
**FROM ONE END OF THE SPECTRUM TO THE
OTHER: THE CASE FOR STRONGER PROPERTY
RIGHTS IN FCC SPECTRUM LICENSES AND A
RESPONSE TO MUSEY’S “SPECTRUM
RATIONALIZATION CHALLENGE”**

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I. INTRODUCTION

In a society where access to information needs a vehicle through which transmission occurs, the federal government’s task of licensing different parts of the nation’s broadband spectrum grows in necessity.¹ Multiple theories emerge as to why the federal govern-

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¹ See CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE, AND THE INTERNET, ¶ 17D.03 (Matthew Bender, Rev. Ed. 2013) (discussing differences between licensed and unlicensed uses of the nation’s broadband spectrum). Any entity may apply for a spectrum license, and may obtain authorization for a license in two ways: 1) They may submit an application and processing fee to the FCC for the particular license they seek; or 2) they may enter a competitive bidding process where the spectrum license is sold to the firm who pays the highest amount for it. *See id.* (delineating different methods for obtaining spectrum license). Owning a license, however, does not entitle a licensee to simply dispose of the spectrum however it wants to, for the FCC issues licenses for particular frequencies in very specific service areas (usually areas that do not have as much service to begin with) and for very specific purposes. *See id.* (outlining restrictions imposed by the FCC after a spectrum li-

ment provides licenses to own certain parts of the bandwidth to private telecommunications companies, such as the scarcity of bandwidth, its pervasive presence in the marketplace, and the special impact and public interest that telecommunications has on the nation's electronic infrastructure.² Because of these theories and constitutional justification, such as limited First Amendment protection for freedom of speech, the Federal Communications Commission (FCC or Commission) has heavily regulated the broadcasting and electronic media industries more than others.³ In particular, the recent phenomenon of holding auctions to disseminate spectrum licenses to broad-

cense is granted). An applicant may also use spectrum that has been designated for unlicensed use, a practice the FCC increased over the course of the 20th century through administrative rule-making, and which has led to more wireless internet service providers on the bandwidth. *See In the Matter of Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License*, 4 FCC RCD. 3493 (1989) (revising Part 15 in order to increase "administrative convenience" and flexibility for use of unlicensed spectrum).

² *See* FERRIS & LLOYD, *supra* note 1, at ¶ 1.04 (delineating different theories for why the federal government offers spectrum licenses to the public). The theory that the nation's electromagnetic spectrum and bandwidth is scarce is proffered as the most fundamental justification for broadcast regulation in the United States. *See id.* (stating most basic reason for broadcast regulation). The "pervasive presence" theory stems from the idea that broadcast media is so present in the lives of Americans that questions of privacy inevitably arise and thus justify their regulation, particularly as it pertains to indecent speech. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 764-65 (1978) (distinguishing broadcasting from other forms of speech, such as radio, by examining whether home owners voluntarily admit the communication medium into their homes or whether it is an outside force that invades a home involuntarily); *see also* *Erznoznik v. Jacksonville*, 422 U.S. 205, 214-216 (1975) (reversing prior restrictions on public viewership of nudity at voluntary drive-in theatres). Perhaps the single most important difference between the scarcity theory and the pervasive presence theory hinges on the substantive content restrictions present in the latter theory. *See* FERRIS & LLOYD, *supra* note 1, at ¶ 1.04 (explaining why programmatic content restrictions inevitably arise when dealing with a particularly pervasive communication medium). The special impact theory advocates that because certain communication mediums require an affirmative act from their consumptive audiences, the persuasiveness of those mediums which do not require such an affirmative act give rise to a regulatory justification. *See* FERRIS & LLOYD, *supra* note 1, at ¶ 1.04 . (explaining philosophical underpinnings of the special impact theory); *see also* *Banzhaf v. FCC*, 405 F.2d 1082, 1099 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (upholding FCC regulations pertaining to cigarette commercials).

³ *See* FERRIS & LLOYD, *supra* note 1, at ¶ 1.04 (explaining courts' proclivity for more scrutinized regulation of electronic media and broadcasting industries).

casters has proven a viable strategy for protecting the limited resource that is spectrum bandwidth.⁴

One of the ways a private company may obtain a spectrum license is by bidding on the price of a specific block of frequency at public auctions held each year by the FCC.⁵ The bidding system used at the auction creates efficiency and saves time, while at the same time providing a market value for the band of frequency that is bid on by a particular company.⁶ In doing so, the FCC has implicitly

⁴ See FERRIS & LLOYD, *supra* note 1, at ¶ 1.04 (affirming scarcity theory of spectrum bandwidth as leading justification for FCC's issuance of licenses for parts of nation's broadband).

⁵ See Andrea J. Serlin, *Nextwave v. FCC: Battle for the C-Block Licenses*, 50 CATH. U. L. REV. 219, 219-20 (2000) (outlining how businesses bid on spectrum frequency and how the FCC ultimately determines who receives a license and for what purpose). Serlin's scholarship examines the consequences of a bankruptcy proceeding by a firm called NextWave, who alleged the FCC fraudulently conveyed licenses to it six months after auction by asking the firm to pay the full auction price of the license (valued at approximately \$4.7 million) rather than its present value at the time of conveyance in bankruptcy (around \$1 billion), for which the bankruptcy court reduced its initial estimate of what NextWave owed. See *id.* at 221-22 (stating several companies filing claims against the FCC to retain their licensing without having to pay a winning bid in full).

⁶ See Andrea M. Settanni, Comment, *Competitive Bidding For The Airwaves: Meeting The Budget And Maintaining Policy Goals In A Wireless World*, 2 COMMLAW CONSPECTUS 117, 122 (1994) (describing benefits to the auction system and why market-oriented bidding is the best solution for awarding spectrum licensing). Settanni examines the FCC's original use of comparative hearings, a process utilized by the FCC where there are two applications for the same frequency of spectrum, and lotteries, where a licensee is randomly chosen from a pool of applicants at a lower cost than a comparative hearing. See *id.* at 119 (describing two methods the FCC uses to award licenses to mutually exclusive applicants); see also *Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations By Random Selection (Lottery)*, 4 FCC RCD. 2256, 2261 (Jan. 30, 1989) (defining "mutually exclusive" as where either two firms apply for the same frequency of spectrum, or where the use of two different frequencies will interfere with one another); Lawrence J. White, "Propertyizing" *The Electromagnetic Spectrum: Why It's Important, And How To Begin*, 9 MEDIA L. & POL'Y 19, 22 (2000) (proposing idea that public interest better served when individual ownership of particular bandwidth is present). In particular, White advocates that for true "propertyzation" of the spectrum to occur, owners of particular "parcels" of spectrum (as opposed to licenses) ideally would be allowed to sub-divide and buy and sell parcels, so long as this did not create interference for owners of other "parcels," and so long as it complied with other applicable laws applicable to business, such as the antitrust laws as one example. See *id.* at 30 (proposing new system of creating "parcels" on spectrum

recognized private property rights in an otherwise scarce broadband spectrum, and has made a conscious policy choice to issue licenses which allow the owner of a particular frequency to exclude others from using it while it is licensed to them.⁷ Some have criticized this approach as creating an inefficient system whereby licenses simply go to the highest bidder, and argue that given the strong public interest present in regulating communications, property rights should not be as strong for those licensees of the FCC who own auctioned fre-

bandwidth, as opposed to licenses, to more closely parallel real property laws, and proposing the additional creation of a national registry to aid buyers and sellers identify potential transactional parties and to more easily identify interferers from other “parcels” of spectrum).

