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Smut in Space: The FCC and Free Speech on Satellite Radio

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Smut In Space: The FCC And Free Speech On Satellite Radio

By Andrew Sperry*

> *"This will be the dominant form of media because there is no government regulation. It's the death of the FCC. They have ruined commercial broadcasting—down with the FCC!"*
>
> *– Howard Stern, announcing his move to Sirius Satellite Radio*[1]

I. Introduction

Not so fast Mr. King-of-all-Media. Howard Stern, one of the most prolific and controversial commercial radio personalities of all time, announced in November of 2004 that he was taking his brand of talk radio off the terrestrial airwaves and into the future at satellite radio.[2] Discontented with what he perceived as unfairly targeted Federal Communications Commission ("FCC") indecency fines, Mr. Stern signed a five-year, $500 million dollar deal to peddle his brand of entertainment on a medium free from the Commission's regulatory

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[1] Steve Hargreaves, *Howard Makes a Sirius Pitch*, CNN/Money, *at* http://money.cnn.com/2004/11/18/news/newsmakers/stern/index.htm?cnn=yes (Nov. 18, 2004) (last visited May 10, 2005).

[2] *Id.*

grasp.[3]

Since this announcement, interest in satellite radio has skyrocketed.[4] Mr. Stern's new home, Sirius Satellite Radio, Inc., needs 1.1 million Stern listeners to abandon traditional broadcast format in favor of radio free from content-based regulation just to break even on its investment.[5] But will satellite radio remain a First Amendment oasis for broadcasters and listeners? For some the question is not whether, but when the government will regulate the content on satellite radio.

Ever since the now-infamous Janet Jackson episode at the 2004 Super Bowl, libertarians and moralists alike have pushed the indecency discussion to the mainstream.[6] Ever the opportunists, Congress seized the issue and pushed through more stringent indecency fines with the passage of the Broadcast Decency Enforcement Act of 2005.[7] While those measures merely increased the FCC's already existing power to regulate the content on traditional mediums, such as broadcast television and radio, Congress has sought to extend its reach into other mediums once thought free. In 1996, Congress passed the Communications Decency Act of 1996 ("CDA"), which criminalized the "knowing" transmission of "obscene or indecent" material over the Internet.[8] Similarly, under the guise of its interstate commerce power, Congress has pushed cable television and satellite television to include local broadcast television stations amongst their other programming.[9]

This article will analyze whether satellite radio will fall victim to some form of congressionally-mandated FCC content regulation. Still in its relative infancy, satellite radio travels comfortably through space within the content regulation-free zone. But as technology

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[3] *Id.*

[4] Lorne Manly, *As Satellite Radio Takes Off, It Is Altering the Airwaves*, N.Y. TIMES, Apr. 5, 2005 (predicting that by 2010, subscribers of satellite radio could range from 30 million to 45 million people).

[5] Associated Press, *Carmaker Deals May Drive Satellite Radio Toward Profit*, CHI. TRIB., Mar. 28, 2005 [hereinafter Associated Press].

[6] James Poniewozik, *The Decency Police*, TIME MAG., Mar. 28, 2005, at 24.

[7] *See* H.R. 310, 109th Cong. (2005) (noting that this bill has passed the House of Representatives and is currently pending in the Senate).

[8] 47 U.S.C. §§ 223(a), (d) (2004).

[9] Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 (2004); The Satellite Home Viewer Improvement Act of 1994, 47 U.S.C. § 338(a) (2004).

changes and popularity grows, Congress may use exercise its authority to level the playing field for a sagging traditional broadcasting industry. To understand the FCC's power to do so, this article will discuss the origins and tenets of the FCC's content-regulation powers. Furthermore, this article will analyze the aforementioned attempts to push content regulation into once thought free mediums as well as the United States Supreme Court's interpretation of these laws. Finally, this article will analyze the current rumblings within the Congress, the FCC and the radio industry that may lay the groundwork for future government intervention.

II. Background

A. Origins of Satellite Radio

Satellite communication technology within the broadcasting industry originated more than two decades ago, but has transformed the telecommunications industry ever since.[10] Coasting at 22,300 miles above the earth, a flurry of satellites beam all kinds of data back to receivers including television and radio programming.[11] Ever since the Early Bird satellite transmitted the first television transmission back to earth, popularity has increased with some estimating that as many as 18 million households receive satellite transmission for broadcasting purposes.[12] Observers attributed the rapid growth in subscribers to the ability of satellite transmissions to reach markets untouched by traditional and cable broadcasting.[13]

Since satellite transmissions enjoy an almost unlimited amount of bandwidth, the FCC initial regulation of the satellite industry amounted to playing traffic cop.[14] Initially favoring a hands-off approach controlled by free market theory, the emerging

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[10] EDWIN DIAMOND, NORMAN SANDLER & MILTON MUELLER, TELECOMMUNICATIONS IN CRISIS: THE FIRST AMENDMENT, TECHNOLOGY AND DEREGULATION 40 (Cato Inst. 1983).

[11] *Id.*

[12] The Satellite Broadcasting and Communications Association, *Satellite Industry Overview, available at* http://www.sbca.com/index.asp (last visited May 10, 2005).

[13] DIAMOND ET AL., *supra* note 10, at 40.

