

# TRAGEDY TV: RIGHTS FRAGMENTATION AND THE JUNK BAND PROBLEM

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*Tragedy of the anticommons<sup>1</sup> occurs when property rules fail to enable efficient social coordination. In radio spectrum, rights issued to airwave users have traditionally been severely truncated, leaving gains from trade unexploited. The social losses that Ronald Coase<sup>2</sup> asserted, appealing to basic theories of resource allocation, are now revealed via intense under-utilization of the TV Band.*

*Following the end of analog TV transmissions in June 2009, vast spectrum continues to be allocated to terrestrial broadcasting despite the fact that broadcast video delivery could inexpensively shift to cable and satellite. Making the TV Band (forty-nine channels spanning 294 MHz) available for new services is worth \$107 billion to service providers (at 2008 auction prices) and at least ten times that in consumer welfare.*

*Instead, U.S. regulators treat TV airwaves as a “junk band.” Analogizing to Wi-Fi radios accessing frequencies not allocated to exclusive licenses, the FCC seeks to permit government-approved devices to transmit in unoccupied TV Band “white spaces.” No radios have been approved, however, in eight years of rule makings, reflecting regulatory difficulty in weighing economic trade-offs.*

*Common interest tragedy, already visible in the long under-utilized TV Band, predictably locks in once white space devices are approved. By preempting exclusive spectrum rights, the opportunity for market reallocation of frequencies is lost. Specifically, fragmented and overlapping property rights cannot support investments to efficiently mitigate broadcast TV pollution, cleaning up the “junk band.” Alternatively, if rights to use white spaces were assigned via exclusive overlay licenses, spectrum owners could contract with cable and satellite operators for TV program distribution, releasing valuable airwaves for new services. Gains from reducing airwave pollution would induce cooperation, replacing political gridlock.*

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1. MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008).

2. Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 31 (1959).

## INTRODUCTION

Michael Heller's *The Gridlock Economy*<sup>3</sup> warns radio spectrum regulators: divvy up rights for the use of frequencies into tiny, fragmented, overlapping parcels, and you invite social loss.<sup>4</sup> This echoes and expands the original scholarly warning issued by Ronald Coase,<sup>5</sup> who saw that the parsimonious use rights issued by government regulators did not extend private parties the degrees of freedom needed to coordinate optimal spectrum resource employments.

This paper focuses on tragedy of the anticommons in the U.S. spectrum allocation known as the TV Band.<sup>6</sup> The inquiry has both general and specific payoffs. Generally, Federal Communications Commission (FCC) rules for allocating spectrum are clearly on display in the TV Band, and the economic inefficiencies they engender are easily analyzed. For instance, the property rights awarded economic agents produce a widespread waste of resources while thwarting efficient transactions, illustrating the large social losses defining "tragedy." Specifically, the policies being carried out for TV Band spectrum allocation are ongoing. New rules could, going forward, avert tragedies that previous policies have caused. Services generating over \$1 trillion in consumer surplus are available under a rights regime that takes Professor Heller's advice to avoid wealth-destroying property fragmentation.

In addition, the TV Band policy process exposes a modern attack on Coase's approach to radio spectrum regulation and, by implication, to Michael Heller's encomium on property rights. The idea motivating current policy is that transactions between property owners impose needless costs; to achieve optimal social results, government regulators should plan for additional "spectrum commons" that allow non-exclusive use rights to squeeze full social benefits from bandwidth. "The property approach made sense in 1960, but is now questionable."<sup>7</sup> As will be shown, this view mischaracterizes wireless technology, spectrum regulation, transaction costs, and the efficiency properties associated with alternative property rights structures. This *dirigiste* offensive attempts to resuscitate the *ancien regime* of traditional spectrum allocation, empowering regulators to control "harmful interference." The U.S. TV Band allocation vividly demonstrates the non-market failure that results.

Before embarking, it is first appropriate to trace the basics of the existing spectrum allocation regime in light of Heller's very useful analytical framework. "Tragedy of the commons" has always been in the shadows of radio wave regulation. While a political equilibrium—formed by incumbent radio broadcasters

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3. HELLER, *supra* note 1.

4. *Id.* at 79–106.

5. Coase, *supra* note 2, at 15.

6. The "TV Band" is the broader designation; the DTV Band being a specific reference to the spectrum allocation in place as per the June 12, 2009 end to analog transmissions. That event marked a transition, leaving digital television stations as the sole terrestrial video broadcasting platform.

7. Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863, 867 (2004).

and key federal policy makers—explains the creation of the current regulatory system in the 1927 Radio Act,<sup>8</sup> the public premise was that only government planning could keep radio stations from “chaos,” drowning out communications in a “cacophony of competing voices.”<sup>9</sup> This tragedy equated scarcity—the potential for costly conflict—with the need for government management of the resource. Coase’s contribution was to see that airwave-use rights could be rationed by either central administration or by competitive owners.<sup>10</sup> The key to enabling the latter was the legal enforcement of private ownership rights. This approach would afford the social advantages of markets in discovering and exploiting information not available to regulators. On theoretical grounds, he proposed such a system in 1959, following up with an extensive policy proposal in 1962.<sup>11</sup>

By limiting access to the spectrum resource, treating airwaves as “state property” (or, equivalently, “administrative allocation”<sup>12</sup>), policy makers ostensibly avert tragedy. Apropos of Heller’s argument that inefficient over-use is more visible than inefficient under-use,<sup>13</sup> actions to limit spectrum access regularly result in under-consumption of wireless services, what I have previously called Type II error by regulators.<sup>14</sup>

This outcome generally obtains when government follows the traditional path. Licenses mandate specific uses, prohibiting applications or technologies not expressly authorized. So, in the TV license, a specified party is granted the right to broadcast a video signal from a particular location (and height) at a given power level using a technology standard determined by the regulator. The business model is likewise fixed. Video must be transmitted free to customers; ad-supported services are authorized while subscription-only services are precluded. Some rules have been adjusted or relaxed for digital TV licenses, but the basic rights truncation remains: a station owner cannot decide that the 6 MHz allocated to the station’s license would be better used for some service other than over-the-air

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8. Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 151, 166 (1990).

9. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969).

10. Thomas W. Hazlett, David Porter & Vernon L. Smith, *Radio Spectrum and the Disruptive Clarity of Ronald Coase* 5–6 (George Mason Law & Econ., Research Paper No. 10-18, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1583098](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583098).

11. Ronald H. Coase, William Meckling & Jora Minasian, Problems of Radio Frequency Allocation, at iii (RAND unrestricted draft No. DRU-1219-RC, Sept. 1995), available at <http://www.rand.org/content/dam/rand/pubs/drafts/2008/DRU1219.pdf>. This paper was commissioned by the Rand Corporation and completed in 1962; the study was published, however, in 1995. Rand suppressed the paper after being warned by referees that the property rights proposal was too radical and would damage their reputation as a think tank. See R. H. Coase, *Comment on Thomas W. Hazlett: Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 577, 579–80 (1998).

12. See D. Lueck & T. Miceli, *Property Law*, in HANDBOOK OF LAW AND ECONOMICS 183, 236–45 (A.M. Polinsky & S. Shavell eds., 2007).

13. HELLER, *supra* note 1, at 17–19.

14. 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, 382 (2001).

television broadcasting, or a different transmission format, or a wholly different pricing model.

In short, the “exclusive” license grants just one party the right to operate the specified TV station, but does not grant exclusive rights in *spectrum*. FCC regulators retain control of basic airwave allocation choices on the premise that this control is needed to avert a tragedy of the commons. Specifically, the regulatory agency limits the inputs used by licensees and the activities they pursue with mandates that aim to mitigate “harmful interference.” The enterprise is misguided. “Harmful interference” is not to be mitigated, but to be incurred wisely. Valuable products regularly impose “harmful interference” with society’s other goals. The question is: are the goods or services produced more valuable than those excluded? This is an economic query.

The present system . . . involves detailed specifications as to the use to which an assigned frequency may be put, the power of the transmitter, the size, locations, and height of the antenna, polarization, modulation of the transmission, and so on. If this system results in the use of the “proper” combination of resources required to maximize the value of production with the frequency spectrum, it is either because the licensing agency has at its disposal, and utilizes, all of the information concerning the value of the resources in alternative uses, or it is fortuitous. In light of the fact that changing technology is continually enlarging the range of alternative combinations, and that additional uses for the spectrum develop over time, it seems unlikely that a system of rigid input specifications will result in an efficient use of the spectrum.<sup>15</sup>

