the terms and conditions of their previous permits.<sup>119</sup>

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117. *Id.*

118. *Id.* (“Where . . . the federal government has not explicitly created a property right in a permit, [the courts] ordinarily look to the degree to which the federal government has restrained its own discretion relating to that permit. If a benefit is a ‘matter of statutory entitlement for persons qualified to receive them,’ then the government has created a property interest in that benefit.”) (citations omitted).

119. *Id.* at 1198–99 (citations omitted).

The FCC has similar discretion in deciding the terms of renewal for broadcasters' licenses. For example, the FCC recently required the broadcasters to transition from analog to digital broadcasting and reduced the amount of spectrum allocated to the broadcasters. Furthermore, a recent FCC Report and Order stated that:

Even after licenses are awarded, the Commission may change the license terms if in the judgment of the Commission such action will promote the public interest, convenience, and necessity. The Commission may exercise this authority on a license-by-license basis or through a rule-making, even if the affected licenses were awarded at auction.<sup>120</sup>

In the above statement from the *Open Internet Order*, the FCC is clearly asserting its power to regulate the terms of licenses not only on renewal but also during the terms of the licenses, even though the license holder paid for them.<sup>121</sup> As discussed in Part II.C *supra*, the 1996 Act increases the FCC discretion concerning renewal evaluations, as it replaces comparative analysis with the FCC's discretion as to whether the broadcaster is acting in the "public interest, convenience, and necessity." As such, and in light of *Babbitt*, a court would not likely analyze the potential property interests in FCC licenses beyond the text of the relevant legislation.<sup>122</sup> Even if a court were to do so, *Federal Lands Legal Consortium*, recent FCC orders, and the analysis of this Article all support the conclusion that the broadcast licenses do not confer property rights.<sup>123</sup> Accordingly, the lack of success of grazing permit owners in asserting property rights in those permits (when their arguments were perhaps more favorable than that of the broadcasters) does not bode well for the broadcasters. The fact that property rights in spectrum licenses lack legislative and social history support, even when compared to the grazing permit precedent, gives the broadcasters little reason to hope for a more favorable outcome.

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120. *Open Internet Order*, *supra* note 29, at 74-75, ¶ 133 (quotation marks omitted) (citations omitted).

121. An FCC report is, of course, the agency's view of the law. It does not carry legal force, nor does it necessarily reflect how a court might rule. A cynical view might be that this statement is merely meant to be a bit of "saber rattling" by the FCC to "loosen-up" the broadcasters with a thinly veiled threat as opposed to a substantive legal opinion.

122. See *Public Lands Council v. Babbitt*, 529 U.S. 728, 741 (2000).

123. See *Federal Lands Legal Consortium*, 195 F.3d at 1200; *Open Internet Order*, *supra* note 29, at 74-75, ¶ 133.

*C. Any Property Rights Would Nevertheless Exclude Higher Value  
Broadband Use*

Even if the broadcasters possessed property rights in the spectrum and were therefore entitled to some compensation for the nonrenewal of their spectrum license, they would not be entitled to compensation for any incremental value that results from the government's future use and/or need of the spectrum for higher value mobile broadband applications. Any such compensation would be limited to the value of the spectrum for its current television broadcasting use.

In *Fuller*, the Court cited *United States v. Miller*, which held that the increase in fair market value "represented by knowledge of the Government's plan to construct the project for which the land taken was not included within the constitutional definition of 'just compensation.'"<sup>124</sup> *Fuller* also cited *United States v. Cors*, where the Court ruled that compensation to the owner of a tugboat requisitioned by the government during World War II could not include the appreciation of the value in the tugboat created by the government's increased wartime demand.<sup>125</sup> In *Cors*, the Court said: "That is a value which the government itself created and hence in fairness should not be required to pay."<sup>126</sup> In *Olson v. United States*, the Court ruled that the person whose property is condemned by the government "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."<sup>127</sup>

Government reallocation of broadcasting spectrum for higher value applications is highly analogous to the knowledge of a future government use, as in *Miller*, or the value added by the government's need, as in *Cors*. Under the Court's reasoning in *Miller* and *Olson*, the government would not have to compensate the broadcasters for any value in the spectrum beyond their present use for television broadcasting. Broadcasters are simply not entitled to compensation for the higher value use for which the government intends to reallocate the spectrum.

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124. *United States v. Fuller*, 409 U.S. 488, 491 (1973) (citing *United States v. Miller*, 317 U.S. 369, 374 (1943)).

125. *Fuller*, 409 U.S. at 491 (citing *United States v. Cors*, 337 U.S. 325, 333-34 (1949)).

126. *Cors*, 337 U.S. at 334.

127. *Olson v. United States*, 292 U.S. 246, 255 (1934).

### III. GOVERNMENT COULD SHORT-CIRCUIT ANY ALLEGED PROPERTY INTEREST BY AMENDING THE COMMUNICATIONS ACT

Even if the broadcasters had a cognizable claim to property rights in the spectrum based on their renewal expectations, the government could simply avoid compensating them by changing the law. Scholars differ as to whether impacted entities should be compensated for the costs of regulatory changes when there has been an implicit agreement that the entities could rely on the existing regulation.<sup>128</sup> Recent court cases, however, make clear the government does not owe such compensation absent explicit guarantees that the impacted entities could rely on the existing regulation.

Professors J. Gregory Sidak and Daniel F. Spulber argue that a regulated entity should not be able to assume that the law will remain the same, but that it should be able to rely on an implicit agreement with the government if one exists.<sup>129</sup> This can be a problematic distinction: How does one show that there was an implicit agreement? How can the government change a regulation without concern that it might be violating a possible implicit agreement? Sidak and Spulber argue that regulators should compensate companies for the cost of the stranded assets in which the companies invested but cannot utilize as a result of the regulatory change.<sup>130</sup> They also argue that companies should be compensated for “investment backed expectations” that were made on the basis of a then-existing regulatory regime, even if they were based on the expectation of a regulatory monopoly.<sup>131</sup>

Under Sidak and Spulber’s reasoning, the broadcasters may have an implicit agreement with the government that entitles them to the full expectation of the profits they hoped to make based on permanent rights to their spectrum—the lack of an explicit governmental promise of permanent spectrum rights would be immaterial. Sidak and Spulber base their argument on *United States v. Win-*

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128. Compare J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward Looking Costs*, 72 N.Y.U. L. Rev. 1068, 1076 (1997) [hereinafter Sidak & Spulber, *Forward Looking Costs*] (maintaining that deregulation requires the state to compensate for past contractual obligations), and J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851, 855 (1996) [hereinafter Sidak & Spulber, *Deregulatory Takings*] (arguing that regulators must honor their past commitments), with William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. Rev. 1037, 1041 (1997) (contending that firms are not entitled to compensation for the loss of monopolistic prices).

129. See Sidak & Spulber, *Forward Looking Costs*, *supra* note 128, at 1104.

130. *Id.* at 1093.

131. See Sidak & Spulber, *Deregulatory Takings*, *supra* note 128, at 864.

*star*,<sup>132</sup> where the Supreme Court rejected the government's defense that it did not owe compensation because the plaintiff did not meet the "unmistakability" standard.<sup>133</sup>

The *Winstar* case involved significant economic incentives (e.g. tax incentives, lowering of capital reserve requirements) to financial institutions for taking over failing thrifts. About eight years after implementation, Congress withdrew the regulatory rules that created these incentives, and three of the banks affected sued for damages. In *Winstar*, the government argued that the plaintiff must show that the government made certain promises in "unmistakable" terms in order for these promises to be enforceable. The Court rejected this argument, indicating that the "unmistakability doctrine" only applies if the agreement is one that restricts the government's sovereign power, such as an agreement to give up sovereign power to change a law. The Court reasoned that the doctrine does not apply to ordinary course contracts because it would compromise the government's ability to enter into such contracts.<sup>134</sup>

Sidak and Spulber quote Justice Souter's plurality opinion, which states that the unmistakability defense for ordinary contracts would "place the [unmistakability] doctrine at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies."<sup>135</sup> Sidak and Spulber seem to be suggesting that the government should also compensate those harmed by regulatory changes even if the government did not "unmistakably" promise not to change the system. In their view, an existing regulatory regime should be treated as an implicit contract. Presumably, this principle would protect broadcasters if Congress were to reamend the Telecommunications Act to deny any right broadcasters would have to renew their spectrum licenses despite expectations or implicit promises otherwise. Thus, based on *Winstar*, Sidak and Spulber would view the current regulatory treatment of the Telecommunications Act as a contract that the government must either honor, or compensate license holders if it does not.

Professors William J. Baumol and Thomas W. Merrill, however, argue that the government does not need to compensate companies for losses due to a removal of monopoly-based expectations.<sup>136</sup> This would presumably include changes to legislation such as changes to the 1934 Act that would deny broadcasters' renewal rights and thus

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132. *United States v. Winstar*, 518 U.S. 839, 887 (1996).

133. See Sidak & Spulber, *Forward Looking Costs*, *supra* note 128, at 1148.

134. *Winstar*, 518 U.S. at 880.