[14] *Id.* at 41.

popularity of the satellite technology forced the FCC to take a stronger regulatory stance. In 1981, the FCC granted its first application for direct satellite broadcasting services to the Satellite Television Corporation.[15]

By this time, traditional broadcasters began to feel the heat of competition from satellite broadcasters. Citing what they considered "deregulatory favoritism" toward satellite services, the National Association of Broadcasters ("NAB") asked the FCC to define satellite transmitters as broadcasters.[16] If defined as broadcasters, satellite carriers would be subject to many of the same regulations as traditional broadcasters, including those regulations that give the FCC the power to regulate content.[17] The FCC held a proceeding to determine what criteria it should use when classifying a communications service as a broadcaster or a non-broadcaster.[18] The Commission determined that the intent of the licensee to broadcast to the general public was the controlling factor.[19] Specifically, the Commission cited the deciding factors as: whether the customer needs a special receiver to decode the information, whether the information transmitted is encrypted and whether the operator and subscriber are in a contractual relationship.[20]

Based upon these factors, the FCC gave satellite operators a choice between regulatory treatment as a non-broadcaster or a broadcaster.[21] To date, no satellite operators have chosen the broadcasting classification presumably because the non-broadcasting classification offers the most regulatory freedom. Because satellite radios provide services that require a decoder to receive information, transmit encrypted information, and require subscribers to enter into a contractual relationship, they fit the non-broadcasting classification as defined by the FCC.[22]

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[15] HARVEY L. ZUCKERMAN ET AL., MODERN COMMUNICATIONS LAW 145 (West Group 1999).

[16] Nat'l Ass'n of Broad. v. Fed Communications Comm'n, 740 F.2d 1190, 1198-1202 (D.C. Cir. 1984)

[17] *Id.* at 1200-06.

[18] *In the Matter of* Subscription Video, Report and Order, 1987 WL 343713, at *1 (1987).

[19] *Id.* at 11, ¶ 41.

[20] *Id.*

[21] ZUCKERMAN ET AL., *supra* note 15, at 145.

[22] *Subscription Video, Report and Order*, 1987 WL 343713 at 11, ¶ 42.

This classification allows Howard Stern to boast that satellite radio enjoys freedom from government regulation of content. But as this article will discuss in greater detail, the government has extended its reach across this once forbidden line.

B. The First Amendment and Obscenity

The First Amendment of the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech."[23] Long considered the foundational right of any Western democracy, the First Amendment provides societies with a free marketplace of ideas protected from the strictures of government.[24] At its most ideal, the First Amendment allows citizens to criticize the government and its public officials.[25] The First Amendment also provides specific protection for the press ensuring that the press industry maintains watchdog status over the government.[26]

In interpreting the First Amendment, courts have separated the different types of speech and assigned requisite levels of protection. Generally, the courts have created spheres of speech categories including political speech, socio-economic speech, commercial speech, sexual or prurient speech and criminal speech.[27] In general, when the federal or state government seeks to limit speech, political speech will receive the highest level of protection while sexual, prurient, or criminal speech will receive the lowest.

The current indecency debate centers on the use of and protections for obscene or indecent speech. The Supreme Court determined that obscene speech enjoys no First Amendment protection.[28] On the other hand, indecent speech does enjoy some First Amendment protection and any limitations upon that speech must further a compelling state interest using the least restrictive

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[23] U.S. CONST. amend. I.

[24] Dunagin v. Oxford, 489 F.Supp 763, 769 (N.D. Miss. 1980).

[25] Mills v. Ala., 384 U.S. 214, 218 (1966); Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[26] N.Y. Times v. Sullivan, 376 U.S. 254, 269 (1964).

[27] WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY 23 (3rd Ed. Found. Press 2002).

[28] *In the Matter of* Indus. Guidance on the Comm'ns Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8000 (2001) (hereinafter *Industry Guidelines*).

means available.[29] As demonstrated by the next section, the Court has upheld the FCC's ability to regulate indecent and obscene speech.

C. The FCC's Ability to Regulate Content

In *FCC v. Pacifica Foundation,* the Supreme Court affirmed the FCC's definition of indecent language as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[30] Congress made it a violation of federal law to broadcast obscene or indecent material.[31] This law also gave the FCC administrative responsibility for enforcing 18 U.S.C. section 1464.[32] Although the power derives from a criminal statute, the FCC has the power to levy civil penalties such as station license revocation, fines or warnings.[33]

The FCC, through its indecency jurisprudence, has advanced four separate reasons why it should regulate content on broadcast mediums.[34] First, because radio receivers are in nearly every home and are easy to operate, children often have access to them without parental supervision.[35] Second, since radios are found in homes, a person's privacy interest "is entitled to extra deference."[36] Third, adults who do not wish to hear indecent and profane language may turn on the radio and hear offensive language without any warning.[37] Lastly, given that there is a scarcity of spectrum space for this medium, it is in the public's best interest to grant licenses only to operators that provide suitable programming.[38]

Many interest groups have challenged the FCC's ability to

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[29] *Id.*

[30] Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 732 (1978).

[31] 18 U.S.C. § 1464 (2004) (prohibiting the utterance of "any obscene, indecent, or profane language by means of radio communication").

[32] *Id.*

[33] 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D) (2004).

[34] Pacifica Found., 437 U.S. at 731 n.2.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

regulate content; some ask the Court to give the FCC more power, while some ask the Court to strip the FCC of its power.[39] For example, in *Action for Children's Television v. FCC*, the D.C. Circuit court rejected the FCC's ruling that it could regulate content for material aired after 11:00 p.m.[40] As the FCC commenced proceedings to determine the proper airtime for regulation, Congress intervened and gave the FCC statutory power to regulate broadcasts for the full twenty-four hours.[41] The court quickly rejected this standard as too restrictive.[42] Eventually Congress and the courts settled on the time period of 6:00 a.m. to 10:00 p.m. as the only times that the FCC may punish broadcasters for airing obscene or indecent material.[43]

The FCC follows a two-step process for determining if a broadcast is indecent.[44] First, the FCC must determine if the broadcast describes or depicts sexual or excretory organs or activities.[45] Second, the FCC must determine if the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.[46] The FCC defines the community standard as what the average broadcast viewer or listener may find offensive, not the "sensibilities of any individual complainant."[47] Furthermore, the FCC analyzes the full context of the broadcast to determine the explicitness of the sexual or excretory

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[39] *See generally In the Matter of* Establishment of Rules and Policies For the Digital Audio Radio Satellite Serv. in the 2310-2360 MHz Frequency Band Radio Serv. Terrestrial Repeaters Network, MB 04-160, NAB Pet. for Declaratory Ruling (Apr. 14, 2004) (asking FCC to extent regulations over local content to satellite radio); Satellite Broad. & Communications Ass'n of Am. v. Fed. Communications Comm'n, 146 F. Supp. 2d 803 (E.D. Va. 2001) (challenging the constitutionality of the "must-carry" provisions).

