

*The Great Airwaves Robbery***THE FCC'S DECISION ON CHANNELS 60 – 69 COULD TRANSFER \$10 BILLION OR MORE FROM TAXPAYERS TO BROADCASTERS**

By Michael Calabrese*

Last December Sen. John McCain described the 1996 “loan” of a second TV channel to broadcasters – for the stated purpose of facilitating the transition to digital and high-definition television – as “one of the great rip offs in American history. They used to rob trains in the Old West, now we rob spectrum.”¹

But even critics of the first Congressional giveaway could not have anticipated that within five years the FCC would allow broadcasters operating on channels 60 to 69 to capture for themselves as much as two-thirds of the \$10-to-\$30 billion that may be bid by wireless providers at the public auction now scheduled for next June 19. In an effort to create incentives for the 21 broadcast companies with stations on channels 60-69 to clear the band – thereby freeing it up more quickly for commercial wireless and public safety services – the FCC took the unprecedented step of completely delegating to the two affected industries the power to negotiate the share of the public auction proceeds that will be paid to the broadcasters instead of to the Treasury.

“Allowing industry to negotiate private marketplace deals that dictate the governance and the transfer of spectrum and to earn profits on the spectrum through such arrangements is outrageous,” Senate Commerce Committee Chairman Ernest F. Hollings wrote to FCC Chairman Michael Powell after the ruling. “Under the law, the FCC is also required to reassign channels 60-69 through an auction. When Congress enacted these statutory provisions, it did not envision that the FCC would hand over its authority to manage spectrum to industry and to the marketplace,”² Hollings wrote. The FCC’s decision, announced September 17, also allows these same broadcasters, organized as the Spectrum Clearing Alliance, to delay indefinitely the conversion to digital TV that nationalized their receipt of a second six MHz broadcast channel in the first place.³

In short, thanks to a misguided industrial policy, the most precious public asset of the information age – the electromagnetic spectrum, or airwaves – is being held hostage by incumbent licensees demanding a payoff for something they got for nothing in the first place. And due to a combination of Congressional inaction and the

pressing need to find frequencies for the wireless phone industry and public safety, the FCC seems all too willing to write a blank check for ransom.

How did we get here?

As the original Talking Head, musician David Byrne, once asked: Well, how did we get here? The root of the problem rests with Congress – and it will ultimately require Congressional action to guide the FCC to a new, more flexible and fair spectrum policy. Over the objection of Sen. McCain, then-Senate Majority Leader Bob Dole and a few others, the Telecommunications Act of 1996 gave each TV station a temporary license for a second channel at no charge for the purpose of facilitating the transition from analog to digital over-the-air broadcasting – a giveaway then valued by the FCC at \$37-to-\$70 billion, but now worth far more.⁴ Since broadcasters, unlike the phone companies, pay nothing to use the airwaves, the law required them to return the extra channel upon substantial completion of the conversion. Congress also required the FCC to auction the channels, once returned, for cell phones and other services.

Subsequently the 1997 Balanced Budget Act allowed broadcasters to occupy their analog channels until 2006 or until 85 percent of households have DTV sets or set-top converters, whichever is later, *and* required the FCC to auction the equivalent of six channels (36 MHz) of spectrum in channels 60-69 for commercial use and to re-allocate the remainder (24 MHz) for public safety, by 2000 (a deadline later extended to 2002). In his reply letter to Sen. Hollings, Michael Powell describes the FCC’s dilemma as the “incongruity presented by the statutory provisions” that require a public auction of the 60s channels years before the incumbent licensees are required to actually vacate those frequencies.⁵ In Powell’s view, creating financial incentives for the broadcasters to give back one of their two channels earlier than the statute requires will “facilitate the transition to the new uses that Congress has deemed important – not the least of which is public safety.”