135. Sidak & Spulber, *Forward Looking Costs*, *supra* note 128, at 1148 (quoting *Winstar*, 518 U.S. at 883).

136. See Baumol & Merrill, *supra* note 128, at 1041-57.

end the broadcasters' monopoly use of the spectrum. Baumol and Merrill contend that implied promises still need to meet the "unmistakability" test. Baumol and Merrill explain:

Four justices joined in Justice Souter's plurality opinion, which would have recognized an exception to the unmistakability doctrine for government "indemnification" agreements holding entities harmless in the event of future changes in regulation. However, a majority of five Justices rejected such an exception. Justice Scalia, joined by two other Justices, saw no need to create the exception, because in his view the contracts in question unmistakably promised the acquiring S&Ls they would receive favorable accounting treatment. . . . Thus, by a vote of five to four, *Winstar* reaffirmed the unmistakability doctrine and rejected Justice Souter's proposed exception.<sup>137</sup>

However, they further note that implied promises based on past dealing are unlikely to meet this standard:

To show in "unmistakable" terms that any of these promises [related to guarantee of a regulatory monopoly] was made, it will almost certainly be necessary to point to specific language in a corporate charter, franchise agreement, or public utility statute, or a longstanding judicial doctrine, that expressly reflects these understandings. Implied understandings based on a long course of dealing, or action taken in reliance on apparently settled practices, might plausibly be thought to give rise to a contract between the government and the LECs. But it will be much harder to show that these practices reflect an unmistakable contractual agreement.<sup>138</sup>

Moreover, Baumol and Merrill argue that this interpretation of the unmistakability doctrine is good public policy. If the government pays compensation for the denial of monopoly profit expectations, consumers would not benefit from those regulatory changes. Any public benefits would be subsumed by the compensation paid to the prior monopolists.<sup>139</sup> Baumol and Merrill further argue that the removal of an advantageous pricing standard is not a taking, nor is historical cost relevant in determining fair cost in the present period.<sup>140</sup>

The debate between *Sidak/Spulber* and Baumol/Merrill may have been resolved by the subsequent Supreme Court case, *Verizon*

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137. *Id.* at 1046 (citations omitted).

138. *Id.* at 1047 (citations omitted).

139. *Id.* at 1048-49.

140. *See id.* at 1045 (explaining that the only significant constraint on cost determination arising from case law is that a utility must be allowed an opportunity to earn a competitive return on its investment).

*Communications Inc. v. FCC*.<sup>141</sup> In this case, the FCC was sued, in part, for the way it required state utility commissions to set the rates charged by incumbents to newcomers wishing to lease elements of the incumbents' telephone service networks. The Court held that "[t]he FCC can require state commissions to set the [new] rates charged by incumbents for leased elements on a forward-looking basis untied to the incumbents' [past] investment."<sup>142</sup> Verizon was exposed to market risk on its prior equipment investments and argued that its rates should be calculated based on the prior cost of its investment as opposed to the current and future market prices for that equipment. Yet, this rate regulation was not deemed to be a regulatory taking, nor was it sufficiently "unreasonable" to justify the Court's setting it aside.<sup>143</sup> Analogizing to the question of compensation for nonrenewal of broadcast spectrum licenses, the broadcasting market's decline is not something that the government should be required to subsidize through continued "must carry" regulation, or repurchase of broadcasters' spectrum after their licenses expire.

The holding in *Verizon* implies that the government has significant latitude to simply change the rules and not renew the broadcasters' licenses, forcing the broadcasters to take a loss on their investments as long as the rationale for the changed rules is not unreasonable.<sup>144</sup> Based on the reasoning in *Verizon*, Congress could change the Telecommunications Act and refuse to renew broadcasting licenses so that the spectrum can be used for higher value mobile broadband without compensating the broadcasters. Congress would not be constrained by prior non-binding statements by the FCC, Congressional leaders, or the executive branch. Moreover, the renewal expectations in the 1996 Act would not constrain Congress, as the government did not "unmistakably" revoke its rights to overturn those expectations. Any implied expectations to renewal would likely yield to the clear statutory text of the 1934 Act, which states that the broadcasters do not have property interests in their spectrum licenses. The government could simply change the law to eliminate renewal expectations, allow existing licenses to expire, and reallocate the spectrum without compensating broadcasters. However, as explained in Part VI and VII of this Article, this may not be the most politically efficient solution.

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141. *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467 (2002).

142. *Id.* at 468.

143. *See id.* at 468-72.

144. *See id.* at 468.

IV. PRINCIPLES OF TRADITIONAL PROPERTY LAW  
PROVIDE LITTLE SUPPORT FOR ANY BROADCASTER  
CLAIMS TO PROPERTY RIGHTS

Another perspective that may suggest FCC license holders have property rights is based on principles of general property law. This analysis is consistent with Judge Easterbrook's "Law of the Horse"<sup>145</sup> argument that calls for evaluating technology laws and rights using the same laws used for traditional property rather than creating new areas of law specifically geared toward developing areas in the economy. An advantage of relying on well-established traditional property law is that it can minimize the deliberations that would be necessary to agree upon and codify new alternative paradigms specific to technology, which would save considerable time. Given the relative urgency of the National Broadband Plan<sup>146</sup> and the need for additional mobile broadband spectrum, time is a significant consideration.

Traditional property law is well-suited to analyze the issue of whether FCC licenses confer property rights. It provides several frameworks in which someone who has been using property for an extended period (such as the television broadcasters) can claim property rights without an actual written agreement, even where the original owner (the government in this instance) clearly did not intend to give up property rights. An analysis of traditional property principles suggests broadcasters have an arguable, albeit weak, claim of property rights.

*A. Elements of Property*

The most basic element of property rights consists of "the right . . . to possess, use, enjoy, and dispose of a thing and to exclude everyone else from interfering with it."<sup>147</sup> Clearly, broadcasting licenses fit this aspect of property rights because a broadcasting license prevents others from broadcasting on the licensed spectrum. Spectrum rights, like rights to traditional real property, are geographically bounded. Spectrum rights are also frequently

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145. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 208.

146. *National Broadband Plan*, *supra* note 3, at 75 (stating that a major goal of the National Broadband Plan is to allocate an additional 300 MHz to mobile broadband within five years and 500 MHz by 2020 as well as provide 100Mbps of broadband service to most U.S. homes by 2020).

147. 73 C.J.S. *Property* § 1 (2011). See also Armen A. Alchian, *Property Rights*, in *The Concise Encyclopedia of Economics* (2d. ed. 2007), available at <http://www.econlib.org/library/Enc/PropertyRights.html> ("A property right is the exclusive authority to determine how a resource is used . . .").

limited (“authorized”) to only allow certain types of use, just as traditional real property can be “zoned” for specific types of use. The television broadcasters are limited by a large array of restrictions affecting ability to use, sell, and charge viewers, as well as various public service requirements and a host of other limitations.<sup>148</sup> The critical question for broadcasters is whether the spectrum rights resemble traditional property rights to the extent that the broadcasters would be entitled to compensation if the government does not renew their licenses.

### B. Easement Rights for Broadcasters?

In many cases, a party can argue that it has rights to someone else’s property due to an easement. Often, express easements are clearly written into a deed or another recorded document. The statutory text expressly denying property rights in spectrum and the absence of other supporting documentation from the FCC show that there is no express easement granted by an FCC broadcast spectrum license. In the absence of documentation, however, easements may also be implied. The public policy underlying implied easements is to reward investment in land and encourage its use. This Article will examine the three primary types of implied easements with respect to their potential application to the broadcasters’ ability to assert property rights.

#### 1. Easement by Estoppel May Apply

Easement by estoppel occurs when a person with permission to use someone else’s land relies on that permission to do something that would be detrimental to the user if the permission were revoked.<sup>149</sup> An illustrative example is *Holbrook v. Taylor*, where a landowner let his neighbor use his land to access his property and watched as the neighbor built a house that needed the access.<sup>150</sup> The court ruled that the neighbor was entitled to an easement by estoppel—the landowner could not withdraw permission to use that access because the neighbor relied on that permission in building his house and the landowner was aware of that reliance.

Similarly, the broadcasters might argue that they have easement rights to the spectrum based on estoppel. Specifically, the broadcasters might claim that the FCC stood by and watched them invest large amounts of money in their broadcasting businesses based on their spectrum rights. Moreover, the agency also

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148. 47 U.S.C §§ 201-03, 214 (2006).

149. Restatement (Third) of Prop.: Servitudes § 2.10 (2000).

150. *Holbrook v. Taylor*, 532 S.W.2d 763, 764 (Ky. 1976).

approved sales of spectrum at prices that would only make sense if there was an expectation of renewal. The FCC knew of and often explicitly approved their investments, which would be severely harmed if their rights to use the spectrum were withdrawn. License holders who make large infrastructure upgrades or who purchase licenses for high prices towards the end of their license periods would provide the strongest cases for easement by estoppel.

The digital conversion would also support the broadcasters' estoppel argument. In June 2009, Congress and the FCC forced the broadcasters to convert from analog broadcasts to digital transmission. Broadcasters were required to purchase digital transmission equipment and invest in other changes to meet the new standards. The cost of this conversion varies, but a Canadian study estimated the average cost per station/channel at between a few hundred thousand dollars and a few million dollars, with most in the \$250,000 to \$1,000,000 range,<sup>151</sup> and a CTIA study estimates the average cost of the conversion at \$898,000 per station/channel.<sup>152, 153</sup>

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151. Patrice Lemée & François O. Gauthier, Spectrum Expert Inc., Engineering Report ER-008E: Cost Estimate of Digital Television (DTV) Conversion for Canada Presented to Canadian Radio-Television & Telecommunications Commission (CRTC) 7 (2009), <http://www.crtc.gc.ca/eng/publications/reports/dtv0903.pdf>.