[40] Action for Children's Television v. Fed. Communications Comm'n, 852 F.2d 1332, 1334 (D.C. Cir. 1988).

[41] Making Appropriations for the Dep'ts of Commerce, Justice, and State, the Judiciary and Related Agencies for the Fiscal Year Ending Sept. 30, 1989, and for other purposes, Pub. L. No. 100-459, § 608, 102 Stat. 2186 (1988).

[42] Action for Children's Television v. Fed. Communications Comm'n, 932 F.2d 1504, 1508 (D.C. Cir. 1991).

[43] Action for Children's Television v. Fed. Communications Comm'n, 58 F.3d 654, 658 (D.C. Cir. 1995).

[44] *Industry Guidelines*, *supra* note 28, at 8002.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 8002.

reference.[48] If the broadcast in question transpired for an unusually long period, the FCC is more likely to find it offensive.[49] As the result of a lawsuit, the FCC provides examples of questionable broadcasts and it's reasoning as to why or why not the material was offensive.[50]

The FCC may only regulate content after a complaint has been filed, it does not independently monitor the airwaves.[51] Complainants must provide the FCC with a full or partial tape or transcript of the broadcast, the date and time of the broadcast and the call signs of the station in question.[52] If the FCC determines that the broadcast may be patently offensive, the licensee is notified and afforded an opportunity to be heard.[53] The FCC considers the licensee response and determines the proper course of action, if any.[54] If the FCC decides to take action, the licensee can appeal through administrative means.[55] If the licensee refuses to pay the fine, the U.S. Department of Justice may initiate a trial de novo in the U.S. District Court, where the allegations of indecency are re-evaluated.[56]

III. Discussion

A. *Reno v. ACLU*: Congress Moves to Regulate Content on a Non-Broadcast Medium

Despite the clear delineations between traditional broadcasting mediums and new technologies, Congress has nonetheless sought to regulate the content of mediums once thought out of its reach. In 1996, the House and Senate, both with Republican majorities, passed the Telecommunications Act of 1996.[57] President

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[48] *Id.* at 8002-8003.

[49] *Industry Guidelines*, *supra* note 28, at 8003.

[50] *Id.* at 8003-8015.

[51] *Id.* at 8015.

[52] *Id.*

[53] 47 U.S.C. § 503(b) (2004)

[54] *Industry Guidelines*, *supra* note 28, at 8016.

[55] *Id.*

[56] *Id.*

[57] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

Bill Clinton, a Democrat, signed the bill, which stated that its purpose was to reduce regulation in the telecommunications industry and encourage "the rapid deployment of new telecommunications."[58]

Although the legislation aimed to spur competition, it also contained content-based regulation such as the Communications Decency Act of 1996 ("CDA").[59] This provision sought to prohibit the knowing transmission of indecent or obscene material to any recipient under the age of eighteen by means of a telecommunications device.[60] Underneath the technical gobbledygook lies a clear attempt by Congress to prohibit obscene and indecent material over the Internet, which at the time used phone lines as a conduit. By the mid-1990s, the Internet was booming both as a business and personal communications device.[61] The Court noted that at the time of trial almost 40 million people had used the Internet and that number was expected to balloon to 200 million by 1999.[62] Because the Internet housed an almost inexhaustible amount of information, including sexually explicit material that could be harmful to minors, Congress wanted to patrol the medium.[63]

Plaintiffs, including the ACLU and other civil liberties groups, immediately challenged the constitutionality of the CDA, filing suit the same day that the President signed it into law.[64] Plaintiffs argued primarily that the CDA unconstitutionally chilled protected First Amendment speech with its overbroad language and inherently vague definitions of "obscene" and "indecent."[65] The Government countered stating that Court decisions in *Ginsberg, Pacifica* and *Renton* provided the necessary precedent to justify the legislation.[66] The Government argued that the Court allows it to

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[58] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 857 (1997).

[59] 47 U.S.C. § 223 (West 2005).

[60] 47 U.S.C. § 223(a)-(d) (2004).

[61] *Reno*, 521 U.S. at 850.

[62] *Id.*

[63] *Id.* at 849-50.

[64] *Id.* at 861.

[65] *Id.* at 862.

[66] Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a New York statute that prohibited selling obscene material to minors under age 17 even if that material would not be obscene to adults.); FCC v. Pacifica Found., 438 U.S. 726 (1978) (establishing definition of obscene and indecent); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult

regulate content that may be harmful to minors even if that same material is not harmful to adults.[67] Therefore, this convoluted logic provides its basis for Internet content regulation.

The Court rejected this argument and held the CDA unconstitutional as an overbroad attempt to regulate protected speech.[68] Although the Court noted that each mode of communications creates its own set of constitutional problems, it did re-establish that the Government's ability to regulate content over the broadcast medium was based on "special justifications."[69] The Government may only regulate content over a medium that has a "scarcity of available frequencies" or is invasive in nature.[70] Broadcast content regulation meets constitutional muster because radio and television bandwidth is relatively scarce, television and radio receivers are in nearly every home and because the listener has very little warning of unexpected and unwanted content.[71]

The Government can't apply this argument to the limitless bounds of cyberspace.[72] Furthermore, although most Web pages are freely available, access to these and other pay-first sites require "a series of affirmative steps more deliberate and directed than merely turning a dial."[73] Because of the Internet's free form, the Court agreed with Judge Dalzell's District Court opinion that the Internet was "the most participatory form of mass speech yet developed" thereby entitled to "the highest protection from government intrusion."[74]

The Court's protection of the Internet from government content regulation represents its unwillingness to allow expansion of free speech intrusion into non-broadcast mediums. This trend will have very positive ramifications for those in the satellite communications industry that want to keep the government out of its programming decisions. However, as the section will demonstrate,

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theaters from entering a neighborhood).