In our view, Sen. Hollings is correct that the FCC action, however well-intentioned, both violates Congressional intent and is “outrageous” considering the available

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alternatives and the implications both for the U.S. budget and for spectrum policy. The FCC's action radically alters both the statutory benefits and burdens associated with the DTV transition. First, as Sen. Hollings suggests, the FCC's order effectively delegates to the Spectrum Clearing Alliance, led by Paxson Communications, the leverage (if not the actual authority) to determine what share of the total auction proceeds will go to the broadcasters and what share will be left over for the public treasury. Although wireless industry bidders will be a party to this "voluntary band-clearing agreement," their interest is to minimize the *total* cost of the spectrum. This means that both private parties deputized by the FCC to negotiate the terms of this transfer have an inherent self-interest in reducing the public's share. The model of a private market transaction presupposes that the owner of the property is party to the negotiation over the price of its transfer. Likewise, as Sen. Hollings suggests, allowing self-interested private parties to determine the public's share of the revenue from a public asset appears inconsistent with the FCC's fiduciary role as the public trustee of the airwaves.⁶

This unprecedented arrangement is likely to cost taxpayers (and the now-strapped federal budget) dearly. The chairman of Spectrum Exchange – the firm organizing the voluntary band-clearing agreement for Paxson's Alliance – says the FCC's order gives the Alliance great latitude to determine the portion of the total auction revenue that will be deposited into the "clearing fund" for participating broadcasters and that "right now it's set at 66 cents" of each dollar bid.⁷ At this level these "private voluntary efforts," as the September 17 order calls them, could reduce the public's share of the revenue for the 30 MHz due to be auctioned next June by \$10 billion or more. Last January 2001, the winning bids for a far smaller band of 3G spectrum totaled \$16.8 billion – more than \$1 billion per MHz on a national average basis, according to the FCC.⁸ Even if wireless providers pay only half as much (on a MHz/pop basis) for this 30 MHz as they bid last January, these lucky few broadcasters would receive a windfall approaching \$10 billion – far in excess of any economic loss due to added delay in their ability to broadcast in digital.

The FCC's order is a disturbing precedent because in the past incumbents relocated from re-allocated spectrum (e.g., microwave incumbents on the auctioned PCS spectrum, or military users on 1710-1755 MHz) were entitled to actual compensation for costs – but were certainly not allowed, in effect, to appropriate the public value of the asset through a private "sale." Although broadcasters originally argued that the clearing payments were justified to compensate stations for the loss of their over-the-air *analog* audience, the FCC's order allows broadcasters that sell one channel to delay indefinitely their promised conversion to digital television and to continue broadcasting in analog until 70 percent of U.S. homes can receive digital signals.⁹ Since less than 1 percent of households own over-the-air digital tuners now – only 150,000 units as of August, compared with 245

million total TV sets owned nationwide – these niche broadcasters (conspicuously populated by home shopping, paid-programming and foreign-language stations) are hardly losing many viewers or advertising dollars by not transmitting a second signal in digital.¹⁰ Indeed, to the contrary, they are also deferring the expense of meeting the Congressional DTV mandate and – in the unlikely event that an over-the-air DTV transition ever occurs – taking a free ride on mainstream stations farther down the dial.

As the figure above indicates, broadcasters licensed to operate on channels 60-69 actually occupy less than 10 percent of the potential station slots, on average, across the nation's 210 TV markets. On average less than one station per market operates on the 60s channels – indeed, 106 of the nation's 210 market areas have no stations at all operating on 60-69. As a percentage of the nationwide viewing audience, stations operating on channels 60-69 range (on average) from a low of 7 percent (channel 69) to a high of 36 percent (on channel 62). Although the broadcasters contend that the adjacent and co-channel protection they receive – which leaves many other channel slots unassigned to minimize interference – greatly increases the share of the total band that they effectively encumber, the reality is that they are attempting to leverage their tiny audience in a very underutilized band of spectrum to capture the lion's share of the auction revenue that rightfully belongs to all Americans.

Perhaps Lowell Paxson said it best: "We are entrepreneurs hoping to reward our shareholders who invested in *our business of amassing spectrum*."¹¹

Alternatives to Band-Clearing Ransom

Although Congress laid the foundation for this policy fiasco when it failed to auction spectrum allocated for DTV in 1996, there are alternatives to conferring a windfall on broadcasters at public expense – and to giving them additional incentive to delay the DTV transition.

One option available to the FCC, as Sen. Hollings suggested, is to "refrain from bending the law." While it is always preferable to auction unencumbered spectrum, Congress obviously knew the band would be encumbered for some years when it set (wisely or not) the original 2000 auction date. The wireless industry would bid less, but at least all of the stations would have remained subject to the DTV transition deadline set by Congress – and there would be no precedent for incumbent licensees receiving ransom to re-allocate public airwaves to a better use.