⁷ See Joseph M. Ward, Comment, *Secondary Markets in Spectrum: Making Spectrum Policy as Flexible as the Spectrum Market it Must Foster*, 10 *COMMLAW CONSPECTUS* 103, 110-11 (2001) (noting the “bundle of rights” concept inherent in the common law of property as applied to spectrum licenses). It is worth noting here that Ward, like White, places an emphasis on the alienation of a license as a significant determinant of whether or not a licensee truly possesses property rights in its license, and points to the language of Section 310(d) of the Communications Act as an example of why these rights are stifled:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d) (2012). The Commission also promulgated rules which restrict the assignment or transfer of construction permits without its approval. *See also* Application for Voluntary Assignment or Transfer of Control, 47 C.F.R. § 73.3540 (2010) (delineating Commission’s prohibition on voluntary transfers of construction permits and any associated rights stemming from said permits); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 828-29 (D.C. Cir. 1965) (holding these restrictions as applying to de facto licenses); *In re* Application of Town & Country Radio, Inc., Rockford, Ill., 28 F.C.C. 129, 151 (1960) (holding these restrictions as applying to de jure licenses). Significantly, Ward cites the Commission’s decision in *Intermountain Microwave*, which established a new standard for determining whether or not a particular licensee possesses “exclusive responsibility for the operation and control of the facilities” under the language of § 310(d), and how this decision has had a chilling effect on owners leasing their spectrum for others to use. *See Applications for Microwave Transfers to Teleprompter Approved with Warning, Public Notice*, 12 F.C.C.2d 559, 560 (1963) (creating new standard for what constitutes “control” under § 310(d)).

quency bandwidth.⁸ However, individuals in this camp, those who point to the rising costs of "spectrum inflexibility" as a reason for re-considering the way the FCC distributes licenses, should more seriously consider moving towards a more market-based approach that creates dynamism in the market, and allows for a greater transferability of licenses by their owners.⁹

⁸ See Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863, 914 (2004) (advocating a new model for allocation of spectrum frequency based upon technological advances and use of wireless equipment for specific purposes). Werbach's analysis posits an interesting insight by claiming that spectrum policy over the years, viewed from either a strong property rights model or a strong "commons" model, is really not about rights in spectrum or specific frequencies itself, but in equipment and infrastructure to broadcast over that spectrum or frequency. See *id.* at 914 (stating proposition that property rights extend to equipment, not to particular bandwidth). Werbach's model, called the "Supercommons," advocates piecemeal experimentation from current licenses with a grand provision for what he terms a "universal access privilege" that would allow a transmission wherever it would not be harmful to other systems. See *id.* at 915 (proposing "Supercommons" approach); see also Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 337 (2001) (rejecting "property rights" approach to broadband, and articulating demand for wireless devices as creating impetus for communications reform). Hazlett opines that the central impediment in the Commission's rulemaking, as it applies to wireless devices, is its focus of subjecting new wireless competitors to its own scrutiny, rather than carving out rules which promote innovation and competitive entry into the market, as demonstrated by the fact that the burden of proof lies not on the incumbent licensee, but on the potential entrant. See *id.* at 400 (highlighting how the burden of proof for incumbents is very low, as they do not need to show how less competition helps the public interest, but only rebut proponents of competition).

⁹ See Jeffrey A. Eisenach, *Spectrum Reallocation and the National Broadband Plan*, 64 FED. COMM. L.J. 87, 96 (2011) (proposing a national revision to current federal communications policy where primary focus is on spectrum's intended use or purpose). Eisenach points to two important concepts in what he terms the "Spectrum Reform Consensus" moving forward: 1) dynamism and flexibility for spectrum licenses with respect to evolving technologies and the services associated with them, and 2) allowing spectrum to be tradable and assignable to deal with changing market forces and technologies. See *id.* at 88-89 (describing the four key provisions that most scholars agree on when it comes to reforming spectrum policy). In particular, the insatiable, perhaps unquenchable, thirst and demand for wireless services has created a push for reform in re-allocating spectrum that is capable of supporting wireless services, spectrum which is quite expensive due to its scarcity. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation

This note argues that while rapidly advancing technologies necessitate reform to federal communications policy, it should be performed in a manner, which continues to recognize property rights in frequency spectrum. I will begin by providing a history of how the Federal Communications Commission received the administrative authority to regulate the nation's broadband, the subsequent statutory change enacted to create federal jurisdiction for the hearing of final orders appealed from the FCC, and the case law delineating certain attributes of spectrum licensing the FCC is obligated to enforce. I will then turn to the central academic debate on whether the public interest is best served through recognizing property rights in broadband spectrum, recognizing both sides of the debate. Finally, I will present my own analysis on why the continuing recognition of property rights in the spectrum is necessary to advance a market-oriented approach to allocating the nation's bandwidth, and how broadcast licenses might fit into such an approach.

II. HISTORY

A. Early Recognition by the Supreme Court of the FCC's Authority

The Supreme Court first recognized the FCC's authority in issuing regulations pertaining to broadcasting companies in *National Broadcasting Co. v. United States*,¹⁰ holding that the FCC was charged with discerning the "public interest" in promulgating standards to govern the telecommunications industry.¹¹ The Court's rea-

Act of 1993; *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Thirteenth Report*, 24 FCC RCD. 6185, 6216 (2009) (noting example of AT&T acquiring 12 MHz of 700 MHz spectrum covering roughly 196 million Americans for \$2.5 billion).

¹⁰ See *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (concluding that the Communications Act of 1934 endowed the FCC with the power to promulgate regulations to curb abuses within the practice of chain broadcasting).

¹¹ See *id.* at 224 (holding FCC retained administrative authority to issue regulations between broadcasters and their affiliates). The Supreme Court acknowledged further what this "public interest" was: "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." See *id.* at 216 (quoting *Federal Communications Comm'n v. Sanders Radio Station*, 309 U.S. 470, 477 (1940) (reversing decision of lower court by holding that resulting economic injury to a competing radio station was not by itself a consideration of "pub-

soning essentially endowed the FCC with administrative authority it did not previously have under the Communications Act of 1934 ("CA"),¹² declaring that the Act gave the FCC powers greater than merely "engineering" technical aspects of radio regulation.¹³ The Court recognized the FCC's role to be more than just "supervision of traffic," articulating a broader authority for the Commission to recombine and affirmatively compose the substance of that traffic.¹⁴ While the breadth of this ruling certainly opened the door to the FCC to seize a greater role in policy making, it was a more symbolic ruling in foreshadowing the authority the FCC obtained in the following decades.

B. Public Input on Licenses

Before the FCC had the power to auction for licenses, it allowed the public to comment on whether or not a particular license that it issued should be renewed, and in *Office of Communication of United Church of Christ v. FCC*,¹⁵ it received this power from the

lic interest, convenience, or necessity"). "The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license." *See id.* If the Commission's decisions based upon "public interest" could be based solely on whether or not such objections were made, then "how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station?" *See id.* at 216-17 (reasoning why courts need to consider other factors beyond objections to licenses when evaluating "public interest"). It is for this reason that since the federal government's initial regulation of radio, "comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience, or necessity.'" *See id.* at 217 (quoting *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, n. 2 (1940) (rejecting the premise that courts hold the power to order an administrative agency to change its internal procedures)).

¹² *See* 47 U.S.C. § 151 (2011) (creating the first Federal Communications Commission which regulated electronic communications in the United States).

¹³ *See Nat'l Broad. Co.*, 319 U.S. at 215 (expanding the administrative power of the FCC).

¹⁴ *See id.* at 215-16 (perceiving FCC's need for greater role in constructing the nation's airwaves).

¹⁵ *See Office of Comm'n of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (holding representatives of listening public have standing to challenge the broadcasting renewal licenses).