[67] *Reno*, 521 U.S. at 874.

[68] *Id.* at 862.

[69] *Id.* at 867.

[70] *Id.*

[71] *Id.* at 867.

[72] *Reno*, 521 U.S. at 867.

[73] *Id.* at 852, 854. ("[A] child requires some sophistication and some ability to read, to retrieve material and thereby to use the Internet unattended.").

[74] *Id.* at 863.

the government has made some attempts to regulate the content on the satellite radio format.

B. Subscription-based Entertainment Received Via Satellite Outside the FCC's Reach

In 2002, the Litigation Recovery Trust ("LRT") presented the FCC with a petition for declaratory ruling on satellite television's ability to provide pay-for-view "adult" movies to hotels.[75] LRT claimed that Comsat, the satellite signal provider, had violated the public interest standard within the Satellite Communications Act by distributing "pornographic" and indecent material to hotel guests who requested these movies.[76] The FCC firmly rejected this claim, stating that unlike traditional broadcast media, this satellite transmission was neither pervasive nor invasive.[77] Furthermore, satellite communication does not suffer from the same scarcity of spectrum that the traditional regulated broadcast medium does.[78]

This argument against content regulation of subscription-based entertainment resurfaces as the FCC confronts the exploding satellite radio industry.

C. The FCC and Satellite Radio: End of a Love Affair?

Thus far, the FCC has embraced satellite radio with open arms. However, Commissioners have been mindful of the threat that this technology may present to the traditional radio format. Commissioner James H. Quello addressed the threat at the Intelevent Convention in 1994.[79] In his address, Commissioner Quello presented the preservation of "free, over-the-air broadcasting" as the most important public policy goal of his administration.[80] In Commissioner Quello's opinion, the advent of satellite radio raises the possibility

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[75] *In the Matter of* Litig. Recovery Trust, 17 F.C.C.R. 21,852, 21,853 (Fed. Communications Comm'n Oct. 4, 2002).

[76] *Id.* at 21,856; 47 U.S.C. § 761 (2005) (asking the FCC to consider the public's best interest before granting satellite licenses).

[77] *Litig. Recovery Trust, supra* note 75, at 21,856 n.24.

[78] *Id.*

[79] James H. Quello, Nurturing the Environment: Different Regulatory Approaches, Address of Intelevent 1994 (Sept. 27, 1994), *available at* www.fcc.gov/Speeches/Quello/spjhq406.txt.

[80] *Id.*

that traditional broadcast radio will crumble from the multitude of programming options.[81] According to Commissioner Quello, the FCC has favored behavioral and structural regulation over content regulation as a means of maintaining a viable free broadcasting format.[82]

Likewise, Commissioner Harold W. Furchtgott-Roth stated his belief that new formats such as satellite radio make content-based regulation a futile effort.[83] In his opinion, market transformations will decrease the broadcast industry's ability to "corral content and control information flow."[84] Ultimately, Commissioner Furchtgott-Roth believes that as alternative sources of programming and distribution increase, "broadcast content must be eliminated."[85]

Even the much-maligned former Chairman Michael Powell has questioned the validity of content regulations over broadcast media.[86] But he has remained steadfast in his belief that government censorship should never reach satellite radio.[87] When asked about the FCC's relationship with satellite radio, outgoing Chairman Powell told the crowd at the Consumer Electronics Show that "it's a dangerous thing to start talking about extending government oversight of content to other media just to level the playing field."[88]

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[81] *Id.*

[82] *Litig. Recovery Trust, supra* note 75 (citing deregulation and the Fairness Doctrine as examples of structural and behavioral regulation, respectively).

[83] FCC Commissioner Harold W. Furchtgott-Roth, Separate Statement *In the Matter of Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency* (2001), *available at* http://ftp.fcc.gov/headlines2001.html (4/06/0—Separate Statement of Commissioner Harold W. Furchtgott-Roth).

[84] *Id.*

[85] *Id.*

[86] FCC Chairman Michael Powell, Remarks at the NAB Summit on Responsible Programming (Mar. 31, 2004) ("The First Amendment is cherished, but it bends only for you among media services. The Supreme Court and countless legal decisions create a special exception that allows government to demand more from broadcasting, rightly or wrongly.").

[87] David Becker, *FCC Chief Buoys VoIP, Satellite Radio,* CNETnews.com (Jan. 6, 2005), *available at* http://news.com.com/FCC+chief+buoys+VoIP%2C+satellite+radio/2100-7353_3-5515823.html (last visited June 3, 2005).

[88] *Id.* ("[A]t the end of the day, I think we're going to move in the direction of the Jeffersonian free-speech tradition.").