152. CTIA – The Wireless Association & Consumer Electronics Association, Broadcast Spectrum Incentive Auctions White Paper 17 (2011) (citing National Telecommunications and Information Administration, Television Station Construction Costs, [http://www.ntia.doc.gov/legacy/otiahome/ptfp/application/EquipCost\\_TV.html](http://www.ntia.doc.gov/legacy/otiahome/ptfp/application/EquipCost_TV.html) (last updated Jan. 12, 2011)), *available at* [http://www.cesweb.org/shared\\_files/edm/Press/Spectrum\\_Whitepaper\\_FINAL.pdf](http://www.cesweb.org/shared_files/edm/Press/Spectrum_Whitepaper_FINAL.pdf).

153. Calculating an actual conversion cost for a television station is quite complex, and the accounting issues involved are significant. A comprehensive analysis of the issue is beyond the scope of this Article. However, to summarize, if the conversion involves only the cost of equipment to replace the output of an old analog station, convert the output, and transmit it in digital, the cost is likely close to the lower end of the range (a few hundred thousand dollars). Most stations, on the other hand, kept their analog station, built an interim digital facility, and simulcasted for years prior to complete conversion to digital. The electricity cost was significant during the period of simulcasting, particularly in the high UHF bands where many transition stations were located. In addition, broadcasters had to maintain two transmitters, towers (including leases), transmission lines, antennas, etc. They later had to move to their final digital facilities, which was often a third facility. The cost of running dual plants for years (for the many stations that did) was probably far greater than the bare cost of the basic digital equipment. Moreover, many stations also upgraded to HD to take advantage of the new digital plants. Finally, much of the cost variation likely depended on the radio frequency (“RF”) engineering that was needed to replicate the transmission which varied with the topography of the license area.

The FCC has made over 1,800 digital television channel assignments.<sup>154</sup> Some of these channel assignments may not result in a functional broadcast station. However, assuming there were an estimated 1,750 television stations<sup>155</sup> converting to digital transmission at a conservative average conversion cost estimate of \$650,000<sup>156</sup> to \$898,000 per station would result in a total industry cost of digital conversion of approximately \$1.0 to \$1.6 billion. Total digital television transition costs should then be compared to the value of the television broadcasting industry—one valuation of the broadcasting industry by the FCC places its value at \$63.7 billion,<sup>157</sup> while another by economist Coleman Bazelon puts it at \$63.2 billion.<sup>158</sup> While the estimated \$1.0 to \$1.6 billion industry investment in the DTV transition is not an overwhelming sum relative to estimated broadcasting industry value, this amount is nonetheless substantial. It could support a claim that broadcasters relied upon an expectation of continued rights to the spectrum.

The UHF stations may have the strongest argument for estoppel. According to the Canadian study, it was more costly, on average, to convert the higher UHF frequencies.<sup>159</sup> Signals using these higher frequencies do not propagate as far as VHF frequencies, and presumably needed additional RF engineering to successfully convert to digital transmission. There is also a higher conversion cost for stations that had to change frequencies. In the U.S., the UHF band was “repacked” as part of the digital conversion, freeing up the 700 MHz band for auction. In order use their new bandwidth allocation many UHF stations had to incur the cost of changing frequencies. As such, the UHF stations may have a somewhat stronger argument that the government was aware that their investment was sufficiently substantial that they would have made it only with an expectation of continuing to broadcast for an extended period of time. The broadcasters could point not only to

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154. *FCC Announces Final Assignment of Digital Television Channels*, fcc.gov (Aug. 6, 2007), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-275789A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275789A1.pdf).

155. This estimated number is slightly discounted from the 1,800 digital television assignments mentioned as a small number of digital television channel assignments did not occur as a result of an analog station converting to digital. *See supra* note 155 and accompanying text.

156. This lower estimated conversion cost per station is based on the CRTC estimated conversion cost of \$250,000 to \$1,000,000 per station. *See Lemée & Gauthier, supra* note 151.

157. National Broadband Plan, *supra* note 3, at 102.

158. Coleman Bazelon, The Brattle Group, *The Need for Additional Spectrum for Wireless Broadband: The Economic Benefit and Costs of Reallocations* 13 (2009), *available at* [http://www.brattle.com/\\_documents/UploadLibrary/Upload809.pdf](http://www.brattle.com/_documents/UploadLibrary/Upload809.pdf).

159. Lemée & Gauthier, *supra* note 151, at 7.

the 1996 Act, which, as previously discussed, effectively promises renewal rights, but also to the previously discussed statements and actions by the FCC staff and Congress.<sup>160</sup> Taking away their spectrum would effectively be a breach of this implied contract they relied upon in making this investment. The VHF stations can, of course, make the same argument, but the lower cost may make their reliance argument somewhat less compelling.

Notwithstanding any merit of the promissory estoppel theory, such lawsuits against the government have traditionally been unsuccessful. In the case of *Office of Personnel Management v. Richmond*, a disabled government worker was given erroneous advice, both oral and written, from the government personnel office on multiple occasions.<sup>161</sup> Relying on these statements, the worker engaged in activity that resulted in him losing some of his government benefits.<sup>162</sup> The Court held that the government cannot be held responsible for the effect of its employee incorrectly stating the law. Based on this reasoning, the courts would likely consider statements by government officials suggesting that the government would indefinitely renew broadcasting licenses to be erroneous promises. Consequently, as with *Richmond*, a promissory estoppel claim based on the erroneous promises would likely fail as the government cannot be held responsible for the effect of its employees erroneously stating the law. The broadcasters may try to distinguish *Richmond* by arguing that the FCC and executive officials did not misstate the current law regarding spectrum licenses, but rather were misstating future law. However, this distinction is hollow. If the government officials' statements were treated as prediction of future laws, the courts would probably be even less likely to allow an estoppel claim. If the government cannot be held liable for its employees' statement of the actual law, the government a fortiori should not be held liable for an incorrect prediction of potential legal changes, since there is even less reason to rely on such predictions, which are inherently uncertain.

Moreover, the government will be able argue that the *Verizon* case effectively prevents estoppel arguments against the government unless there is an agreement in "unmistakable" terms. The FCC licenses are clear on their face that they do not constitute an unmistakable, or even implicit agreement to grant property rights in spectrum. The FCC could also argue that the broadcasters are sophisticated entities, and the FCC's job does not include the policing of their business investment practices. The sum of these arguments is likely to be very convincing.

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160. *See supra* Part I.C.

161. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 416-19 (1990).

162. *Id.*

Although the broadcasters' promissory estoppel claim is weak, it may have the most support of any of the traditional property principles for the theory that FCC licenses convey property rights. The FCC, like the Bureau of the Interior in *Babbitt*, is allowed to change its rules without compensation, but *Fuller* indicates that principles of equity are also important: "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law."<sup>163</sup> However, courts have generally used this equitable principle to determine the level of compensation owed for a government action it has determined to be a taking, as opposed to using it to determine whether a government action is a taking and thus due compensation in the first place.<sup>164</sup> Nevertheless, fairness principles and the significant investment made by broadcasters could theoretically support an easement by estoppel argument by the broadcasters. On the other hand, equity can also undercut the broadcasters argument. Since this renewed broadcast spectrum was originally obtained at no cost from the FCC, the broadcasters have already been conferred significant advantages by their licenses. In sum, this theory is likely the broadcasters' strongest argument for rights in spectrum grounded in traditional property law principles. Its ultimate chances of success are slim, however, because an easement by estoppel argument is usually hard to make against the government and, in this case, it does not meet the "unmistakability" test.

## 2. Broadcasters Are Unlikely To Successfully Claim Easements Implied from a Prior Use

If a person has been using property rights for an extended period of time, even without permission, in a manner that should have been discoverable by the owner, the user may be able to claim there was an easement based on prior use. In the classic case of *Van Sandt v. Royster*, property owners whose sewage line ran underneath Van Sandt's property to get to the main neighborhood sewage line were entitled to an easement based on prior use.<sup>165</sup> The court found that Van Sandt should have noticed that this was the design of the sewage system when he bought his home. He had allowed his neighbor's sewage line to run under his home for years

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163. *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citations omitted).

164. See, e.g., *United States v. 564.54 Acres of Land*, 506 F.2d 796, 799 (3d Cir. 1994) (citing *Fuller*, 409 U.S. at 490, when discussing the use of equitable principles of fairness in the valuation of recreational land used by a church where no similar market value was available).

165. *Van Sandt v. Royster*, 83 P.2d 698 (Kan. 1938).

without challenging it. Thus, the neighbor was granted an easement from prior use.<sup>166</sup>

In the case of telecommunications spectrum, license holders may argue that the automatic renewal system and the regular allowance of transferring licenses has created a pattern of prior use that essentially grants easement rights. However, the government could easily overcome this argument by contending that the license holders were granted a license that, like a rental agreement, the government can terminate on expiration, regardless of the amount of time that passed and regardless of whether its previous policy was to grant renewal. Indeed, the Telecommunications Act makes clear that Congress never intended to transfer an implied easement to spectrum through the granting of broadcast spectrum licenses.<sup>167</sup> Ultimately, any argument based on easement by prior use would be weak.

### 3. Easement by Prescription Is Unlikely

Similar to adverse possession, easement by prescription occurs when use is without permission (hostile) and done in an open and notorious manner. Where users act as if they have true property rights in an open and notorious manner for a certain period of time, they can often claim that they have gained those rights via easement by prescription.<sup>168</sup> A critical element is that there must be a non-permissive (adverse) nature to the possession with respect to the original owner.