Nor would failing to clear the band prior to resolution of the DTV transition necessarily deny anyone 3G or public safety services. There is no urgency to clear *broadcast* spectrum for 3G consumer services, since alternative and superior spectrum has been identified this year to meet the still-speculative consumer demand for 3G services over the next five years (viz., the 120 MHz proposed last

SHARE OF U.S. TV MARKETS WITH STATIONS IN CHANNELS 60-69

Channel 60	Channel 61	Channel 62	Channel 63	Channel 64	Channel 65	Channel 66	Channel 67	Channel 68	Channel 69
6%	10%	11%	9%	8%	8%	8%	10%	10%	5%

Percentage of 210 U.S. TV Markets with Stations (by channel)

22%	29%	36%	21%	19%	18%	21%	23%	24%	7%
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Percentage of Total Viewing Households in Markets with Stations (by channel)



New 700 MHz Band Plan

Guard Band Public Safety Commercial Services (3G)

Source: *Cable and TV Factbook 2001*, Nielsen Media Research (<http://mediaresearch.com>)
and *100,000 Watts: US Radio and TV Directory* (<http://100000watts.com>).
A list of the stations in each of the 210 Designated Market Areas is available upon request.

month by the Commerce Department, which unlike broadcast spectrum is in bands designated globally for 3G; and the 95 MHz of military spectrum, also within the global 3G band, proposed by Rep. Charles Pickering and the wireless industry).

With respect to public safety, the FCC has been considering a 50 MHz band (4.9 GHz) that could meet much of the need, but has tentatively concluded that it need not be allocated exclusively to public safety because of the availability of channel 60 to 69 spectrum.¹² If the 130-odd stations scattered across channels 60-69 (less than one per market) cannot be consolidated to free up airwaves needed prior to 2006 for public safety purposes – or alternative spectrum identified – then ultimately that is a judgment for Congress to revisit. Just as the current crisis lends weight to Chairman Powell's argument that the nation should urgently increase spectrum for public safety, crisis-related legislative vehicles allow Congress to reconsider its priorities and the bargain, now broken, at the heart of the statutory mandate for a DTV transition.

If the FCC had adhered to the statute and auctioned encumbered spectrum, then the pressure would be redirected where it belongs – on Congress to resolve the failure of its DTV transition and spectrum giveaway policy. As Tom Wheeler, president of the Cellular Telecommunications and Internet Association argues, "[i]t is clearly time for Congress to revisit the issue and ask whether this spectrum should be used for home shopping or for homeland security."¹³

A second option is to turn the FCC's premise on its head— instead of rewarding broadcasters for delaying the

DTV transition, an escalating rental fee for occupying the second channel can internalize the opportunity cost of spectrum. Former FCC Chairman Bill Kennard suggested a "spectrum squatters fee," charged to broadcasters who failed to return the analog spectrum on time. If appropriately designed with escalator clauses, such a fee would provide major incentives for broadcasters to expedite the rollout of digital television, instead of providing them with incentives to delay the rollout further.

A related option – which could be combined with the first two – is to impose a hard deadline on broadcasters of 2006 for the conversion to digital and the return of the analog spectrum for auction. The auction could be open to a variety of wireless service providers, including broadcasters. Broadcasters that return channels, under those circumstances, could be compensated appropriately and generously for their costs, and the public would still be better off in both policy and monetary terms.

A third approach, which would also require Congressional action, is to earmark a portion of the auction revenue to subsidize digital set-top converters for citizens who still rely on over-the-air analog signals. We agree it would be unfortunate if Americans who now rely over-the-air television were denied such access. Indeed, since the expressed intent of Congress is to preserve localism in broadcasting and facilitate universal access to digital TV signals, rather than give a windfall to incumbent licensees it would be both cheaper and more effective to reinvest the public's auction revenue in the DTV transition itself. This could not only speed the transition, but also head off the politically implausible scenario whereby (under

current law) as many as 15 percent of the nation's households are left without an over-the-air TV signal once the 85 percent DTV threshold established by the Balanced Budget Act of 1997 is reached (and the "loaned" second channel is returned for auction).

In sum, the combination of the original Congressional "loan" and the recent FCC giveaway leaves the public with the worst of all possible policy worlds: greatly reduced revenues for the public treasury, even more delayed access to digital and HDTV, and a precedent that encourages every licensee of the public airwaves to hoard spectrum and to "hold out" for a payoff. Ultimately only bipartisan leadership in Congress will be able to guide the FCC to a new, more flexible spectrum allocation policy that achieves a fair return for the owners of this valuable asset – the American people.