Some within the FCC recognize that like it or not, the content regulation battle may be thrust upon them. Addressing the very real threat that satellite radio technology poses to traditional radio broadcasting, FCC Commissioner Kevin Martin, who is now the Chairman of the FCC, told the National Association of Broadcasters in September of 2004 that the FCC "will have to face [the decision] of whether or not there should be changes made to level the playing field." [89]

As these comments by past commissioners and future Chairmen of the FCC demonstrate, the government and the FCC in particular have not indicated a desire to toy with satellite radio programming. However, the National Association of Broadcasters ("NAB") and its members, sensing the inevitable competition from the emerging satellite radio industry, have urged the FCC to step in and regulate content.[90]

On April 14, 2004, the NAB filed a petition with the FCC requesting a declaratory ruling on satellite radio's ability to broadcast local weather and traffic information.[91] NAB argued that satellite radio has created local programming in violation of its licensing agreement.[92] When satellite radio was conceived, the FCC "envisioned a ubiquitous, national-only programming service."[93] If allowed to provide local programming and compete with terrestrial broadcasting, satellite radio would gain an unfair marketplace advantage.[94] Furthermore, local-specific content is an "integral element, and a statutorily-mandated responsibility, of all terrestrial broadcast stations in the United States."[95] According to the NAB, satellite radio has pulled a bait-and-switch with FCC regulators by promising unique senior and children's programming and instead competing directly with terrestrial broadcasters, "without being

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[89] Billboard Radio Monitor, *Politically Charged: Can the FCC Muzzle Satellite?*, www.billboardradiomonitor.com (Nov. 19, 2004) (on file with author).

[90] *In the Matter of* Establishment of Rules and Policies For the Digital Audio Radio Satellite Serv. in the 2310-2360 MHz Frequency Band Radio Serv. Terrestrial Repeaters Network, MB 04-160, NAB Petition for Declaratory Ruling (Apr. 14, 2004) [hereinafter *Rules and Policies*].

[91] *Id.*

[92] *Id.* at 8-9.

[93] *Id.*

[94] *Id.*

[95] *Rules and Policies*, *supra* note 90, at 19.

subject to any public interest obligations." [96]

The Satellite Broadcasting and Communications Association ("SBCA") countered that the proposal for FCC regulation of satellite radio content would be in violation of the terms of the license and would violate their First Amendment rights.[97] Because this regulation would amount to content-based restrictions, the FCC must craft a narrowly tailored regulation that advances a compelling governmental interest.[98] The NAB could not demonstrate any proof that local programming on satellite radio harmed terrestrial radio, thus undermining any justification for such regulation.[99]

Seeing no resolution with its petition for a declaratory ruling, NAB dropped its petition and took its fight directly to Congress.[100] On March 24, 2004, Congressman Charles Pickering (R–MS) introduced H.R. 4026, titled the Local Emergency Radio Service Preservation Act of 2004.[101] If passed, this law would prohibit digital audio satellite service licensees from providing any targeted content that is local in nature.[102] One provision instructs the FCC to complete a rulemaking proceeding to determine "the impact of locally oriented satellite radio services on the viability of local radio broadcast stations and their ability to provide news and other services to the public."[103]

A member of the NAB placed the issue of content regulation for satellite radio more bluntly before the FCC. On October 29, 2004, Mr. Saul Levine, President of Mount Wilson FM Broadcasters, Inc., petitioned the FCC to commence a rulemaking to amend the Satellite Digital Audio Radio Service rules ("SDARS") to include the same

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[96] *Id.* at i (discussing the Executive Summary).

[97] *In re the Matter of* Establishment of Rules and Policies For the Digital Audio Radio Satellite Serv. in the 2310-2360 MHz Frequency Band Radio Serv. Terrestrial Repeaters Network, MB 04-160, Opposition of Satellite Broadcasting and Communications Assoc., 9, 14 (June 4, 2004).

[98] *Rules and Policies*, *supra* note 90, at 14.

[99] *Id.*

[100] *In the Matter of* Petition for Declaratory Ruling of the National Association of Broadcasters Regarding Programming Carried by Satellite Digital Audio Radio Serv. Providers, MB 04-160, Mot. to Dismiss Without Prejudice (Nov. 10, 2004).

[101] H.R. 4026, 108th Cong. (2004) (stating that the bill was referred to the House Subcomm. on Telecomm. and the Internet on Mar. 30, 2004).

[102] *Id.* at § 3.

[103] *Id.* at § 4.

indecency provisions as those that apply to traditional broadcast television and radio.[104] Mr. Levine argued that since the FCC has already imposed its political broadcasting rules and policies upon satellite radio, it also could impose indecency rules.[105] Furthermore, without such indecency provisions, the FCC would be treating traditional broadcasters unfairly by subjecting them to penalties inapplicable to a comparable medium.[106]

The FCC denied Mr. Levine's petition for rulemaking to extend content regulation to subscription-based services.[107] Citing the FCC record, Mr. Ferree repeated the FCC position that "subscription-based services do not call into play the issue of indecency."[108] Mr. Ferree also stated that existing Court precedent requires the FCC not to "impose regulations regarding indecency on services lacking the indiscriminate access to children that characterizes broadcasting."[109]

These proceedings demonstrate the power of the NAB lobby and Congress to extend content-regulation to satellite radio. If passed, H.R. 4026 could break the protective seal around satellite radio's content freedom. But the FCC's consistent response also demonstrates the strength of court precedent against extending indecency regulations to subscription-based services such as satellite radio. How these implications will play out remains to be seen, but the groundwork for future battles between these competitors has been laid.

D. Congress Beats the Drums for Expansion of FCC's Indecency Powers

Politicians love measures of public reaction. With a finger on the pulse of their constituents, politicians often ride that sentiment into legislation aimed more for the campaign trail than the public

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[104] *In the Matter of* Establishment of Rules and Policies for the Digital Audio Radio Satellite Serv. in the 2310-2360 MHz Frequency Band, Part 25, Pet. for Rulemaking (Oct. 29, 2004) (on file with author).

[105] *Id.*

[106] *Id.*

[107] Letter from W. Kenneth Ferree to Mr. Saul Levine, Re; SDARS Program Content Rulemaking Petition, DA 04-3907 (Dec. 15, 2004).

[108] *Litig. Recovery Trust, supra* note 75, at 21,856.