It is doubtful the broadcasters' use of spectrum pursuant to their licenses is sufficiently adverse to invoke such rights. The broadcasters might be able to argue that, via their statements and sales of their business interests to investors, they were acting as owners in direct defiance of the Communications Act of 1934 prohibiting such ownership. According to this theory, they have been acting as owners of the spectrum in an adverse manner for decades and are therefore entitled to quiet title of the spectrum.

However, it would be very difficult for broadcasters to prove that they have been claiming licensed spectrum in a non-permissive

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166. *See id.* at 702-03.

167. *See* 47 U.S.C. § 301 (2006); *supra* note 21 and accompanying text .

168. Adverse possession is a principle of real estate law whereby somebody who possesses the land of another for an extended period of time may be able to claim legal title to that land. The exact elements of an adverse possession claim may be different in each state. To prove adverse possession under a typical definition, the person claiming ownership through adverse possession must show that its possession is actual, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period. *See* Restatement (Third) of Prop.: Servitudes §§ 2.16-17 (2000).

manner under the theory of easement by prescription. Virtually all of the television broadcasters use their spectrum largely in accordance with the licenses the government granted them. To establish the non-permissive element, the broadcasters would have to argue that they acted as though they had an ownership interest and were not merely users of the spectrum. As evidence, the broadcasters might use public statements, statements from financial filings and the like, as well as their purchases and sales of spectrum in a manner that is more consistent with ownership. They could argue this evidence implies they were holding themselves out as having an indefinitely ongoing business interest in the spectrum.

On balance, the broadcasters' argument is ultimately weak. Adverse possession is typically based on non-permissive use of property as opposed to non-permissive claims of ownership. Additionally, the policy rationale of prescriptive easement is intended to reward the long-time user of property by fulfilling expectations fostered by long-term use and penalizes the property owner who sleeps on his or her rights.<sup>169</sup> Hypothetically, a broadcaster with no license who had been using the spectrum for years, or one who has a license and has been using the spectrum for uses above and beyond those permitted by the license for several years might have a reasonable claim for adverse possession. But, such a broadcaster is unlikely to exist. In the present cases, broadcasters followed the terms of the license closely, keenly aware of the possibility that they could be denied license renewal by the FCC if their uses did not comply with the terms of the license. In fact, the policy prescription of prescriptive easement provides a stronger argument to allow the government to reallocate spectrum to higher value use. Moreover, courts generally tend to be leery of granting easement by prescription out of fear of depriving innocent owners of their property. As such, the broadcasters' claim to property rights would find little support in this traditional property rights theory.

### *C. Purchase vs. Assignment of Licenses Should Not Matter*

In many cases, FCC spectrum licenses were purchased at auction. In other cases, they were merely assigned to the current holders at no cost.<sup>170</sup> Under a strict legal analysis, whether a licensed is

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169. Restatement (Third) of Prop.: Servitudes § 2.17, comment c. (2000) (“Prescription doctrine rewards the long-time user of property and penalizes the property owner who sleeps on his or her rights. In its positive aspect, the rationale for prescription is that it rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property.”).

170. See Glen O. Robinson & Thomas B. Nachbar, Communications Regulation 49 (2008).

purchased, or granted by application, is immaterial to whether the license confers property rights.<sup>171</sup> In other words, FCC licenses acquired by either purchase or assignment have equal standing in resolving the ultimate question of whether the licenses bestow property rights. There is some political debate, however, about whether license purchasers have a stronger claim to property rights in their licenses than do assignees, on fairness grounds.

At first blush, the concept of “fairness” suggests that those who paid for their use of the spectrum should have a greater claim to it than those to whom it was merely assigned free of charge. Based on *Fuller* and *Olson*, the government might be able to argue that “fair” compensation that restores users to their original position is much lower for licensees who did not initially pay the government for their licenses. However, licensees who received their spectrum licenses without paying the government (as is the case with all television broadcasters)<sup>172</sup> could offer two counter arguments. The first argument for broadcasters is that the return to “original position” should be measured as their position immediately prior to the taking, as opposed to their position before the property interest was arguably acquired. The second is that the license payments were merely “rent” for the period of the initial license term and they do not provide an additional claim to rights that arose beyond the initial period. A counter-argument to both is that the FCC has asserted its power to change license terms in the middle of a license period, even in the case of licenses for which the holders for the license have paid for their rights.<sup>173</sup> This asserted power notwithstanding, the government is unlikely to terminate a broadcaster’s license in the middle of the license period for practical reasons: the FCC’s view that it can terminate a license in mid-contract has not been tested, since waiting out the remainder of the license term would undoubtedly be easier and cheaper than facing extended litigation.

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171. Mere procurement of a license does not give the license holder vested rights protected by due process. See *Quetgles v. City of Columbus* 491 S.E.2d 778, 781 (Ga. 1997) (denying a takings challenge against a town ordinance restricting business activity permissible under a prior granted license); see also *Munjoy Sporting & Athletic Club v. Dow*, 755 A.2d 531, 537 (Me. 2000) (“Generally, licenses do not create a protected property interest when broad discretion is vested in a state official or agency to deny or approve the application. . . . In such cases, an applicant has little more than an abstract or unilateral expectation in that license.”).

172. Although no broadcasters paid the government for their spectrum licenses, many broadcasters bought their licenses in the secondary market. See David S. Zlotow, Comment, *Broadcast License Auctions and the Demise of Public Interest Regulation*, 92 Cal. L. Rev. 885, 893–99 (2004).

173. *Open Internet Order*, *supra* note 29, at 74–75, ¶ 133. See also *supra* Part II.B.

From a strictly legal perspective, whether or not consideration was given for the initial spectrum rights would have little bearing on whether the holder has property rights.<sup>174</sup> From a political perspective, however, license holders who paid large sums for their initial rights may be in a better position to argue that they should have property rights than those to whom the government simply gave licenses without charge. However, since both will likely be equally situated vis-à-vis the existence of legal property rights, the point may be moot.

*D. As a Whole, Broadcasters' Arguments for Property Rights Based On Traditional Property Law Are Very Weak*

On balance, broadcasters have a relatively weak argument based on traditional property principles for property rights in licensed spectrum. Although they may assert that they have property rights based on theories of adverse possession or easement by prior use, their strongest argument for property rights would be based on easement by estoppel.<sup>175</sup> This theory, combined with arguments based on historical FCC administration of the statutes and implied government promises,<sup>176</sup> may support a property rights theory. However, this argument is quite weak because the licenses and the statutes are clear that no such property rights exist, and Supreme Court precedent gives clear deference to statutory text in interpreting similar property claims and is reluctant to grant estoppel claims against the government.

## V. BROADCASTERS MAY HAVE DUE PROCESS RIGHTS

Although broadcasters are unlikely to possess property rights in their FCC licenses, they may have due process rights that could considerably complicate FCC attempts to reacquire the spectrum. In *Perry v. Sindermann*, the Supreme Court held that reasonable expectations of property rights can give rise to due process rights.<sup>177</sup> *Sindermann* involved a college teacher without formal tenure rights whose contract was not renewed.<sup>178</sup> He claimed that there was an informal system that essentially amounted to tenure.<sup>179</sup> The Court ruled that if “there are such rules or mutually explicit understand-

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174. This is the same point made in the *Open Internet Order*. See *Open Internet Order*, *supra* note 29, at 74–75, ¶ 133.

175. See *supra* Part IV.B.1.

176. See *supra* Part I.D.

177. *Perry v. Sindermann*, 408 U.S. 593, 597–602 (1972) overruled in part on other grounds by *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

178. *Perry v. Sindermann*, 408 U.S. at 594–96.

179. *Id.* at 599–601.

ings that support his claim [of some reasonable expectation of tenure] that he may invoke at a hearing[,]” the teacher was entitled to due process rights to fight his nonretention.<sup>180</sup> The court notes that “[p]roof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency.”<sup>181</sup> These same principles of due process are equally applicable in the broadcasting context. Although they have no formal property interest, the broadcasters’ expectations of continued use likely entitle them to some form of due process before they could be stripped of their rights in the middle of a license period. However, as there is no requirement for a “hearing on the record” for FCC license disputes, the due process procedure is likely to be in the form of an informal adjudication, which would somewhat mitigate the administrative burdens on the FCC. Moreover, if a broadcaster’s license is simply not renewed at the expiration of the license period, in accordance with Congressional legislation, the broadcaster would not likely be found to have due process rights based on the clear text of the law that denies them property rights. However, the broadcaster would have standing under the Administrative Procedure Act to seek judicial review of an FCC decision not to renew its license. This could be a significant administrative challenge for the FCC.

*A. Congress Can Simplify the FCC’s Process*

Congress and the FCC could coordinate efforts to avoid the necessity of the FCC undertaking a rulemaking or adjudication process. Specifically, Congress could simply pass legislation to eliminate the broadcasters’ rights upon renewal and reallocate the spectrum for mobile broadband, with or without payment to the broadcasters. The right to appeal a termination of a benefit by an agency such as the FCC does not apply to Congressional actions. Therefore, any of the broadcasters’ asserted rights would simply terminate cleanly under this new legislation. If, however, such legislation merely gives discretion to the FCC to create a rulemaking process to determine new uses for the broadcasters’ spectrum, the FCC would still have to engage in a rulemaking process. If such legislation also grants the FCC discretion to determine which broadcasters’ licenses to terminate, constitutional due process considerations per *Sindermann* would require an adjudication hearing for each termination.