D.C. Circuit Court of Appeals.¹⁶ The D.C. Circuit Court of Appeals noted that “On 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.”¹⁷ Thus, a consequence of this ruling is that citizen lobbying groups began to sprout up in order to challenge any interest they might have in a particular frequency of spectrum, particularly if it meant eliminating a competitor.¹⁸

C. Jurisdictional Authority Close To Home

Approximately a decade later, Congress passed the Hobbs Act, deciding to make the D.C. Circuit Court of Appeals a “specialized” court where appeals from the FCC are heard.¹⁹ The complementary language to the Act is found under Title 47 of the United States Code, and is fairly broad, allowing for a petitioner’s appeal under a number of instances, including denial of an application or re-

¹⁶ *See id.* at 1001-02 (granting FCC the power to hear input from the public on whether issued licenses should be renewed). In arriving at this conclusion, the Court expounded upon the idea that in order to find standing for a particular petitioner from the listening public, economic interest and electrical interference need not be the exclusive determinants in granting such standing. *See id.* at 1001 (“It is important to remember that the cases allowing standing to those falling within either of the two established categories have emphasized that standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest.”).

¹⁷ *See id.* at 1004-05 (explaining public’s role in aiding the FCC as to whether license should be renewed or not).

¹⁸ *See id.* (noting how citizen groups with sufficient intervention might be the only ones to challenge a renewal due to financial burdens). The Court made a reasonable comparison by noting that since an applicant frequently floods the Commission with testimonials from interest groups (what the court terms “representative community groups”) when it initially applies for a license, and because the Commission values these testimonials as important for granting a license, it seems only reasonable that when the license is up for renewal, the listening public at large should be allowed to give its own input on the licensee’s performance during its license tenure. *See id.* at 1005 (outlining need for public input in license renewal process because such input is present in initial grant of license).

¹⁹ *See* 28 U.S.C. § 2342(1) (1975) (stating D.C. Circuit Court of Appeals has exclusive jurisdiction for hearing appeals from final orders of the FCC).

newal for a spectrum license.²⁰ This Act was not just intended for the FCC, but for all administrative agencies to have their orders appealed to the D.C. Circuit Court of Appeals.²¹ Thus, judicial review of administrative agency orders found a court close to home, but even this change was not the end of the FCC's expansion of airwave regulation.

D. The Authority To Auction

The "public interest" factor resurfaced once again in *FCC v. National Citizens Committee For Broadcasting*,²² with the Supreme Court upholding the Commission's regulations pertaining to divestiture of "common ownership," by one company, of a radio or television broadcast and a daily newspaper located in the same community.²³ The reasons for divestiture are simple: diversity of programmatic and service viewpoints, and prevention of undue concentration within the industry.²⁴ The divestiture rationale was a principal guiding force for the next decade, leading to Congress amending the National Telecommunications and Information

²⁰ See 47 U.S.C. § 402(a)-(b) (1975) (enumerating appealable instances for petitioners from final orders of the FCC, and granting exclusive jurisdiction for appeals of spectrum licenses). Final orders of the FCC may also be appealed from for denial of an application for authority to transfer, assign, or dispose of any instrument or authorization; for any applicant whose permit was revoked under § 325 of the CA; for the revocation by the Commission of any construction permit or station license; by any person who is aggrieved or whose interests are "adversely affected" by an order of the Commission; by any person upon whom an order to cease and desist has been served under § 312 of the CA; and by any radio operator whose license has been suspended by the Commission. See 47 U.S.C. § 402(b)(3)-(8) (listing other instances for appealing final orders from the Commission).

²¹ See J. Israel Balderas, *Speaking with One Broadband Voice: The Case for a Unified Circuit Appeals Process after Brand X Internet Services v. FCC*, 13 *COMMLAW CONSPPECTUS* 377, 428-29 (2005) (describing appeals method to the D.C. Circuit Court of Appeals under the Hobbs Act); see also Paula W. Foley, *Untangling the Third Wire: Broadband Over Power Lines, Open Access, and Net Neutrality*, 6 *J. HIGH TECH. L.* 194 (2006) (explaining example of one case appealed to D.C. Circuit Court of Appeals through Hobbs Act).

²² See *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (describing the intent of the Commission for implementing this perception of the public interest).

²³ See *id.* at 780-81 (upholding FCC's divestiture standards to break up "common ownership" circumstances).

²⁴ See *id.* at 780 (explaining policy justifications for divestiture).

Administration Organization Act (NTIAO) as part of an effort to grant the FCC more authority in regulating the broadband spectrum.²⁵ This amendment directed the Department of Commerce to identify unused bandwidth spectrum the federal government owned, and to transfer it to the FCC for reallocation in a non-federal, commercial setting.²⁶ The momentum from these prior grants of statutory authority to the FCC culminated in Congress passing the Omnibus Budget Reconciliation Act of 1993 ("OBRA").²⁷ OBRA amended the CA by granting the FCC the authority to issue spectrum licenses through a competitive bidding auction process.²⁸ The uses for which a license may be issued are plentiful: cell phones, subscription television, radio controlled cars, garage door openers, and even entire businesses, to name a few.²⁹

In 1996, the FCC began its implementation of OBRA by partitioning the broadband spectrum into six different auction blocks, A-F, for allocation and dissemination of licenses.³⁰ The FCC was man-

²⁵ See 47 U.S.C. § 921 (2013) (mandating reallocation of unused spectrum bandwidth back to the federal government for more efficient, commercial use).

²⁶ See William Kummell, Comment, *Spectrum Bids, Bets, and Budgets: Seeking an Optimal Allocation and Assignment Process for Domestic Commercial Electromagnetic Spectrum Products, Services, and Technology*, 48 FED. COMM. L.J. 511, 514-15 (1996) (describing NTIAO's new authoritative grant to Department of Commerce).

²⁷ See 47 U.S.C. § 309(j)(1) (1997) (granting authority to the FCC for dissemination of spectrum licenses for particular spectrum frequency).

²⁸ See *id.* (delineating competitive bidding auction process used by the FCC for issuing of spectrum licenses).

²⁹ See Nicholas W. Allard, *The New Spectrum Auction Law*, 18 SETON HALL LEGIS. J. 13, 14 (1993) (listing the multiple and varied uses for which a spectrum license may be issued).

³⁰ See Implementation of Section 309(j) of the Communications Act-Competitive Bidding, 59 Fed. Reg. 37566, 37572 (July 22, 1994) (to be codified at 47 C.F.R. pt. 24) (establishing specific auction blocks for entrepreneurs on blocks C & F). The licensed broadband PCS (personal communications services) spectrum was divided into three 30 MHz blocks, those being blocks A, B, and C, and three 10 MHz blocks, those being blocks D, E, and F. See also New Personal Communications Services, 59 Fed. Reg. 32830, 32831 (June 24, 1994) (to be codified at 47 C.F.R. pts. 2, 15, 24) (dividing broadband spectrum into six different auction blocks). The Commission also created two different types of services areas: Basic Trading Areas (BTAs), of which there are 493, and Major Trading Areas (MTAs), of which there are 51, with the licenses in frequency blocks A and B being awarded on an MTA basis, and the licenses on frequency blocks C, D, E, and F being awarded on a BTA basis. See *id.* (delineating further how frequency blocks are categorized). More

dated to promulgate rules ensuring that small businesses, rural telephone companies, and businesses owned by minority groups and women all received a fair shot at obtaining a license under OBRA's amendment to the CA.³¹ A particular case, *Omnipoint Corp. v. FCC*,³² rejected an attempt to block the implementation of these rules as it pertained to the issuing of Broadband PCS licenses, a wireless service for mobile cellular phones.³³ The petitioners, a group of small business owners, argued that the implementation provisions pertaining to women and minorities undercut the Commission's obligation to aid small businesses.³⁴ The Court's reasoning pointed to the fact that the 49% equity option, which allowed certain minority-owned and women-owned companies to have a non-voting investor acquire up to 49.9% of the company's equity and still bid on a license, applied to all bidding firms, not just minority-owned and women-owned firms.³⁵

After having its implementation strategy initially upheld for minority and women-owned enterprises, a major win for bidding firms to obtain greater property rights in their licenses was evidenced in *Fresno Mobile Radio, Inc. v. FCC*,³⁶ where the Court revised some of the Commission's decisions with regards to owners of Specialized

than 2,000 broadband PCS licenses were issued from this Order. *See id.* (stating the quantity of licenses issued).