[109] Harriscope of Chicago, Inc., 3 FCC Rcd. 757, 760 n.2 (1988) (citing Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985)); Jones v. Wilkerson, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

interest. Public reaction to the Janet Jackson episode spurred the largest increase of FCC complaints in history.[110] And Congress listened by drafting the aforementioned Broadcast Indecency Enforcement Act of 2005.[111]

But some political opportunists want to carry a perceived public sentiment against indecent broadcasts into satellite radio and other subscription-based entertainment services. Former Senator John Breaux (D–LA) drafted an amendment to the 2004 Senate version of the Broadcast Indecency Enforcement Act that would have extended the indecency provisions to cable and satellite television.[112] This provision received strong bi-partisan support but was narrowly defeated by a vote of eleven yeas to twelve nays.[113]

Senator Ted Stevens (R-AK), the Chairman of the Senate Commerce Committee that oversees the satellite radio industry, told reporters and members of the NAB that he would push legislation to apply the indecency standards to cable and satellite television as well as satellite radio.[114] Senator Stevens said he "violently" disagrees with those that say Congress does not have the power to regulate content on cable and satellite outlets.[115] Since most people receive traditional and cable broadcasting from the same source, people can't differentiate the content.[116] Therefore, the mediums have essentially coalesced into one and the FCC should regulate both to the same extent.[117] Congressman Joe Barton (R-TX), Chairman of the House

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[110] FCC Report, *Indecency Complaints and NALS: 1993-2004* (Jan. 3, 2005) (evaluating that the number of indecency complaints rose from 202,032 in 2003 to 1,068,802 in 2004).

[111] H.R. 310, 109th Cong. (2005).

[112] S. REP. NO. 108-253, Broadcast Decency Enforcement Act of 2004 (Roll call votes in Committee).

[113] *See id.*(showing Sens. Lott and McCain voting "yea" alongside Sens. Kerry and Boxer).

[114] Reuters, *Senator Fights Cable "Indecency"; Alaska's Stevens says he'll push to apply public broadcast standards to satellite, too. www.money.cnn.com.* (Mar. 1, 2005) (on file with author).

[115] See *id.* (quoting Sen. Stevens saying "If that's the issue they want to take on, we'll take it on and let the Supreme Court decide.").

[116] Brooks Boliek, *Sen. Stevens: Pay TV Should Comply With Indecency Regs*, HOLLYWOOD REP., Mar. 1, 2005, *available at* www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000819253 (last visited May 10, 2005).

[117] *Id.*

Energy and Commerce Committee, agreed with his senatorial counterpart stating "it's not fair to subject over-the-air broadcasters to one set of rules and subject cable and satellite to no rules."[118] Some predict this provision could end up as an amendment to the current version of the Broadcast Indecency Enforcement Act of 2005.[119]

The public statements of Senator Stevens and Representative Barton have led to a proposed bill that would attack indecent, gratuitous and violent material on cable and satellite television.[120] Dubbed the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, this bill contends that the current technologies that help parents block content, such as the V-Chip, do not "achieve the compelling governmental interest in protecting all children from violent video programming."[121] Therefore, this bill instructs the FCC to develop more effective technology to meet the government's compelling interest.[122] Should the FCC find that available technologies are ineffective, they must "adopt measures to protect children from indecent video programming."[123] Senator Jay Rockefeller (D-WV), the drafter and chief sponsor of the bill, reasons that because 85.1% of American homes subscribe to some form of multi-channel video programming, consumers can no longer differentiate between cable and broadcast content.[124]

Although the bill doesn't directly refer to extending content-based regulations to cable and satellite television, the public statements of Senator Stevens and Representative Barton demonstrate that the option will undoubtedly enter the floor debate. Should this bill pass with some call for content-based regulation of paid programming services, it will serve as a warning to satellite radio broadcasters that they too may succumb to a similar type of bill in the near future. If satellite radio enjoys the same commercial success as its television counterpart, some enterprising politician will try to

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[118] Genaro C. Armas, *GOP Pols Target Indecency on Cable TV,* CHI. SUN-TIMES, Mar. 2, 2005, at 4.

[119] *See* Harriscope of Chi., Inc., 3 F.C.C.R. at 760 n.2 (citing *Ferre*, 755 F.2d at 1420 and *Wilkerson*, 800 F.2d at 1006-7).

[120] Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005).

[121] *Id.* at § 2, ¶ 17.

[122] *Id.* at § 4.

[123] *Id.*

[124] *Id.* at § 2, ¶ 4.

extend content-based regulation under the same theories espoused in Senator Rockefeller's proposal.

To combat the growing sentiment for extended censorship, Congressman Bernard Sanders (I-VT) recently introduced the "Stamp Out Censorship Act of 2005."[125] This bill seeks to amend the Communications Act of 1934 to limit the FCC's jurisdictional power to impose fines for indecency.[126] Under this amendment, the FCC could only fine traditional radio and television broadcasters and not providers of cable television systems, satellite carriers, the Internet, or non-broadcasters.[127] The passage of this bill would protect satellite radio, defined as non-broadcasters, from the FCC's indecency powers.[128] Representative Sanders and his nine co-sponsors represent the lone coalition fighting for satellite radio's First Amendment rights.

As demonstrated by this political rhetoric, the bi-partisan desire and support for expanded indecency powers already exists within the halls of Congress. Whether or not those interested in indecency expansion can garner widespread political support remains to be seen. President George W. Bush has not openly endorsed this tactic—often stating that parents should be the first line of defense against indecency.[129] However, in a recent speech to the American Society of Newspaper Editors, President Bush stated that he favored some decency standard for satellite and cable but reiterated his belief in the power of the marketplace to make those decisions.[130] This statement, coupled with increased public interest and a strong minority voice could light the congressional fire for quick, albeit reactionary legislation.

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[125] Stamp Out Censorship Act of 2005, H.R. 1440, 109th Cong. (2005).

[126] *Id.* at § 2.

[127] *Id.*

[128] Subscription Video, Report and Order, *supra* note 18, at 11, ¶ 42.