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180. *Id.* at 601.

181. *Id.* at 603.

On February 24<sup>th</sup>, President Barack Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act).<sup>182</sup> Title VI of the Act gives the FCC authority to conduct a voluntary auction process for television broadcast spectrum.<sup>183</sup> This authorization would enable the FCC to conduct a two-step auction process: the first step is a “reverse-auction” to determine the price at which broadcasters would surrender their spectrum, while the second step would be an auction of the spectrum to parties who would use it for mobile broadband service.<sup>184</sup> Prior to such legislation, the FCC had no authority to compensate the broadcasters for their spectrum. However, though the legislature has offered a tool by which the FCC can reallocate useful spectrum, the process is not yet at its end. Currently, the main drawback of the voluntary auction legislation is that some broadcasters (each owning licenses in different frequencies, and in different broadcast markets) undoubtedly will choose not to participate. Under this scenario, the FCC would reclaim a patchwork of frequencies across the country instead of continuous blocks of nationwide spectrum that nationwide broadband services can efficiently use.<sup>185</sup> More significantly, the FCC may additionally encounter broadcaster “holdouts” that prevent it from reallocating enough spectrum in certain markets. Television broadcasters are opposed to any involuntary changes to their licenses. However, to ensure that the reallocation of spectrum will be effective, the FCC will likely need a means for moving some non-participating broadcasters off the spectrum. The Spectrum Act does not contain such a mechanism.

Despite general universal agreement on the importance of the reallocation of television broadcast spectrum, there is legislative silence with respect to the FCC’s power to force television broadcasters to vacate their licenses. This is likely due to the reality that politicians generally distance themselves from any action that is unpopular with broadcasters.<sup>186</sup> One possible explanation is that

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182. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 [hereinafter Spectrum Act].

183. *Id.* §§ 6401–14.

184. *See id.* §§ 6402–03.

185. Joan Engebretson, *FCC Chairman Spars with Broadcaster Over Voluntary Incentive Auctions*, Connected Planet (Mar. 21, 2011), <http://blog.connectedplanet-online.com/unfiltered/2011/03/21/fcc-chairman-spars-with-broadcasters-over-voluntary-incentive-auctions/>. Some of the problems associated with non-contiguous spectrum may be mitigated by additional proceedings to “repack” the remaining broadcasters’ spectrum.

186. For a detailed journey through the history of the cozy relationship between American politicians and broadcasters see Tim Wu, *The Master Switch* (2011). For a more generalized introduction to the topic of “regulatory capture,” see Adam Thierer, *Regulatory Capture: What the Experts Have Found*. *The Technology Liberation Front* (Dec. 19, 2010),

regulations give broadcasters significant flexibility to give sitting politicians airtime for “bona fide news” events without violating rules requiring that they provide “equal coverage and equal time” to (qualified) political candidates.<sup>187</sup> As a result, most members of Congress are loath to offend broadcasters in their district. Therefore, it is understandable that Congressional passage of the Spectrum Act, which avoids an adjudication process via a voluntary return of spectrum licenses, though it eliminates broadcasters’ protest rights, was highly favorable to the broadcasters. Alternatively, Congress could have chosen to pass legislation that left more of the contentious details for the FCC to determine in a rulemaking and/or adjudication process.

*B. At Least One Rulemaking Process Will Be Necessary*

As mentioned above, the Spectrum Act does not allow the FCC to easily sidestep a rulemaking process. Even though the legislation provides the FCC with the authority to compensate broadcasters for spectrum it reallocates, and sharply limits the FCC’s options for rulemaking,<sup>188</sup> the FCC will nonetheless need to conduct a rulemaking process to determine the details of the auction process. However, without this legislation, the text of section 204 of the 1996 Act allowed the FCC the option to deny renewal of the broadcasters’ licenses.<sup>189</sup> The FCC could then reassign the newly available spectrum to use by mobile broadband operators. Thus, the FCC would theoretically have been able to make the change itself without the new Congressional legislation. The Spectrum Act does not, however, allow the FCC to invoke such a renewal denial during the auction process.<sup>190</sup> The FCC may yet, however, resort to this process to handle holdouts in certain markets after the auction process authorized in the Spectrum Act is completed, or in future spectrum reallocation processes. If the FCC were to engage in such renewals and reassignments after the action, however, it would no longer have the authority from the auction authorization to compensate the broadcasters for the spectrum.<sup>191</sup> As such, the FCC’s

<http://techliberation.com/2010/12/19/regulatory-capture-what-the-experts-have-found>.

187. See *Election Coverage and Equal Time*, Radio Television Digital News Association, [http://www.rtnda.org/pages/media\\_items/election-coverage-and-equal-time1600.php](http://www.rtnda.org/pages/media_items/election-coverage-and-equal-time1600.php) (last visited Oct. 30, 2011). For the relevant statute and FCC rule, see 47 U.S.C. § 315 and 47 C.F.R. § 73.1941, respectively.

188. Spectrum Act, *supra* note 182, §§ 6401-14.

189. See 47 U.S.C. § 309(k), codified as amended at 47 U.S.C. § 309(k)(1)(A) (2006) Telecommunications Act of 1996, Pub. L. No. 104-104, § 204(a)(1), 110 Stat. 56, 112-113 (codified as amended at 47 U.S.C. § 309(k)(1)(A) (2006)).

190. Spectrum Act, *supra* note 182, § 6403(g).

191. *Id.* §§ 6403(b)(4), (d).

ability to invoke a license denial and reassignment per section 204 of the 1996 Act after the auction process if it does not meet its spectrum goals remains a potent “stick” to encourage broadcasters to participate in the auction. It also remains a tool for the FCC in future spectrum reorganization processes for television broadcasters and other FCC licenses holders.

Absent additional new legislation, however, denying renewal of television broadcast spectrum licenses and reassignment for use by mobile broadband providers would likely to involve a challenging two-step process. First, the FCC would have to undertake a rule-making process to determine whether renewal of the broadcasters’ spectrum licenses is in the public interest.<sup>192</sup> Second, the FCC would need to conduct a rulemaking process to change the allocation of the newly released spectrum from broadcast to mobile broadband usage.

#### 1. Decision to Not Renew Broadcasting Licenses Likely Needs Rulemaking

Major policy changes, such as not renewing broadcasters’ licenses after decades of routinely doing so, generally require government agencies to conduct a rulemaking process. Absent a requirement of a hearing “on the record,” the FCC would be able to use an informal rulemaking process to determine that the current broadcast use is not in the public interest. Such a process would enable the broadcasters and their supporters to enter comments and data into the record for the FCC to consider. The FCC would be obligated to promulgate its policies using a rational and logical process based on the information in the record. This process would also give the broadcasters ample opportunity to enter their objections into the record. The FCC would be obligated to evaluate the objections objectively. With these requirements, applying an informal process outlined to the FCC’s adoption of a new policy regarding spectrum reallocation could take a year or more.

The FCC may have been positioning itself to avoid a rulemaking process with the *Open Internet Order*, which implies that current rules allow it to make these changes in license renewal and spectrum usage, even in the middle of a license period.<sup>193</sup> However, any such action would be a significant change from historic practices. The FCC may wish to conduct a detailed rulemaking process in

192. Even though the prohibition on comparative use was not meant to convey property rights to broadcasters, the FCC likely cannot deny license renewal and divert the spectrum to a higher value use in one fell swoop. Such an action would likely be found to be a prohibited comparative use basis. *See supra* Part I for a discussion of the 1996 Act and the issue of comparative renewal.

193. *Open Internet Order*, *supra* note 29, at 74–75, ¶ 133. *See also supra* Part II.B.

order to avoid a judicial finding that its decision to not renew broadcasters' spectrum licenses is "arbitrary and capricious."<sup>194</sup> Without a rulemaking process, the first broadcaster whose spectrum license renewal is denied could argue that, in the tens of thousands of prior renewals in more than 70 years of the FCC's existence, all broadcasters had their licenses renewed absent egregious violations of the license terms. This first "deprived" broadcaster could further argue that, since it was in the same position as the others, the decision to take its spectrum must have been arbitrary or capricious.

To avoid a tedious rulemaking process for a decision not to renew broadcasters' licenses, the FCC could issue a policy statement that gives notice of its new plans to legally reclaim broadcasters' licenses, and the *Open Internet Order* may give it some room to do that.<sup>195</sup> However, an FCC licensee, especially one who did not pay the government for its license (as is the case with all broadcast licenses) may be viewed a benefit holder, with respect to whom changes in policy may require a rulemaking.

One example where a policy change required a rulemaking is *National Family Planning Association, v. Sullivan*, where the D.C. Circuit held that the U.S. Department of Health and Human Services needed to conduct a rulemaking process when it suddenly changed its application of an earlier regulation, which had previously strictly restricted abortion counseling in Title X funded public health programs.<sup>196</sup> The agency had vigorously and successfully defended their previous regulation against statutory and constitutional challenge in the Supreme Court, all the while maintaining that the strict prohibition was mandated by the relevant statutory language.<sup>197</sup> However, the agency subsequently "reinterpreted" both the statute and its own regulations.<sup>198</sup> The court held that in order to effect this change, the agency must engage in a formal rulemaking procedure that satisfies the notice and comment requirements of the Administrative Procedure Act.<sup>199</sup> The court in its holding restates the maxim of administrative law, that "[i]f a second rule repudiates or is irreconcilable with [a prior legislative interpreta-

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194. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1966).