³¹ See 47 U.S.C. § 309(j)(3)(B) (1997) (elaborating different requirements for implementation by the FCC in issuing licenses to certain applicants and bidders).

³² *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996).

³³ See *Omnipoint Corp.*, 78 F.3d at 626 (upholding implementation of § 309(j) mandate under OBRA). Because blocks C & F were designated as "entrepreneur" blocks, eligibility for these blocks was limited "to entities that, together with their affiliates and certain investors, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million." *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, 9 FCC RCD. 5532, 5585 (1994).

³⁴ See *Omnipoint Corp.*, 78 F.3d at 625 (laying out petitioner's argument for overturning implementation mandate).

³⁵ See *id.* at 634 (reasoning how 49% equity option is beneficial and applicable to all firms bidding for spectrum licenses); see also *Graceba Total Commc'n, Inc. v. FCC*, 115 F.3d 1038, 1039 (D.C. Cir. 1997) (explaining other implementation provisions, including 25% bidding credit for minority-owned and women-owned firms bidding on licenses).

³⁶ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

Mobile Radio Service (SMR).³⁷ The Commission originally adopted a system whereby the upper 200 channels of the SMR bandwidth were auctioned off for each of the newly-designated “Economic Areas (EA),” areas which were in need of coverage for SMR service.³⁸ Fresno Mobile was a provider of SMR, and challenged the FCC’s “interim coverage requirement,” which mandated SMR providers to have their facilities completed within two years of obtaining a license, while EA licensees were given potentially five years to complete their facilities.³⁹ The D.C. Circuit sided with *Fresno Mobile*, holding that full-service SMR providers who must serve an entire area with multiple facilities should have at least as much implementation time to construct such facilities as do EA licensees, who were not even required to fully service the unprofitable precincts for which they were licensed.⁴⁰

The battle for property rights on the SMR bandwidth, particularly regarding auction bidding by small businesses, continued in *Small Business In Telecommunications v. FCC*,⁴¹ where the Small Business Administration (SBA) lobbied to prevent the FCC from unilaterally re-defining “small business” so as to exclude small businesses from bidding on particular bandwidth.⁴² The petitioners challenged the FCC’s authority because the Commission conducted an

³⁷ See *id.* at 967 (granting extension to owners of SMR services in building their facilities in order to equalize requirements with those of “Economic Area” licensees). This decision was prompted by ambitious licensees of SMR who sought to use it for cell phone and data transmission services over a wide area, as compared with original SMR licensees, who sought to provide less ambitious services, such as local dispatch for taxis, ambulances, and other responder services. See *id.* (comparing original uses of SMR to present-day uses).

³⁸ See *id.* at 968 (describing the auctioning of EA licenses on an entire geographical area, as opposed to channel-by-channel licensing).

³⁹ See *id.* at 970 (explaining differing requirements for SMR service providers versus providers to Economic Areas (“EA”).

⁴⁰ See *id.* at 970-71 (reasoning how EA licensees only required to cover, at most, two-thirds of their licensed areas, and with up to five years to do so, while SMR providers only given two years).

⁴¹ See *Small Bus. in Telecomm. v. FCC*, 251 F.3d 1015 (D.C. Cir. 2001).

⁴² See *id.* at 1018 (reiterating previous FCC ruling requiring Commission to obtain approval of its “small business” definitions from the SBA); see also 15 U.S.C. § 632(a)(2)(C)(iii) (1958) (“Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a [small] business concern, unless such proposed size standard...is approved by the Administrator [of the SBA].”).

auction for spectrum licenses on the 800 MHz spectrum before obtaining approval from the SBA, thus allowing small businesses a chance to bid on the particular licenses to be issued.⁴³ The D.C. Circuit held that even though the FCC did not obtain approval from the SBA prior to re-defining its "small business" definition, the SBA later approved the change before the auction took place, and failed to show any of its member constituents were harmed in the process from obtaining spectrum licenses.⁴⁴

An associated ownership right the FCC grants similar to a spectrum license is a construction permit for new radio stations, and allows "new entrants" to obtain a New Entrant Bidding Credit (NEBC) to offset the auction cost of bidding for one.⁴⁵ This objective is aimed at granting more ownership rights to firms who have not yet obtained property rights in other parts of the broadband spectrum, but more recently the question of who qualified as a "new entrant" arose in *Minnesota Christian Broadcasters Inc. v. FCC*, where a Minnesota broadcasting station who won an auction bid sued for not receiving a bid credit as a "new entrant."⁴⁶ Minnesota Christian Broadcasters, Inc. (MCBI) already owned three other FM broadcast stations, and claimed they were eligible for a credit because these other stations were non-commercial, educational stations.⁴⁷ According to MCBI, the FCC's rules excluded ownership of these stations from consideration in determining whether MCBI was a "new entrant."⁴⁸ The D.C. Circuit rejected MCBI's claims, holding that MCBI already held an "attributable interest" in those stations under

⁴³ See *Small Bus. in Telecomm.*, 251 F.3d at 1025 (articulating petitioner's argument against the Commission for failing to obtain the SBA's prior approval of its definition of "small business").

⁴⁴ See *id.* at 1026 (holding that the tardy approval of FCC's definition change is without merits because no harm was done to members constituents of SBA).

⁴⁵ See *Minn. Christian Broad., Inc. v. FCC*, 411 F.3d 283, 284 (D.C. Cir. 2005) (delineating policy reasons for granting spectrum licenses and construction permits with bidding credits in certain circumstances).

⁴⁶ See *id.* at 284-85 (outlining preliminary facts giving rise to the dispute brought by MCBI against the FCC).

⁴⁷ See *id.* at 284 (restating MCBI's argument as to why it was eligible for receiving a bidding credit).

⁴⁸ See *id.* (describing how MCBI interpreted FCC's rules for who is considered a "new entrant").

federal law, and thus could not receive a bidding credit under “new entrant” status for their present FM construction permit.⁴⁹

Since 2006, the FCC re-worked its rulemaking procedures to address a more modern problem in issuing spectrum license ownership and the use of bidding credits: Parent-affiliate relationships in corporations.⁵⁰ In particular, under OBRA’s amendment to the CA, the FCC is obligated to seek the “avoidance of unjust enrichment through the methods employed to award” spectrum licenses, and to establish “such...antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.”⁵¹ This problem arose in a recent Third Circuit case, *Council Tree Communs, Inc. v. FCC*, where a corporation sought to circumvent the FCC’s mandate through its affiliate/subsidiary, particularly for bidding credits.⁵² To prevent corporate relationships from abusing the auction process, the FCC issued a “50% Impermissible-Relationship Rule” and a “25% attribution rule”, whereby an applicant or licensee is prohibited from obtaining a bidding credit if it has resold or leased at least 50% of its spectrum capacity, and is deemed to have an “attributable” material relationship when it has a relationship with another entity for the lease or resale (including wholesale agreements) of 25% of the spec-

⁴⁹ See *id.* at 286 (reasoning why MCBI is not a “new entrant” under existing federal law). MCBI’s argument was that subsection (f) of 47 C.F.R. § 73.3555 did not apply to them because they were a noncommercial educational station, and thus the bidding credit offset that normally is not given to owners of property rights in other parts of the spectrum should be given to them because their station was one that was not-for-profit. *id.* (detailing MCBI’s argument that section (f) of 47 C.F.R. § 73.3555 is not applicable to noncommercial educational TV stations). Thus, although MCBI’s station was noncommercial in nature, the Court sided with the Commission’s interpretation that a station need only have an “attributable interest,” commercial or not, in order to deny a bidding credit to them for a license in another part of the spectrum. See *id.* (defining “attributable interest” in § 73.5008); see also 47 C.F.R. § 73.3555(f) (1999) (“This section is not applicable to noncommercial educational FM and noncommercial educational TV stations.”).