[129] Poniewozik, *supra* note 6, at 30 (stating that parents are "the first line of responsibility. They put an off button [on] the TV for a reason.").

[130] Pres. George W. Bush, Remarks at Am. Soc'y of Newspaper Eds. Convention (Apr. 14, 2005).

IV. Analysis

> *"Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime . . . the Constitution protects coarse expression as well as refined and vulgarity no less than elegance."*
>
> *– Former Supreme Court Justice Potter Stewart*[131]

A. The FCC and the Future Freedom of Satellite Radio

From a purely legal standpoint, it is unlikely that the FCC will intervene to regulate satellite radio. Satellite radio does not conform to any of the broad policy reasons that the FCC has put forth to justify its regulation of broadcast radio.[132] First, unlike traditional radio receivers, satellite radio requires the subscriber to purchase a separate receiver.[133] Traditional radios can be found nearly everywhere; they come standard in almost every car, nearly everyone wakes up to a clock radio, most homes have some form of a traditional radio receiver. The fact that satellite radio requires an affirmative purchase of a specialty product lessens the chance that child can access them without parental supervision.

Since satellite radio can be found in those homes and automobiles, a person's privacy interest "is entitled to extra deference" when considering whether to regulate content.[134] However, considering satellite radio is not nearly as ubiquitous as traditional radio, the FCC is unlikely to consider a person's privacy interest as more important that satellite radios' First Amendment rights. But the issue of popularity does raise an interesting question. If satellite radio does explode as some predict, will satellite radio receivers become as ubiquitous as traditional radio? Will we reach

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[131] Ginzberg v. U.S., 383 U.S. 463, 498 (1966) (J. Stewart dissenting).

[132] Pacifica Found., 438 U.S. at 731 n.2.

[133] Sirius Radio, at https://home.sirius.com/webDUWI/HomePage.aspx (offering a variety of purchase plans for receivers) (last visited May 10, 2005).

[134] *Id.*

the day when there is a Sirius satellite radio in every home, in cabs, in offices, in grocery stores?[135] If so, will the FCC want to step in and protect a person's right not to hear obscene and indecent material?

Third, unlike traditional radio, adults can't complain that they will have no warning of indecent or profane programming when they turn on a satellite radio. Since that same adult would have to purchase a satellite radio receiver and the subsequent subscription, it is assumed that they know what content they are purchasing. Since traditional radio comes over public airwaves, the public trusts the government to provide the programming that is not indecent or obscene.

Lastly, the satellite radio spectrum is nearly unlimited. Therefore, the government could not argue that it needs to regulate a limited spectrum in the public's best interest. Although the SBCA does argue that they have limited bandwidth, that bandwidth is only limited by the FCC.[136] The unlimited bandwidth of satellite radio may prove troublesome to those who wish to monitor the content of traditional radio. If traditional radio moves to the satellite spectrum, the Government loses the compelling interest of licensing limited bandwidth.[137]

The only real threat to expressive freedom of satellite radio rests in the halls of Congress. The actions of Senators Breaux, Stevens, and Rockefeller indicate a hunger to flex Congressional muscle with complete disregard to the judicial and administrative precedent. Congress may assert its compelling interest in the "free and full exchange of information over the broadcast spectrum" to regulate the content of satellite radio.[138] Cracking down on the indecency on satellite radio may level the playing field and keep traditional radio from sinking into irrelevance. This will incite a war between the opposing interest groups and their respective

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[135] *See* Associated Press, *supra* note 5 (showing XM Satellite Radio and Hyundai Motor Co. have reached a new deal to factory-install satellite radios in new models. Sirius Satellite Radio has reached a similar agreement with Ford Motor Co.).

[136] *See In The Matter of* Establishment of Rules and Policies For the Digital Audio Radio Satellite Serv. in the 2310-2360 MHz Frequency Band Radio Serv. Terrestrial Repeaters Network, IB Docket No. 95-91, NAB Pet. for Declaratory Ruling (Apr. 14, 2004).

[137] Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 637-38 (1994).

[138] Satellite Broad. & Communications Ass'n of Am. v. FCC, 146 F.Supp.2d 803, 809 (E.D. Va. 2001).

associations. Any form of content regulation arising from the ashes of that war would forever alter the landscape of entertainment communications.

But before First Amendment lawyers launch a Michael Moore-ian campaign of hysteria, a look at the past provides an interesting prologue. Proponents of the freedom of satellite radio should pay close attention to the history of cable television. Like satellite radio, the cable industry emerged as a new technology originally thought of as a companion, not a competitor of traditional broadcasting media.[139] But as cable continued to grow and traditional broadcasters began to feel the effects of competition, the FCC quickly moved in and regulated the industry.[140] Soon after, attempts were made to regulate the content on cable eventually leading to regulations that required equal time for political candidates, reasonable opportunity for presentation of conflicting views, and information on lotteries.[141] Courts approved these measures but struck down attempts by the states of Florida and Utah to punish any person who knowingly distributes pornography or indecent material by cable to its subscribers.[142] Despite this strong court precedent, Senator Rockefeller's new indecency bill has launched a fresh assault on the cable industry threatening content restrictions and monetary sanctions for the airing of indecent programming.[143]

The history of cable television regulation could foreshadow the future of satellite radio regulation. As with its stance towards the burgeoning cable industry, the FCC initially refused to regulate satellite radio. Only after satellite radio began to compete with traditional radio did the FCC step in and initiate regulatory hearings.[144] But hysterical opponents of regulation should remember that the courts, armed with legal precedent, prevented all attempts at

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[139] Vicky Hallick Robbins, *Indecency on Cable Television—A Barren Battleground for Regulation of Programming Content*, 15, ST. MARY'S L.J. 417, 427 (1984).

[140] *Id.*

[141] *Id.* at n.91.