195. *Open Internet Order*, *supra* note 29, at 74-75, ¶ 133.

196. *Nat'l Family Planning Ass'n v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992).

197. *See Rust v. Sullivan*, 500 U.S. 173 (1991)

198. *Nat'l Family Planning Ass'n v. Sullivan*, 979 F.2d at 230.

199. *Id.* at 241 ("[T]he law seems clear that when an agency adopts a new construction of an old rule that repudiates or substantially amends the effect of the previous rule on the public, after the old interpretation of that rule has been advanced as a necessary interpretation of the statute and has been argued to and validated by the Supreme Court, the agency must adhere to the notice and comment requirements of § 553 of the APA."); *see also* 5 U.S.C. § 553(b) (2006).

tion], the second rule must be an amendment to the first; and, of course, an amendment to a legislative rule must itself be legislative.”<sup>200</sup> In the context of the broadcasters’ license renewals, the FCC may need to engage in a rulemaking process to ensure any decision to take away or not renew a television broadcaster’s license can withstand judicial review.

To summarize, if the FCC elects to forego a rulemaking process and simply issues a policy statement (as it suggests it could do in the *Open Internet Order*),<sup>201</sup> and even if the FCC is able to avoid triggering an adverse judicial ruling with respect to the declared policy, judicial review of each individual subsequent adverse adjudication against broadcasters is still likely to be held to the *Chevron* standard of review for agency actions.<sup>202</sup> Under this standard, the court is required first to verify if the agency’s decision is in line with Congressional intent.<sup>203</sup> If Congressional intent was not clear, the court must then ask if the agency’s decision was “based on a permissible construction of the statute.”<sup>204</sup>

On the other hand, and in contrast to the scenario in which the FCC merely issues a policy statement, if the agency instead undertakes a rulemaking process to broadly deny renewal of broadcast licenses, only that single rule will be subject to the *Chevron* standard of review. Each individual adjudication reached under that rule would only be subject to the even more highly deferential *Seminole Rock* standard, whereby the court merely asks whether an agency’s interpretation of its own rules was “plainly erroneous.”<sup>205</sup> It would likely be much easier for the FCC to manage a single rulemaking on non-renewal of broadcast license that would be held to the *Chevron* standard, rather than to risk hundreds of individual appeals that would be subject to the same standard.

## 2. Rulemaking Still Needed to Reallocate Spectrum

After cancelling or not renewing certain broadcasters’ licenses, the FCC would then need to conduct a separate rulemaking process to reallocate the spectrum for mobile broadband use. The allowable uses of the spectrum used by the television broadcasters is codified in regulation as being only for television broadcasting.<sup>206</sup> According to the “*Accardi* Principle,” agencies must follow their

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200. *Id.* at 235 (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 396).

201. *Open Internet Order*, *supra* note 29, at 74–75, ¶ 133.

202. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

203. *Id.*

204. *Id.*

205. *Bowles v. Seminole Rock*, 325 U.S. 410, 414 (1945).

own rules, unless, that is, they make a new one.<sup>207</sup> In *Accardi*, the petitioner appealed to the Board of Immigration Appeals to suspend his deportation from the United States but was denied.<sup>208</sup> The petitioner challenged the denial on the basis that the Attorney General prejudged its outcome and prevented him from receiving a fair hearing by the board.<sup>209</sup> The administrative rules of the Immigration and Naturalization Service gave the Board of Immigration Appeals discretion when considering appeals.<sup>210</sup> The Court ruled that the Attorney General was required to follow the agency's rules, and that discretionary authority granted to the Board of Immigration Appeals meant that the Attorney General could not "sidestep the Board or dictate its decision in any manner."<sup>211</sup> Analogizing to the broadcasting context, the current rule is that the spectrum licensed is to be used for over-the-air television broadcasts. Absent new Congressional legislation or an FCC rulemaking process overturning this rule, the FCC is likewise bound by it.

### C. Elements of Due Process in Adjudication to be Decided

The FCC does not plan to cancel or not renew all television broadcasters' spectrum and reassign it to mobile broadband.<sup>212</sup> Unless the FCC makes a blanket rule that determines which of the broadcast licenses to renew, it will need to determine license renewals individually. Even with the proposed incentive auction legislation, the FCC will likely need to determine which television broadcasters should be given the option to participate in the incentive auction, and which ones should be forced into a sale so that the FCC can reclaim contiguous blocks of nationwide spectrum. If the FCC makes subjective individual decisions regarding each broadcaster, then each broadcaster whose license is taken away should also be entitled to an adjudication process. Broken down, the general considerations of due process with respect to the adjudication are: (1) whether the broadcasters are entitled to due process pre-deprivation (i.e., before their license is not renewed or revoked) or whether they are merely entitled to a post-deprivation appeal; (2) if

206. 47 C.F.R. § 2.106 (2011), available at [http://edocket.access.gpo.gov/cfr\\_2009/octqtr/pdf/47cfr2.106.pdf](http://edocket.access.gpo.gov/cfr_2009/octqtr/pdf/47cfr2.106.pdf) (last visited May 15, 2011) (showing a table of spectrum allocations).

207. *Accardi v. Shaughessy*, 347 U.S. 260 (1954). See Thomas W. Merrill, *The Accardi Principle*, 74 Geo. Wash. L. Rev. 569, 604 n. 232 (2006).

208. *Accardi* at 263.

209. *Id.* at 263-65.

210. *Id.* at 266.

211. *Id.* at 266-67.

212. The National Broadband Plan calls for initially using 120 MHz of the broadcasters' 294 MHz of spectrum for mobile broadband. See *National Broadband Plan*, *supra* note 3, at 88 (Recommendation 5.8.5).

the broadcasters are entitled to pre-deprivation process, whether they are entitled to an in-person hearing or merely a review process based on written appeals; and (3) if the broadcasters are entitled to an in-person hearing, whether the hearing would include certain procedural elements, including the right to cross examine the government's witnesses.

### 1. Balancing Test for Extent of Due Process Elements

The due process requirements for an informal adjudication can still be substantial. In *Mathews v. Eldridge*, the Court held that a recipient of Social Security disability benefits was entitled to some process prior to deprivation of those benefits.<sup>213</sup> In determining the extent of due process protections required, the Court established a test balancing three distinct factors: (1) the importance of the interests at stake; (2) the risk of an erroneous decision; and (3) the interest of the government.<sup>214</sup> This framework was intended to balance the due process rights with the needs of the government.

### 2. Application of Balancing Test to Broadcasters

We consider each of the three elements in *Mathews*:

First, the importance of the private interests at stake is quite high. From the broadcasters' perspective, their licenses are very valuable. They are potentially worth, on average, about \$3.0 million each. This figure is based on an estimated enterprise value of the U.S. television broadcasting industry of \$62.2 billion<sup>215</sup> and \$63.7 billion.<sup>216</sup> As about 10% of television viewing occurs over-the-air, the value of the industry is likely to be approximately 10% of this figure, or \$6.0 to \$6.5 billion.<sup>217</sup> As there are approximately 2200 television licenses (including nearly 500 low power licenses), this equates to an average broadcaster license value of between \$2.8 and \$3.0 million per license.<sup>218</sup> The significant dollar amounts

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213. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

214. *Id.* at 335 (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

215. Bazon, *supra* note 158, at 14 tbl.3.

216. *National Broadband Plan*, *supra* note 3, at 89 & 102 n.87.

217. A television broadcaster's value is roughly in proportion to the number of viewers that it reaches, since viewers are the basis of a station's advertising revenue.

involved strongly suggest the broadcasters are entitled to meaningful due process.<sup>219</sup>

Second, the risk of error is low, but not insignificant. While it does not seem that the broadcasters have a strong case, there are ambiguities and some potential estoppel arguments, similar to those in *Sindermann*.<sup>220</sup> The cost of an error is quite high, as a broadcaster whose license is revoked may lose its business. Even if its license were later restored, this would not compensate it for its lost business or its viewers who have lost a source of content in the interim. The risk of error and the need to clarify the broadcasters' rights weigh in favor of a detailed process.

Third, the fiscal and administrative burdens of procedural protections on the government are heavy, but the FCC is a significant government agency able to bear this burden.<sup>221</sup> Given the large potential value to society in reallocating the licenses and the prospect of potentially depriving some broadcasters of a viable business model, it would seem that the government would be able to devote significant resources to addressing the issue. This is especially true as the reallocation of spectrum is a task the government

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218. The enterprise value of a television broadcast station is largely proportional to its number of viewers. Thus, a broadcast station's loss of approximately 10% of viewers (over-the-air) through the loss of their FCC license is likely to result in a reduction of value by approximately 10%. While TV broadcasters own other business assets (e.g. equipment) they are generally not included separately in an ongoing business valuation since they do not generate any revenue without the requisite viewership and are needed for the station to maintain its viewers. Moreover, the actual value of a specific license is likely to vary widely depending on the specific geographical location and circumstances of the particular broadcaster. On one hand, the licenses reacquired would be disproportionately located in larger markets where frequency is limited and broadcaster values are higher. On the other hand, the FCC would presumably focus on reacquiring the weakest, and hence the cheapest broadcasters in each market. While a detailed study of broadcast station losses from the loss of spectrum licenses would be beyond the scope of the Article, the industry average of \$2.8 to \$3.0 million per broadcaster is, on balance, a reasonable estimate.

219. Note that if the must-carry rights that attach to the broadcasters' licenses are included, the valuation would likely be much higher, strengthening the broadcasters' argument.