⁵⁰ See *Council Tree Commc’n., Inc. v. FCC*, 619 F.3d 235, 239 (3rd Cir. 2010) (elucidating link between policy considerations under OBRA amendment to Communications Act of 1934 and modern structure of corporate relationships).

⁵¹ See 47 U.S.C. § 309(j)(3)(C), (j)(4)(E) (1993) (mandating the FCC to avoid issuing spectrum licenses where firms seek acquisition of a license through indirect measures, such as parent-affiliate combinations).

⁵² See *id.* at 241 (explaining factual underpinnings of the case).

trum capacity of one of the applicant/licensee's licenses.⁵³ A number of companies challenged this rule, finding this "wholesale lease" method a profitable business model.⁵⁴ The Third Circuit nonetheless upheld both rules, holding that agency decisions are given great deference unless "arbitrary and capricious," and that limiting the permissible size of a Designated Entity (DE) and entities to which it leases more than one-quarter of its spectrum, or leases or resells half of it, are an appropriate and natural outgrowth of the small business provisions the FCC is obligated to enforce.⁵⁵

III. FACTS/PREMISE

The recent trend of consumers and their insatiable, unquenchable, and perhaps uncontrollable thirst for wireless mobile applications and functions, such as e-mail, long range service, and internet access, are beginning to squish the spectrum bandwidth. This has led to a number of analysts advocating for a new policy with regards to opening up more of the nation's limited and scarce airwave space.⁵⁶ Those who support a larger increase in bandwidth re-allocation note the consequences of not pursuing this route: price increases, a less meaningful user experience, and carrier-imposed limits on mobile applications in a crunch to preserve their financial situations.⁵⁷ To combat this potential situation, the FCC released its National Broadband Plan for how it intends to re-allocate spectrum bandwidth.⁵⁸ Specifically, the FCC's proposal aims to re-allocate approximately

⁵³ See *id.* at 240 (substantiating reasoning with FCC administrative rule). See also 47 C.F.R. §§ 1.2110(b)(3)(iv)(A), (B) (1993) (creating 50% Impermissible-Relationship Rule and 25% attribution rule).

⁵⁴ See *Council Tree Commc'n, Inc.*, 619 F.3d at 240 (explaining support of "wholesale lease" method by business community).

⁵⁵ See *id.* at 251 (upholding 25% attribution rule on small business policy rationale).

⁵⁶ See David Goldman, *Sorry America, Your wireless airwaves are full*, CNN-MONEY (Feb. 21, 2012), archived at <http://perma.cc/B3PS-QZSW> (noting the future trend of industry concentration with no re-allocation of spectrum bandwidth).

⁵⁷ See Stacey Higginbotham, *Spectrum Shortage Will Strike in 2013*, GIGAOM (Feb. 17, 2010), archived at <http://perma.cc/3FMC-VKNE> (listing consequences with no plan to re-allocate spectrum bandwidth).

⁵⁸ See FEDERAL COMMUNICATIONS COMMISSION, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN* (2010), archived at <http://perma.cc/EJ4P-VV25> (outlining FCC's proposal to re-allocate certain quantities of spectrum for mobile applications in the coming decade).

300 megahertz (MHz) of spectrum to mobile broadband applications over the next five years, and an additional 200 MHz by the year 2020, totaling 500 MHz overall.⁵⁹ This goal of a broader effort to re-allocate spectrum bandwidth stems from the seminal belief that owners of spectrum licenses do not own property rights in those licenses, thus creating a flexible and somewhat unilateral administrative role for the FCC to re-allocate such scarce bandwidth when it deems it necessary to do so.⁶⁰

A proponent of this approach, J. Armand Musey, advocates that the argument for property rights in the broadband spectrum are weak.⁶¹ According to his analysis, the most recently amended text of the Communications Act of 1934 does not confer a specific right of property ownership for holders of spectrum licenses.⁶² Musey points to specific language within the 1934 Act that requires all license holders to waive any renewal expectation rights, presumably to give notice to firms that they do not have strong property rights claims in

⁵⁹ See *id.* at 75 (stating numerous objectives for FCC over the next decade, including re-allocation of certain bandwidth for mobile applications).

⁶⁰ See *id.* at 78 (noting that “[t]he federal government, on behalf of the American people and under the auspices of the FCC and NTIA, retains all property rights to spectrum”).

⁶¹ See J. Armand Musey, *Broadcasting Licenses: Ownership Rights and the Spectrum Rationalization Challenge*, 13 COLUM. SCI. & TECH. L. REV. 307, 314 (2012) (arguing that owners of spectrum licenses do not possess greater property rights under either the Communications Act of 1934 or the Telecommunications Act of 1996); see also 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., 1989) (demonstrating Max Paglin’s view of regulation of broadcasters as one akin to regulating public utilities).

⁶² See Musey, *supra* note 61, at 315 (pointing to CA’s language as evidence of weak property rights for spectrum license holders). The specific language Musey points to reads as follows:

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.

Id.; see also 47 U.S.C. § 301 (2006).

their licenses.⁶³ It is a waiver of "any claim to the use of any particular frequency or of the electromagnetic spectrum...because of previous use of the same."⁶⁴ Nor does he believe such property rights are found in the 1996 Telecommunications Act language either, specifically noting the FCC's charge of maintaining the "public interest" in setting its policies.⁶⁵ His argument notes, however, that the language of the 1996 Act is a bit vague, as it creates a *prima facie* impression for owners of spectrum bandwidth to assert strong property rights in their licenses, including a prohibition on the FCC to not consider a comparison of a current licensee to a potential licensee for the same bandwidth.⁶⁶ Notwithstanding this ambiguity or apparent grant of property rights in spectrum licenses, Musey argues that the Commission retains the power to alter the terms of the licenses it distributes, if doing so is in the "public interest," even if it may not compare a current licensee with a potential one for the same bandwidth.⁶⁷ Musey thus presents a policy reason for why spectrum license owners should be limited in asserting property rights: the Commission's goal of "the development and rapid deployment of new technologies, products, and services."⁶⁸

Despite what seems like negative treatment of property rights for spectrum licensees, Musey elaborates on why he believes the practical application of the 1934 Act and 1996 Act may confer property rights to those same licensees.⁶⁹ He notes the historical analysis

⁶³ See Musey, *supra* note 61, at 315 (articulating support from statute's requirement that firms do not expect renewal of their licenses at any time).

⁶⁴ See Musey, *supra* note 61, at 315 (quoting statutory language to specify waiver requirement); see also 47 U.S.C. § 304 (expressing waiver requirement in statute).

⁶⁵ See Musey, *supra* note 61, at 316 (stating that under the Telecommunications Act of 1996, FCC retains a right to impact licensees because of "public interest, convenience, and necessity" it must uphold).

⁶⁶ See Musey, *supra* note 61, at 315 (listing language supporting property rights for spectrum license holders, including flexibility in spectrum use for broadcasters, reductions in station ownership limitations, and license terms extended to 8 years).

⁶⁷ See Musey, *supra* note 61, at 316 (delineating that FCC's ability to issue licenses and alter their terms demonstrates the lack of property rights spectrum license owners have in their bandwidth).

⁶⁸ See Musey, *supra* note 61, at 316 (observing one of FCC's goals in carrying out the "public interest" for spectrum licenses); see also *In the Matter of Preserving the Open Internet Broadband Industry Practices*, 25 FCC RCD. 17905, 17978-79 (2010) [hereinafter *Preserving the Open Internet*].