[142] *Ferre*, 755 F.2d at 1420 (11th Cir. 1985) (striking down a city ordinance to regulate obscene and indecent material aired on cable); *Wilkerson*, 800 F.2d at 991 (10th Cir. 1986) (finding that federal law pre-empts Utah from regulating material aired on cable).

[143] Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, *supra* note 120, § 5 (2005).

[144] ZUCKERMAN ET AL., *supra* note 15, at 145.

indecency regulations over cable television. What the current court makeup with its penchant for divisive five to four decisions will do with Senator Rockefeller's bill remains to be seen.

Ultimately, a vastly polarized consumer audience will decide this issue. On one side of the spectrum, moralists such as the Parents Television Council ("PTC") have made a cottage industry out of filing FCC complaints and provoking change through administrative and procedural means.[145] Tim Winter, Executive Director of the PTC, boasts of an army of members that search through over 100,000 hours of broadcast programming for "every incident of sexual content, violence, profanity, disrespect for authority and other negative content."[146] This organization, which claims to have nearly one million members, has its roots firmly planted in moral ideology and crosses both political parties.[147] Overreaching legislation such as the one introduced by Senator Rockefeller and encouraged by Senator Stevens would only embolden this group to take the indecency fight to Stern and other satellite radio broadcasters.

On the other end of the spectrum, First Amendment proponents will continue to push the courts to scale back the FCC's content regulatory authority. To some believers of this ideology, the First Amendment is the cornerstone of our democracy. Therefore, any erosion into a citizen's free speech rights, including the right to view and create indecent material, represents an affront to our Constitution.[148] Other believers cite economic reasons, favoring a free market that corrects itself rather than a constricted market that bends to government authority.[149]

What about the great Middle? The great Middle wants great entertainment. Consumers in great Middle don't care much for the moralists, but they do know when indecent material has crossed the line of contemporary community standards. To further this point of view, this great Middle does not complain to the FCC, nor does it contract the sharpest First Amendment lawyer to file suit. This

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[145] *See* PTC WEBSITE, *at* http://www.parentstv.org (showing variety and extensiveness of PTC) (last visited May 10, 2005).

[146] Poniewozik, *supra* note 6, at 26.

[147] *Id.* at 27.

[148] *See generally* Stephen Labaton, *Indecency on the Air, Evolution Atop the F.C.C.*, N.Y.TIMES, Dec. 23, 2004.

[149] *Id.*

demographic votes with its dollar power.[150] The fate of content regulation on satellite radio will not rest in the halls of Congress but in the wallets of the consumer.

Both XM and Sirius Satellite Radio understand the power of the consumer by offering its consumers content choices. XM Satellite Radio offers two of its racier shows, the Opie and Anthony show and Playboy Radio, to those subscribers that are willing to pay above the standard subscription fee.[151] Sirius Satellite Radio offers channel blocking for all of its consumers, which allows the subscriber to block those channels that they deem unsuitable for personal or business use.[152]

But the great Middle continually confounds marketers and government regulators alike with largely unpredictable and contradictory viewpoints towards indecent material and the FCC. For example, in Time Magazine's recent poll of over 1,000 consumers, sixty-eight percent claim to have seen the infamous Janet Jackson incident either live or on a rerun.[153] However, only thirty-one percent stated that they were offended by that broadcast.[154] Similarly, while forty-one percent of the group state the cursing and sexual language should be banned from television, only five percent of the group have ever complained to the broadcaster or the government or participated in a boycott or demonstration against indecent broadcast material.[155]

These wildly varying consumer viewpoints demonstrate the ineffectiveness of content-based regulation. If a small sliver of consumers considers a racy *Desperate Housewives* halftime skit on Monday Night Football indecent and another separate swath of consumers considers an image of bare buttocks suitable for broadcast before 10:00 p.m., how can the FCC reach a national consensus suitable for content regulation?[156] Extending this power to the

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[150] Manley, *supra* note 4.

[151] XM Radio, *at* http://www.xmradio.com/programming/neighborhood.jsp?hood=premium

[152] Sirius Satellite Radio, *at* www.sirius.com/servlet/ContentServer?pagename=Sirius/Page&c=FlexContent&cid=1059597407488 (last visited May 10, 2005).

[153] *See* 18 U.S.C. § 1464 (prohibiting the utterance of "any obscene, indecent, or profane language by means of radio communication"); 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D).

[154] Poniewozik, *supra* note 6, at 29.

[155] *Id.*

[156] *Id.* (finding that 24% of those polled found the *Desperate Housewives* skit

unlimited world of satellite radio would only place a higher burden on the FCC to confine the varied content to contemporary community standards.

To achieve the best possible solution, entertainment providers must arm consumers with content-blocking devices and improved content choices that provide both the protection that moralists desire and the market freedom that intellectualists and economists demand.

V. Conclusion

In many ways, the moralists have already won the battle over broadcast decency. Just the mere threat of legislation sends a chilling ripple through the entertainment industry, waving a disapproving finger at broadcasters that cross a nebulous line. To extend this method of censorship to satellite radio would further erode the tenants of free speech that our founding fathers envisioned. The FCC has a long tradition of allowing the marketplace to determine programming decisions.[157] This tendency should continue as it wades through the minefield of political rhetoric fueling the current debate. In the end, satellite radio wants to make as much money as possible. If Mr. Stern proves too raunchy for Sirius Satellite Radio listeners, Sirius executives will self-regulate as the market demands. Marketplace regulation will provide the content regulation that some in our Congress would desire.

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offensive while 19% don't mind viewing bare buttocks before 10:00 p.m. when children are presumed to be watching).

[157] *In The Matter of* Establishment of Rules and Policies For the Digital Audio Radio Satellite Serv. in the 2310-2360 MHz Frequency Band Radio Serv. Terrestrial Repeaters Network, IB Docket No. 95-91, NAB Pet. for Declaratory Ruling (Apr. 14, 2004) pp.6-7.