220. See *supra* Part V.

221. The third factor in the *Mathews* test considers the cost to society resulting from additional procedure. *Mathews v. Eldridge*, 424 U.S. 319, 347-348 (1976) ("[T]he final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring . . . an evidentiary hearing upon demand in all cases. . . . [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.").

is voluntarily assuming in order to provide greater value to society. This is not the case of a small, impoverished government agency that has to deal with a problem that is suddenly thrust upon it wherein a government agency plea for administrative relief might be more convincing.

### 3. Likely Requirement for Broadcasters' Due Process in Any Adjudication Process

Courts have generally held that people who are deprived of a benefit are owed some due process prior to deprivation. To the extent the FCC relies on the Spectrum Act to modify or cancel a broadcaster's license, the broadcaster does not have a right to protest.<sup>222</sup> However, as previously mentioned, the FCC may ultimately use a process other than that provided in the Spectrum Act, after the auction concludes, to clear sufficient spectrum. In such a situation, the broadcasters' right to protest would no longer be curtailed. In *Bell v. Burson*, the Court held that before a State could suspend a driver's license, pursuant to a statute that required uninsured drivers involved in an accident to post security claimed by aggrieved parties, it must provide a forum to determine whether there is a reasonable possibility that the driver will ultimately be found liable as a result of the accident.<sup>223</sup> Likewise, in *Goldberg v. Kelley*, the Court ruled that a State cannot deprive a welfare recipient benefits without affording a pre-termination evidentiary hearing.<sup>224</sup> However, in *Gilbert v. Homar*, the Court ruled that a State did not violate due process by suspending (without pay) a police officer, who was arrested on drug charges, nor was he owed a hearing before being temporarily transferred to non-police related duties.<sup>225</sup> This series of cases suggests that a pre-deprivation hearing is generally owed to a person who will be deprived of a benefit unless practical concerns (e.g., public safety, as in *Gilbert*) require otherwise.<sup>226</sup> According to this reasoning, the broadcasters are, in all likelihood, due a hearing before their licenses are withdrawn during their license period. The government will not be able to show the type of urgency that existed in *Gilbert*. However, support for a hear-

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222. Spectrum Act, *supra* note 182, § 6403(h).

223. *Bell v. Burson*, 402 U.S. 535, 539-40 (1971).

224. *Goldberg v. Kelly*, 397 U.S. 254, 263-66 (1970).

225. *Gilbert v. Homar*, 520 U.S. 924, 930-32 (1997).

226. Case law (e.g. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)) suggests that the amount of process due is balanced against the extent of the harm done if the action is ultimately incorrect, and the likelihood that the decision could be in error. Applying such principles to, e.g., *Gilbert*, there is relatively little harm in suspending the officer; if he is ultimately cleared, he can be reinstated and compensated with back pay. *See Gilbert*, 520 U.S., at 930-32.

ing is much weaker if the government (as is widely expected) simply denies renewal at the end of the broadcasters' five-year license periods.

If they are owed a hearing, the broadcasters will likely have the right to an in-person hearing. In *Cleveland Bd. of Educ. v. Loudermill*,<sup>227</sup> the Court ruled that public sector employees were only entitled to tell their side of the story through filing a paper form, later dubbed a "Loudermill Letter," before being fired for failing to disclose a felony conviction. There, the evidence of the felony convictions was strong, resulting in little risk of error. Moreover, in the case of error, employees can simply be reinstated.<sup>228</sup> However, the *Loudermill* criteria do not apply to the broadcasters. If broadcasters' spectrum is taken away, their businesses may soon fail, and simply returning it months, or years, later will not sufficiently compensate them or their viewers. Moreover, the 1934 Act calls for:

[A] full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.<sup>229</sup>

While the text does not specifically call for the hearing to be in-person, the requirement for "the applicant and all other parties" to be "permitted to participate" suggests that this is the case. Broadcasters are likely entitled to due process in the form of an in-person hearing before an impartial judge and a full explanation of the decision before their spectrum rights are taken during the term of their licenses.

It is not clear if the government will owe the broadcasters the right to cross-examine the government's witness. On the one hand, the text of the 1934 Act does not call for a "hearing on the record," which would signal a requirement for a formal adjudication with formal procedures such as the cross-examination of witnesses. Rather, the 1934 Act only requires a "full hearing," signaling that informal adjudication processes that do not require the government to offer the broadcasters a full evidentiary hearing would be sufficient due process. On the other hand, if there are disputed issues, formal procedures such as cross-examination of witnesses are important to prevent a decision from appearing arbi-

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227. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

228. The court's decision in *Loudermill* rested explicitly on the fact that Ohio laws provided for a full post-termination hearing. *Id.* at 546.

229. 47 U.S.C. § 309(e) (2006).

trary or capricious. In *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*, the Court ruled that courts cannot impose additional requirements on an agency beyond those required to meet the needed standard for an informal rulemaking or adjudication.<sup>230</sup> However, courts can declare the process to be arbitrary or capricious if they determine that the agency did not have appropriate information to make its determination. Allowing cross-examination of witnesses can often flesh out an issue so that it does not appear arbitrary to a reviewing court.

Ultimately, the FCC will have to decide whether granting the opportunity for cross-examination of witnesses as part of a pre-deprivation due process hearing will make its decision appear less arbitrary. Cross-examination is time consuming and arguably unnecessary since the issues seem straightforward. On the other hand, providing for cross-examination will increase the odds that a reviewing court will uphold the agency's decision. Given the challenges of the adjudication process, the FCC would likely try to avoid this approach and seek a blanket rulemaking formula that does not require individual adjudications. Given the differing spectrum needs in different markets, however, such a "one size fits all" blanket rule may be difficult to develop.

#### VI. BROADCASTERS LIKELY HAVE RIGHT TO JUDICIAL REVIEW OF ADVERSE DECISIONS

Even if the broadcasters were not afforded due process rights, they would be able to appeal any FCC decision adverse to their individual interests in a judicial proceeding. The text of denial of protest rights to broadcasters in § 6403(h) of the Spectrum Act does not appear to apply to judicial review, but rather limited to FCC agency review under 47 U.S.C. §316. A deprivation of such a fundamental right as judicial review would undoubtedly have been explicitly stated by Congress. A broadcaster whose license rights have been cancelled under the procedures in the Spectrum Act or via another FCC process, would be able to challenge the denial of renewal or terms of a forced sale of their individual licenses. This would include a determination of the level of payment in a forced sale that enables the FCC to reclaim blocks of nationwide spectrum. There are three primary levels on which the television broadcasters could try to fight an FCC decision to take away or not renew their license. The first is to argue that any Congressional legislation was unconstitutional or improperly interpreted. The second is to invalidate any rulemaking process on which the FCC's adverse

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230. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 523-24 (1978).

action is based. The third is for the individual television broadcasters to attack any adjudication made pursuant to the rule that takes away or does not renew their specific license.

#### A. *Attacking Congressional Legislation*

If Congress passes legislation that terminates broadcasters' licenses upon renewal, the broadcasters might argue that the legislation caused an unconstitutional deprivation of property. As discussed earlier,<sup>231</sup> this approach is unlikely to succeed. Alternatively, the broadcasters may argue that the Spectrum Act or other future legislation was somehow misread when applied by the FCC. Absent an extraordinary mistake on the part of Congress or the FCC, this approach is also unlikely to succeed. Although the broadcasters are unlikely to prevail on either of these claims, this approach could force the government into a politically charged legal battle. Notwithstanding the fact that any such legislation would likely be upheld,<sup>232</sup> political pressure may make it hard for Congress to act.

#### B. *Routes for Broadcasters to Attack FCC Rulemaking*

Assuming the FCC pursues a rulemaking process as opposed to a policy statement or Congressional legislation that eliminates the need for rulemaking, the broadcasters can appeal the subsequent decision to a court. The court would not conduct a *de novo* review. Rather it would review the agency action under the "*Chevron* test" to determine whether: 1) the decision was within the power granted to the agency by Congress; 2) the law was clear; and 3) the agency decision was a reasonable interpretation of the FCC's delegated responsibilities.<sup>233</sup>

##### 1. Did the FCC have the Authority to Make the Rule?

The first question under the *Chevron* test is whether the rulemaking (i.e., the decision to withdraw or not renew the broadcaster's license) is within the FCC's statutory authority. The FCC's charter indicates the agency was formed:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United

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231. *See supra* Part I-IV.

232. *See supra* Part V.A.

233. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984).

States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.<sup>234</sup>

This charter language clearly gives the FCC authority to regulate the use of electromagnetic spectrum in the U.S. This grant of power, combined with the FCC's long history of regulation in this area and the fact that Congress has not already passed controlling legislation to the contrary, compels the conclusion that the FCC possesses statutory authority to revoke or refuse to renew broadcasting licenses and to regulate the use of spectrum. The Spectrum Act does not put significant limits on the FCC's approach to the auction and the FCC must be prepared to defend its auction processes as consistent with the legislation.

## 2. Was the Law Clear?

The second question the court would ask is whether the rule-making is in violation of the law. As previously argued,<sup>235</sup> Courts are likely to find that declining to renew broadcasters' licenses is legal based on current U.S. laws as the current underutilization of spectrum is not in the public interest. Likewise, given the sweeping nature of the FCC's charter, as well as its history of regulating spectrum allocation, it is nearly certain that a court would find the reallocation of spectrum from an underutilized application (television broadcasting) to one that is in greater demand (mobile broadband) to be consistent with the laws governing the FCC. Moreover, neither action would violate Congressional intent because there is no other body or law or regulatory agency overseeing electromagnetic spectrum in the U.S. However, the specific limits placed on the FCC by the Spectrum Act may provide more room for judicial challenge of rules made under it.