⁶⁹ See Musey, *supra* note 61, at 323 (pointing to example of frequent license renewal showing the practical application of the 1934 and 1996 Acts).

of Howard Shelanski and Peter Huber, who argue that over the course of the 20th century, the rights granted to owners of spectrum licenses began to look like property rights, particularly license renewals for incumbent owners.⁷⁰ Renewal grants occurred where the spectrum license owner demonstrated a performance that was barely more than minimal, even if potential applicants demonstrated a more meritorious claim to use of the license and its associated bandwidth.⁷¹ In addition to stability for incumbent licensees, the government's willingness to renew licenses also demonstrated a concerted effort by the FCC to encourage investment by licensees in the communications industry as a whole.⁷² Despite this historical development and evolution of property-esque rights in spectrum licenses, Musey maintains such a claim remains weak because the FCC may still reduce the amount of spectrum at the time of renewal for the incumbent licensee, or completely shift their ownership to another slice of the bandwidth altogether.⁷³

IV. ANALYSIS

A. The Text of the 1934 & 1996 Acts

⁷⁰ See Musey, *supra* note 61, at 323 (using Shelanski and Huber's historical recounting to demonstrate potential argument for license owners to assert property rights in their licenses); see also Howard A. Shelanski & Peter W. Huber, *The Law and Economics of Property Rights to Radio Spectrum: A Conference Sponsored by the Program on Telecommunications Policy, Institute of Governmental Affairs, University of California, Davis: Administrative Creation of Property Rights to Radio Spectrum*, 41 J.L. & ECON. 581, 582 (1998) (elaborating on historical development of property rights in spectrum licenses).

⁷¹ See Shelanski & Huber, *supra* note 70, at 587 (stating bare requirement to obtain renewal in a spectrum license); see also *In re Cowles Florida Broad. Inc.*, 60 FCC 2d. 372, 422-23 (1976) (rejecting diversification argument by an applicant challenger to uphold spectrum license renewal for incumbent firm).

⁷² See Krystilyn Corbett, *The Rise of Private Property Rights in the Broadcast Spectrum*, 46 DUKE L.J. 611 (1996) (commenting on increasing privatization of broadband spectrum to encourage industry-wide investment by spectrum license owners).

⁷³ See Musey, *supra* note 61, at 326 (noting ability of FCC to alter conditions of license at renewal); see also 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) (elaborating on how FCC eliminates any property rights argument by altering license renewal conditions for incumbent licensees).

As previously stated, Musey points to the text of the 1934 Communications Act as a basis for why license holders do not possess property rights in their licenses.⁷⁴ Specifically, the text he points to reads as follows:

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.⁷⁵

This text in and of itself clearly uses the language “the *use* of such channels, but not the *ownership* thereof,” thus indicating that while the FCC may grant specific frequencies of spectrum for use, no spectrum license holder may claim indefinite property rights to that particular frequency (emphasis added).⁷⁶ Musey then points to other language which affirmatively substantiates this position, that applicants must waive “any claim to the use of any particular frequency or of the electromagnetic spectrum...because of previous use of the same.”⁷⁷ This language, when read together with the first quotation, creates the reasonable, but perhaps misleading perception that an objective person may view as denying property rights in spectrum licenses.⁷⁸

The language, read another way, does not eliminate property rights, but as Musey points out himself, only eliminates the *presump-*

⁷⁴ See Musey, *supra* note 61, at 315 (denying property rights to spectrum license holders through the 1934 Communications Act).

⁷⁵ See Musey, *supra* note 61, at 315 (reciting language of the 1934 Communications Act to support the claim that license holders do not have property rights in their spectrum licenses); see also 47 U.S.C. § 301 (2006).

⁷⁶ See 47 U.S.C. § 301 (2006) (denying property rights for license holders in a specific frequency).

⁷⁷ See Musey, *supra* note 61, at 315 (quoting language from statute to support denial of claims for licenses renewals); see also 47 U.S.C. § 304 (articulating waiver requirement).

⁷⁸ See Musey, *supra* note 61, at 315 (elaborating how this language of the statute also eliminates claims against property or renewal rights for spectrum licensees).

tion against any *claim* of said rights (emphasis added).⁷⁹ It is important to understand this nuanced distinction, for the definitions of these terms determine what the statute is really denying, and thus whether or not there is a right for spectrum licensees to assert property rights in their respective frequencies.⁸⁰ The denial of a presumption merely means that a licensee does not start from the standpoint of being guaranteed a license renewal, but must prove itself to earn renewal.⁸¹ However, this is only the denial of an expectation, thus leaving the door open for renewal for potentially several periods of time should the licensee prove worthy of renewal.⁸² Moreover, the use of the word “claim” applies to litigation purposes, and thus the denial of a “claim” to a specific bandwidth of spectrum frequency may just as reasonably be interpreted to mean that a licensee may not sue the FCC and attempt to demonstrate they had an expectation of renewal, as such a claim is directly inconsistent with the statutory language.⁸³ The language is thus more of a formality for pre-license purposes, for a licensee may possess an expectation of renewal if an objectively reasonable person could conclude that the licensee did have an expectation of renewal based upon its use of the bandwidth spectrum *once the spectrum license was obtained, as opposed to before it was obtained* (emphasis added).⁸⁴

The language of the 1996 Telecommunications Act is much more friendly to proponents of property rights in spectrum licenses

⁷⁹ See Musey, *supra* note 61, at 315 (explaining denial of presumption against licensees who seek renewal in their licenses).

⁸⁰ See Musey, *supra* note 61, at 315 (interpreting statutory language to demonstrate its alleged explicitness); see also *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 790 (1978) (substantiating the term “public interest” into legally definable language); Levi, *supra* note 73, at 248 (arguing no right of property ownership because of FCC’s ability to alter incumbent license terms unilaterally for “public interest” purposes).

⁸¹ See Musey, *supra* note 61, at 316 (reasoning licensees have no expectation of renewal through statute’s language).

⁸² See Musey, *supra* note 61, at 316 (comparing language of the 1934 Act to the textual additions of the 1996 Act for demonstration of renewal when appropriate).

⁸³ See Musey, *supra* note 61, at 315 (reiterating statutory language’s waiver requirement as denying “claims” of renewal).

⁸⁴ See Musey, *supra* note 61, at 315-16 (demonstrating 1996 Act’s increased ambiguity with regards to renewal terms); see also 47 U.S.C. § 309(k)(1) (2006) (highlighting dual purpose of § 204 under the 1996 Act as creating a quasi-expectation of renewal, as well as absence of “public interest, convenience, and necessity” language from this section).

than the ambiguous language of the 1934 Act.⁸⁵ The text of the 1996 Act uses more definitive and explicit language by stating "The Commission *shall* grant," allowing broadcasters an opportunity to argue they possess some form of a presumption for license, absent violation of terms in the license itself.⁸⁶ Perhaps most persuasively, the FCC, in determining whether to grant a renewal to a particular licensee, may not consider other potential competitors who might use the same frequency of spectrum in a superior manner as part of its criteria.⁸⁷

Musey notes that although this language seems to favor more property rights for license holders, the language merely is interpreted to mean that the FCC retains the discretion to determine if a particular use of spectrum frequency is in the public interest, but it cannot compare another applicant with the incumbent licensee to come to that conclusion.⁸⁸ The FCC's recent Report and Order clarified this discretion for itself when it noted the Commission must promote a number of goals, and may alter the terms of any license "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity....even if the affected licenses were awarded at auction."⁸⁹

The language of the Report and Order, however, is not as clear as it appears on its face, for while the Commission may retain discretion to alter licenses unilaterally if doing so is in the public interest, its goal of promoting the "development and rapid deployment of new technologies, products, and services" may just as easily be read to mean that one firm possessing a license for a particular fre-

⁸⁵ See 47 U.S.C. § 309(k)(4) (2006) (granting renewal to incumbent spectrum licensees absent a violation of license terms).

⁸⁶ See *id.* (highlighting use of the term "shall" to create a clearer understanding of the Commission's directives in granting license renewals).