Endnotes

¹ Christopher Stern, "Broadcasters' Promise of a Digital TV Age Has Not Been Met, and Now Congress Is Having Second Thoughts About Its Role," *The Washington Post*, Dec. 17, 2000, p. H1. A brief history of the capture of spectrum by private broadcasters can be found in David Bollier, *Public Assets, Private Profits: Reclaiming the American Commons in an Age of Market Enclosure*, New America Foundation (Spring 2001). As New York Times reporter Joel Brinkley revealed in his book, *Defining Vision*, the race to develop HDTV was primarily a lobbying strategy by broadcasters to prevent wireless telephone companies from acquiring unused tracts of spectrum adjacent to analog broadcast frequencies. See Joel Brinkley, *Defining Vision: The Battle for the Future of Television* (New York: Harcourt Brace, 1997).

² Letter from Senator Ernest F. Hollings, Chairman, Senate Commerce Committee, to Michael Powell, Chairman of the FCC (Oct. 17, 2001); See David Hatch, "Hollings Chastises Powell," *Electronic Media*, Oct. 22, 2001.

³ FCC, "Order on Reconsideration of the Third Report and Order," Sept. 17, 2001. The order allows stations giving up one channel to continue broadcasting in analog until 70 percent of households in their market area are equipped to receive over-the-air digital signals. See Norman Ornstein and Michael Calabrese, "Hey, Give Back Those Airwaves—Or Pay Up," *The Washington Post*, Oct. 14, 2001, p. C1.

⁴ FCC, Letter from Robert M. Pepper, Chief, Office of Plans and Policy, to Sen. Joseph Lieberman, Sept. 6, 1995. The lower value was based on the sale of recent television stations, while the upper value was based on results of auctions for spectrum licensed for wireless communication services.

⁵ Letter from FCC Chairman Michael K. Powell to Sen. Ernest F. Hollings, Chairman, Senate Commerce Committee (Oct. 23, 2001).

⁶ These arguments were made in a letter from Norman Ornstein and Michael Calabrese to FCC Chairman Michael Powell, Nov. 2, 2001 (all letters cited herein are available on request).

⁷ Interviews with Peter Cramton, Chairman, Spectrum Exchange, Sept. 25 and Oct. 4, 2001.

⁸ The \$1 billion per national MHz estimate is based on the average winning bid at the re-auction of the C block licenses concluded last January, which the FCC calculated to be \$4.18 per MHz per pop (i.e., per capita). See http://wtbwww13.fcc.gov/PCS/Broadband/BTA/Auction_35/Results/mdb/, cited in Thomas Hazlett, "The U.S. Digital TV Transition: Time to Toss the Negroponte Switch," paper presented at International Telecommunications Society Annual Meetings (Dublin, Ireland, Sept. 3, 2001).

⁹ FCC, "Order on Reconsideration of the Third Report and Order," Sept. 17, 2001. The FCC states: "Our underlying policy premise is that voluntary agreements can provide supplemental resources to broadcasters that will both expedite their transition to DTV and strengthen their economic viability, as well as enable earlier delivery of new wireless services..." *Id.*, at p. 3.

¹⁰ Michael Grotticelli and Karen Anderson Prikos, "Special Report: DTV Dog Days," *Broadcasting & Cable*, Aug. 20, 2001, p. 28.

¹¹ Lowell W. Paxson, "Mule Kicks Back," Letter to the Editor, *Barron's Online*, Mar. 26, 2001 (emphasis added). Paxson's letter to the editor came in response to an article by Thomas Hazlett, "Hostage Stand-off," *Barron's*, Mar. 19, 2001, suggesting that "[d]istasteful though it is, the efficient solution is not to shoot the mule [viz., Paxson and broadcasters squatting on frequencies needed for wireless services] but to bribe it to saunter along."

¹² Mary Greczyn, "Sept. 11 Attacks Refocus Attention on Public Safety Spectrum," *Communications Daily*, Oct. 18, 2001, p. 3.

¹³ Tom Wheeler, "Unwired Security for America," presentation at New America Foundation policy forum, Nov. 15, 2001.