## 3. Was the Rule Permissible?

The third question is whether the rule is a permissible interpretation of the agency's delegated responsibilities. The courts would

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234. 47 U.S.C. § 151 (2006).

235. See *supra* Part I-IV.

likely construe an FCC adjudication that takes away a broadcaster's license or that reallocates its spectrum, pursuant to its own rulemaking, to be an interpretation of its own rules. Thus, the FCC would be given considerable deference to answer these questions. The court would not conduct a *de novo* review of whether the ruling was appropriate. It would, however, review the record to ensure that the agency decision was reasonable and supported by sufficient evidence. Therefore, the FCC would have to compile a substantial record with all of the information underlying its decision, including reports of any advisory committees, expert testimony, comments, and responses thereto. Based on this record, the FCC would need to show that its decision was the result of a rational process and was not "arbitrary and capricious."

The FCC should not have a problem assembling a record that demonstrates that its decisions not to renew broadcaster's licenses and to reallocate television broadcasting spectrum to mobile broadband resulted from a reasonable process that was not arbitrary and capricious. It is widely agreed that the television broadcasters' current underutilization of the spectrum is suboptimal and not in the public interest, and that mobile broadband usage would provide more utility to society. However, given the large number of interested parties and comments, the process of assembling a record to demonstrate that its action resulted from a rational process is likely to be extremely time and resource consuming for the FCC. Moreover, any error in assembling the record may result in court-ordered remedies that further delay the process.

Ultimately, the FCC should, at considerable time and expense, be able to conduct rulemaking processes that can withstand court challenges so that it can reallocate the broadcasters' spectrum to mobile broadband use.

### C. Routes for Attacking an Adjudication

In addition to appealing the rulemaking process, if there is an adjudication process,<sup>236</sup> individual adjudication proceedings that result in adverse decisions to the broadcasters would be subject to judicial appeal. In adjudication, the FCC would likely be considered to be interpreting its own rules. As such, a reviewing court would likely give the FCC considerable deference under the *Seminole Rock* standard.<sup>237</sup> The *Seminole Rock* standard defers to the agency's interpretation of its own rules unless it is "plainly erro-

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236. An adjudicatory process remains possible if a decision is challenged on the basis that it is made outside of the authority granted in the Spectrum Act.

237. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

neous” or inconsistent with the regulation.<sup>238</sup> As a result, while the FCC would need to run any adjudication processes carefully, the broadcasters would be unlikely to overturn a reasonable rulemaking decision. Notwithstanding the FCC’s likely ability to withstand these challenges, it would face a potential drain on its administrative resources as there would likely be hundreds of these procedures and potentially hundreds of appeals.

As mentioned previously, if the FCC elects to forego a rulemaking process and instead issues a policy statement suggesting that it can take away or choose not to renew broadcast licenses,<sup>239</sup> judicial reviews of adjudications are likely to be held to the *Chevron* deference standard. This less deferential standard would require determining whether the agency’s decision was a “reasonable interpretation” in each individual case. The policy statement approach would give broadcasters significant opportunity to encumber the FCC in protracted judicial appeals of any adverse adjudication. Either way, the FCC risks getting bogged down in lengthy appeals by broadcasters, but its choice to engage in rulemaking versus a policy statement may determine the standard of review of those appeals. A rulemaking would require more agency work upfront, but would likely save considerable resources when defending its decision.

Ideally, from the FCC’s perspective, Congress would pass legislation eliminating the need for FCC rulemaking and adjudications. As mentioned above, this may not be politically feasible.<sup>240</sup> Such a result would considerably complicate the FCC’s situation. The Spectrum Act’s elimination of protest rights under 47 U.S.C. § 316, however, should eliminate significant internal FCC review processes.

## VII. THE NEED FOR A CLEAR POLICY

As explained above, the FCC has taken the position that broadcasting licenses do not confer property rights, even during the license period. However, in order to revoke, or refuse to renew licenses, the FCC would need to engage in a lengthy and expensive involuntary process against the television broadcasters. Moreover, such action would require the FCC to maintain a delicate balance to avoid devaluing the spectrum rights. To the extent the FCC adopts the position that it can take away spectrum rights before the end of the term, even when the license holder pays for the license, it undermines its ability to maximize the revenue it might receive from re-auctioning the spectrum in the future. Perhaps equally

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238. *See id.*

239. *See Open Internet Order*, *supra* note 29, at 74–75, ¶ 133.

240. *See supra* Part V.B.

importantly, uncertainty about their license rights may also discourage license holders from investing in their spectrum and thus deny U.S. residents the very access to advanced mobile broadband service the FCC is trying to encourage. The uncertainty about spectrum license rights would also have similar repercussions for other FCC spectrum licenses, as well as other government licenses including mineral licenses and water use licenses.<sup>241</sup>

In order to maximize its license revenue and investment in the build-out of services, the FCC will need to clearly spell out its policy regarding the rights of spectrum license holders. The lack of a clear policy creates unnecessary uncertainty that lowers the value of the licenses and discourages the very investment in communications services the FCC seeks to encourage.

#### CONCLUSION – THE GOVERNMENT NEEDED TO FUDGE THIS ROUND

For the purpose of reallocating television broadcasting spectrum, practical and political reasons suggest that the most expeditious solution is for the government to negotiate a price to buy out the television broadcasters that is more generous than the minimal legal compensation required to provide broadcasters due process. However, even this approach raises various concerns. On one hand, it will be difficult for the government to find a legal justification for such a payment without facing legitimate claims of waste of government assets. On the other hand, it would be difficult to maximize the value of future FCC spectrum auctions or motivate licensees to make investments in deploying advanced services on their licensed spectrum if the FCC has a policy of depriving licensees of their expected license rights. Finding a solution that pays the broadcasters as little as possible to clear the political hurdles needed to get the broadcasting spectrum back in a timely manner while not harming its longer-term interests was likely difficult and required a highly pragmatic approach. A principled approach that sets significant precedents would likely harm its long-term interests. Finding a solution that meets all of these needs is undoubtedly a difficult challenge.

Perhaps this is why the FCC and Congress have been struggling with the issue for so long, and have decided to seek a “voluntary incentive auction,” whereby broadcasters will not be forced to give up their licenses, but instead be encouraged to do so in return for some “carrot” in the form of a payment.<sup>242</sup> While the FCC has not commenced its rulemaking process, the Spectrum Act indicates

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241. *See supra* Part II.A-B (noting similarity between grazing licenses and spectrum licenses).

that the FCC must base the auction price on the result of a “reverse auction” to determine broadcasters asking price to turn in their spectrum.<sup>243</sup> This payment will likely reflect a discount to the market value of the spectrum to its higher value use for mobile broadband, but perhaps a slight premium to the broadcasters’ current use value. The “stick” to encourage broadcasters’ participation in the voluntary process is the FCC’s argument that it is able to modify the licenses at any time and the implicit threat to take the spectrum away. While the Spectrum Act prevents the FCC from doing this during the auction process, it could resort to this process after the auction to clear spectrum in problematic markets with holdout broadcasters. Given the large economic growth multiplier effects from expanding broadband connectivity, however, the government is motivated to act quickly. Ultimately, a payment that exceeds the broadcasters’ current use value may be the most expeditious solution to move the television broadcasters off the spectrum. While such a payment would not, absent recent legislation, be legally required, and it would effectively give the television broadcasters an economic right in their spectrum, it would make room for the higher value mobile broadband applications, which will ultimately benefit society as a whole.<sup>244</sup>

Such incentive auctions could not be conducted without congressional authorization. If Congress did not pass appropriate legislation, the administrative hurdles to reclaiming broadcast television spectrum and auctioning it for higher value mobile broadband use in a timely manner may have been insurmountable. In such a case, the FCC may have simply decided to grant the broadcasters the rights to use their spectrum for higher value mobile broadband applications. Such a decision would have been an extremely unfortunate dissipation of government resources by granting the broadcasters an unearned windfall. Nevertheless, similar challenges face the FCC in the event the auction process under the Spectrum Act fails to clear sufficient spectrum or the FCC seeks to reacquire spectrum from other license holders.

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242. *National Broadband Plan*, *supra* note 3, at 90 (“The preference is to establish a *voluntary*, market-based mechanism to effect a reallocation, such as [] incentive auctions . . . .”) (emphasis added).

243. Spectrum Act, *supra* note 182, § 6403(a).

244. The FCC recommends that Congress expand its powers to offer various incentive auctions to incumbent licensees largely because “Contentious spectrum proceedings can be time-consuming, sometimes taking many years to resolve, and incurring significant opportunity costs. One way to address this challenge is by motivating existing licensees to voluntarily clear spectrum through incentive auctions.” See *National Broadband Plan*, *supra* note 3, at 81 (Recommendation 5.4).

Finally, it will be essential for the government to develop coherent standards for the rights and obligations for spectrum license holders going forward. Future spectrum policy must provide certainty to license holders, so as to encourage them to invest in new services, while maintaining the government's ability to direct use of telecommunications spectrum to its maximum social value. Only by balancing these important and competing interests, will the government spectrum be put to its optimal social use: both in the current round of spectrum reallocation, and in the years to come.