⁸⁷ See *id.* (denying FCC's right of comparison between incumbent licensees and potential applicants for purposes of administering a renewal decision).

⁸⁸ See Musey, *supra* note 61, at 316 (arguing the language of § 309 in the statute does not overturn the text of the 1934 Act's directive for not allowing private ownership of spectrum).

⁸⁹ See Musey, *supra* note 61, at 316-17 (reciting FCC's recent Report and Order on its discretion criteria for license renewal); see also *Preserving the Open Internet*, *supra* note 68 (stating multiple objectives for Commission to promote, including "the development and rapid deployment of new technologies, products, and services").

quency of spectrum may accomplish this goal.⁹⁰ It is not necessary therefore, as Musey may argue, to automatically rule out property rights for particular license holders, for while it may seem necessary to de-concentrate the telecommunications market to accomplish this objective, and thus to alter spectrum licenses in the “public interest,” a firm demonstrating the capability of deploying these new technologies, products, and services would not necessarily need its license terms changed.⁹¹ Although the text of the 1996 Act includes the presumptive term “shall” in its language, Musey is correct in pointing out how this alone does not overturn the mandate of the 1934 Act that there “shall” also be no private ownership of spectrum.⁹² However, as a matter of policy, it is more favorable to allow license holders some presumption of renewal in their licenses in order to promote not only the rapid deployment of new technologies, but also to ensure stability and continuity for investment purposes in the industry itself, especially at auctions.⁹³ Indeed, particularly because the Report and Order’s language indicates that even licenses awarded at auction may have their terms altered, not recognizing stronger property rights for license holders may have the unintended and significantly adverse effect of decreasing auction prices for a particular piece of bandwidth, thus dropping the total amount of revenue the FCC brings in for the federal government.⁹⁴ In other words, a particular bidder at an auction will bid less of a purchase price for a particular license of spectrum because of the doubt and uncertainty that is associated with the FCC’s unilateral discretion to alter the terms of that particular li-

⁹⁰ See Preserving the Open Internet, *supra* note 68 (interpreting “public interest” factor).

⁹¹ See Preserving the Open Internet, *supra* note 68 (noting Commission’s required “safeguards” to promote deployment of new technological devices).

⁹² See Musey, *supra* note 61, at 317 (writing how § 204 language of the 1996 Act does not overturn the 1934 Act’s command denying ownership). *But see* 47 U.S.C. § 309(k)(4) (2006) (providing more favorable language to spectrum licensees through inclusion of the term “shall” in the Commission’s directives on renewal).

⁹³ See Corbett, *supra* note 72, at 611 (commenting how license renewal is more effective in ensuring industry-wide investment from current license holders than altering terms of their license).

⁹⁴ See Corbett, *supra* note 72, at 629 (elaborating on how incentives for broadcasters who purchase a license at auction are skewed because they don’t pay the actual cost for their rights to use the spectrum).

cense.⁹⁵ Thus, as a result, because broadcasters who purchase particular licenses for their respective spectrum frequencies do not pay for the full cost of what are otherwise seemingly limited rights, there is no incentive for them to make efficient use of the spectrum they receive, thus hurting the true "public interest" the FCC seeks to promote.⁹⁶

B. Legislative Histories of the 1934 & 1996 Acts

Musey also contends that not only do the texts of the 1934 & 1996 Acts not imply property rights for licensees, but also that the subsequent legislative history which has followed does not imply the same either.⁹⁷ His argument uses the words of Max Paglin, who wrote a book on the history of the Communications Act of 1934, where he stated 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.'"⁹⁸ Musey also notes the 1934 Conference Report language, which was eventually adopted into the statute itself, as well as its discussion on alien ownership rights in spectrum and how the government retains the right to command the airwaves for national emergency purposes.⁹⁹

But possessing a license conveys two different realities: a legal one and an economic one.¹⁰⁰ Legally speaking, as Glen O. Robinson notes, the regulatory scheme pertaining to spectrum licenses is

⁹⁵ See Corbett, *supra* note 72, at 629 (explaining how FCC's administrative allocation of spectrum is typically made adequate knowledge or information, thus leading to wasted resources).

⁹⁶ See Musey, *supra* note 72, at 347 (outlining property rights' proponents' argument that value of production for a particular license is fully realized when ownership of spectrum is allowed).

⁹⁷ See Musey, *supra* note 61, at 318 (pointing to legislative follow-up since passage of 1934 Act, which contends Congress considered nation's airwaves as public property available for societal benefit).

⁹⁸ See Robinson, *supra* note 61, at 9 (quoting Paglin's vision for regulation of public broadcasting); see also Musey, *supra* note 61, at 317-18 (quoting Paglin's words in article text).

⁹⁹ See Musey, *supra* note 61, at 318-19 (quoting the language of the conference report).

¹⁰⁰ See Robinson, *supra* note 61, at 10 (describing evolution of different theories for license ownership rights).

one of “a limited property rights scheme.”¹⁰¹ But economically, the situation is different for “Licenses do not in legal theory convey property rights; in economic reality they do.”¹⁰² Robinson, while explaining this idea, quotes the case of *FCC v. Sanders Bros. Radio Station*,¹⁰³ where the Supreme Court wrote “the 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.”¹⁰⁴ Thus, while proponents of lesser property rights argue that spectrum licenses create no expectancy of renewal, the economic reality of owning a license provides that an expectancy is created through the “good behavior” of the licensee, or one which Musey may argue promotes the “public interest” the FCC is seeking.¹⁰⁵ Once again, although the language of the 1934 Act may create the presumption of no renewal in a spectrum license, this presumption applies *before* the obtainment of the license occurs, as opposed to *after* it is awarded, at least when reading the changes involved in the 1996 Act moving forward.¹⁰⁶

The legislative history of the 1996 Act, Musey also argues, does not imply property rights either, or at least an indefinite use of the spectrum, because the House Report indicates that the amendment to the statute was nothing more than procedural, and meant to have a limiting impact on how the FCC determined whether to grant renewal or not.¹⁰⁷ Musey notes that the FCC’s renewal issues, which Section

¹⁰¹ See Robinson, *supra* note 61, at 10 (explaining legal reality of conveying a license).

¹⁰² See Robinson, *supra* note 61, at 10 (explaining economic reality of conveying a license).

¹⁰³ 309 U.S. 470 (1940).

¹⁰⁴ See Robinson, *supra* note 61, at n.35 (explaining development of “expectancy” interest for licensees to have their licenses renewed for good behavior).

¹⁰⁵ See Robinson, *supra* note 100 (recognizing distinction between legal reality and economic reality of owning a spectrum license).

¹⁰⁶ See 47 U.S.C. § 309(k)(1); (4) (2006) (implying creation of an expectancy of renewal absent violation of license terms and good behavior demonstrated by incumbent licensee).

¹⁰⁷ See Musey, *supra* note 61, at 319-320 (articulating no change to FCC’s standards for renewal of a spectrum license). The language Musey points to reads as follows:

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-denial and informal

204 was meant to address, hinged more on addressing license renewal objections with incumbent licensees.¹⁰⁸ The incumbents feared that the substantial increase in applications for the same frequency of spectrum they currently possessed threatened their property rights, particularly because the applicants were applying to use the same spectrum in a similar manner to the incumbent.¹⁰⁹ Incumbent licensees feared that an applicant who applied to the FCC in order to obtain a license simply to use the spectrum in a similar or identical manner would need something additional, such as preferential treatment, in order to do so.¹¹⁰ This began to lead incumbents to worry their licenses would be lost to applicants who held minority status, as one example.¹¹¹ In addition, the sheer amount of dollars used to fight off objections to their licenses being renewed also weighed on incumbent licensees, as the FCC now has the legal power to allow the public to comment on whether particular licenses should or should not be renewed.¹¹² Certain citizens groups formed to oppose the renewal of certain licenses after the D.C. Circuit's ruling in *Office of Communication of the United Church of Christ v. FCC*, and the public's ability to comment on the renewal process has subsequently continued through the passage of OBRA and the 1996 Telecommunica-

complaints. Further, this section in no way limits the ability of the Commission to act sua sponte in enforcing the Act or Commission rules.

Musey, *supra* note 61, at 319 n.35 (quoting legislative history in demonstrating congressional intent for public participation in renewal process).

¹⁰⁸ See Musey, *supra* note 61, at 319 (arguing why incumbent licensees were concerned about renewal, particularly as it pertained to new applicants).

¹⁰⁹ See Musey, *supra* note 61, at 319 (providing television broadcasting as an example of a type of license that incumbents feared they would lose to new applicants).

¹¹⁰ See Musey, *supra* note 61, at 319 (explaining incumbent licensees' fears of losing license to applicants for similar use of spectrum).

¹¹¹ See Musey, *supra* note 61, at 320 (using minority race or ethnicity as one source of fear for incumbent licensees that licenses would not be renewed).

¹¹² See Musey, *supra* note 61, at 319-20 (demonstrating how citizens groups possess political influence to prevent incumbent licensee from obtaining renewal); see also *Office of Comm'n of the United Church of Christ*, 359 F.2d at 1005 (D.C. Cir. 1966) (noting how certain citizens who are able to bear the costs of intervening into renewal process are the only ones who may challenge, thus limiting the number of objections the FCC might issue).

tions Act.¹¹³ The real reason for this is because the filing of a competing application for a broadcaster's license, or a protest to its renewal, forced a "Comparative Hearing Process," whereby the FCC considers the broadcaster's renewal application and compares its merits and vices to those of the proposed use of the applicant.¹¹⁴ Eventually, broadcasters began to whittle down these efforts by essentially paying a settlement fee to these lobbying groups in exchange for their withdrawal to the broadcaster's license renewal.¹¹⁵ And finally, Musey points to Levi's argument that the 1996 Act's amendment with subsection (k) in Section 309 of the 1934 Act, although it eliminated the comparative hearing process problem for licensees, placed more administrative discretion into the hands of the FCC to alter the terms of a license, thereby weakening any property rights' argument an incumbent might assert.¹¹⁶

The elimination of the Comparative Hearing Process, however, is not truly a disadvantage to an incumbent licensee, as the FCC's inability to compare a prospective applicant's use of the license for which he or she applies is not allowed under existing law.¹¹⁷ Although the FCC retains more discretionary powers to unilaterally alter license terms, as previously mentioned, a licensee who acts in "good behavior" can expect renewal to occur, and without the aid of comparison from citizen group pressure, or from a prospective applicant's potential use of the same frequency, it is much more favorable towards allowing more firms to invest in the industry itself.¹¹⁸

C. Application of the 1934 and 1996 Acts

¹¹³ See Musey, *supra* note 61, at 319-20 (explaining how D.C. Court's ruling gave citizen groups power to protest license renewals),

¹¹⁴ See Musey, *supra* note 61, at 320 (delineating procedure for a "Comparative Hearing Process").

¹¹⁵ See Musey, *supra* note 61, at 320-21 (describing how broadcasters dealt with license renewal challenges).

¹¹⁶ See Levi, *supra* note 73, at 244-45 (arguing how property rights' argument is weakened through more administrative discretion by FCC).

¹¹⁷ See 47 U.S.C. § 309(k)(4) (2006) (outlining criterion FCC may not use in granting license renewal, particularly that of comparing current use of license by incumbent to prospective use by applicant).

¹¹⁸ See Corbett, *supra* note 72, at 611 (arguing why license renewal provides more economic growth than altering terms of the license).

Despite the language and text of both statutes, and their subsequent statutory history, the actual application of the 1934 and 1996 Acts are the best indicators of why property rights in spectrum licenses perhaps do exist, for as Shelanski and Huber note, renewal has become much easier since 1970 when it began requiring simply that the incumbent's performance be "minimal," even if prospective applicants were superior under other criteria.¹¹⁹ Thus, a lesser performing incumbent has a better chance today of obtaining renewal than a superior applicant does, and thus a measure of continuity and stability has arisen in the renewal process.¹²⁰ Much of this came from the FCC's willingness to eliminate bookkeeping and tracking mandates originally required for renewal, both to lower the cost for incumbents, as well as to streamline the renewal process in general.¹²¹ Additionally, license terms were increased in 1981 from three to five year terms for television broadcasters and from five to seven for radio.¹²²

Perhaps the most persuasive argument for property rights in spectrum licenses is that broadcasters now possess an increased ability to transfer their interests in their own licenses, thus allowing for greater alienability, much like the alienability of real property itself.¹²³ Although Robinson does point out that a license does not legally confer property rights in a particular licensee, the ability to alienate property certainly makes the argument much more convincing that property rights do and should exist for licensees.¹²⁴ Although licensees must possess their license for one year before they may transfer it, the FCC has allowed licensees to subdivide the spectrum by

¹¹⁹ See Shelanski & Huber, *supra* note 70, at 585-89 (tracing development of property rights for incumbents through easing of renewal process).

¹²⁰ See *In re Cowles Florida Broad, Inc.*, 60 F.C.C. 2d 372, 423 (1976) (upholding license renewal for incumbent despite more meritorious applicant).

¹²¹ See Shelanski & Huber, *supra* note 70, at 587-88 (elaborating on changes FCC made to renewal process).

¹²² See Shelanski & Huber, *supra* note 70, at 588-9 (explaining other changes leading to conclusion of stronger property rights in spectrum licenses).

¹²³ See Shelanski & Huber, *supra* note 70, at 589-90 (demonstrating how transfer of spectrum licenses allows incumbent licensees to assert greater property rights).

¹²⁴ See Robinson, *supra* note 61, at 10 (demonstrating theory for why licenses do not legally confer property rights). *But see* Shelanski & Huber, *supra* note 70, at 589-90 (recounting how transfer of licenses allows for greater property rights for incumbent holders).

“time brokering” with third parties on joint ventures, thus allowing for greater flexibility.¹²⁵

Due to these significant changes in how the FCC has applied the 1934 and 1936 Acts, despite its text and statutory history, it is not difficult to see why licensees believe they possess greater property rights in their licenses.

IV. CONCLUSION

The FCC’s ability to sell licenses at public auction is a tremendous advantage for the United States federal government, not only to bring in more revenue, but also to commandeer the “public interest, convenience, and necessity” of the nation’s entire electromagnetic spectrum. This interest is all the more potent and elevated in today’s 21st century information society, where an increasing number of individuals rely on digital technology to gain access to knowledge and information they did not previously have. Thus, how the nation’s bandwidth spectrum is used certainly becomes of importance in determining what policy should be adopted. Despite language in the 1934 Communications Act which requires licensees to waive any expectations of renewal in their licenses, and its subsequent statutory history pointing to weak arguments for property rights, the practical application of the Act implies that license holders do have a strong argument for property rights in their licenses. Equally as persuasive, despite the language and statutory history of the 1996 Act, its practical application as well also implies strong property rights for license holders because of a licensee’s longer license term, less expensive bookkeeping directives, and most importantly, the ability to transfer their licenses to third parties, as if the license itself were alienable property. This recognition of stronger property rights for license holders is an important step in establishing continuity and stability in the telecommunications industry. Moving forward, it will be important for spurring the technological innovation and subsequent proliferation of wireless technology devices, which will lead to a stronger and more permanent investment in the telecommunications industry. This, it seems, is the true “public interest” the

¹²⁵ See Shelanski & Huber, *supra* note 70, at 592 (describing FCC’s allowance of greater flexibility for licensees to transfer and subdivide their licenses with third parties).

FCC should seek to follow, and it begins through the practical application of the 1934 and 1996 Acts to recognize stronger property rights for spectrum licensees in their respective frequencies.