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15. Coase, Meckling & Minasian, *supra* note 11, at 99. The economic critique has been highly persuasive among scholars. See Comments of 37 Concerned Economists, No. 00-230, *In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Dev. of Secondary Mkts.* (FCC Feb. 7, 2001), available at [http://www.brookings.edu/~media/Files/rc/reports/2001/02\\_economists\\_litan/02\\_economists\\_litan.pdf](http://www.brookings.edu/~media/Files/rc/reports/2001/02_economists_litan/02_economists_litan.pdf); MARTIN CAVE, DEPT. OF TRADE AND INDUS. FOR HER MAJESTY’S TREASURY, REVIEW OF RADIO SPECTRUM MANAGEMENT 55–60 (2002), available at [http://www.ofcom.org.uk/static/archive/ra/spectrum-review/2002review/1\\_whole\\_job.pdf](http://www.ofcom.org.uk/static/archive/ra/spectrum-review/2002review/1_whole_job.pdf); PETER W. HUBER, LAW AND DISORDER IN CYBERSPACE 155–64 (1997); HARVEY J. LEVIN, THE INVISIBLE RESOURCE: USE AND REGULATION OF THE RADIO SPECTRUM 70 (1971); ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 151 (1983); Gerald R. Faulhaber, *The Future of Wireless Communications: Spectrum as a Critical Resource*, 79 S. CAL. L. REV. 537, 545–54 (2006); Thomas W. Hazlett, *Optimal Abolition of FCC Spectrum Allocation*, 22 J. ECON. PERSP. 103, 122–23 (2008); Hazlett, *supra* note 14, at 390; Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87 (1997); Lawrence J. White, “Propertyizing” the Electromagnetic Spectrum: *Why It’s Important, and How to Begin*, 9 MEDIA L. & POL’Y 19 (2000); Evan R. Kwerel & John R. Williams, *A Proposal for a Rapid Transition to Market Allocation of Radio Spectrum* 3–14 (FCC Office of Strategic Planning & Analysis, Working Paper No. 38, 2002) [hereinafter Kwerel & Williams, *Rapid Transition*]; Evan R. Kwerel & John R. Williams, *Changing Channels: Voluntary Reallocation of UHF Television Spectrum* 7–10 (FCC Office of Strategic Planning & Policy Analysis, Working Paper No. 27, 1992); Douglas W. Webbink, *Frequency Spectrum Deregulation Alternatives* 15–34 (FCC Office of Plans & Policies, Working Paper No. 2, 1980).

The regime has led to the stasis predicted.<sup>16</sup> Perhaps in response to the intellectual consensus or due to changing economic circumstances, policy makers in the United States and around the world have moved away from the state property model in allocating spectrum for mobile phone services. As this industry emerged and eclipsed other wireless services in economic importance, the regulatory system evolved and further altered markets.

While the basic administrative allocation regime is still intact, regulators have increasingly relied on non-traditional methods for controlling interference. In crafting licenses for cellular services, U.S. regulators widely delegate spectrum use choices to licensees.<sup>17</sup> Service providers have discretion to choose their applications, wireless technologies, and business models.<sup>18</sup> Interference between millions of cell phone users is endemic, as users and application suppliers compete to gain access to the network. These conflicts are left to the cellular licensee to resolve under a “liberal license” regime, sharply contrasting with the “traditional license” under which most spectrum use rights are retained by the regulatory authority.<sup>19</sup>

In addition to this move towards in rem, as opposed to in personam, property rights, spectrum regulators have increasingly come to rely on so-called unlicensed band allocations.<sup>20</sup> While labeled “spectrum commons,” band access is regulated, largely via rules embedded in the process wherein radios using these airwaves are authorized for sale. Unlicensed bands have been set aside by the FCC since at least 1938;<sup>21</sup> the most important step in this regulatory path was the decision to relax equipment licensing rules for spread spectrum devices in 1985.<sup>22</sup>

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16. See Gerald R. Faulhaber & David J. Farber, *Spectrum Management: Property Rights, Markets, and The Commons* 6 (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No. 02-12, 2002).

The basics of the system we use today were established when the most important use of the spectrum was broadcasting and the range of usable spectrum was about 1% of what it is today. Few would argue that this system is optimal today, but many may lose if the system were changed. The system is so embedded in how we use the spectrum that change is practically unthinkable . . . . Is this a system that is admittedly highly inefficient yet with so many stakeholders that it cannot be changed?

*Id.*

17. Hazlett, *supra* note 15, at 115–16.

18. *Id.*

19. Thomas W. Hazlett & Evan T. Leo, *The Case for Liberal Licenses: A Technical and Economic Perspective*, 26 BERKELEY TECH. L.J. (forthcoming 2011), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=thomas\\_hazlett](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=thomas_hazlett).

20. *Id.*

21. Amateur bands predate the 1927 Radio Act. Radio operators are licensed (upon passing proficiency exams) and enjoy non-exclusive spectrum access rights. Kenneth R. Carter, Ahmed Lahjouji & Neal McNeil, *Unlicensed and Unshackled: A Joint OSP-OET White Paper on Unlicensed Devices and Their Regulatory Issues* 6 (FCC Office of Strategic Planning & Policy Analysis, Working Paper No. 39, 2003).

22. Michael Marcus, *Wi-Fi and Bluetooth: The Path from Carter and Reagan-Era Faith in Deregulation to Widespread Products Impacting Our World*, 11 INFO, no. 5, 2009, at 19, 28–30.

This reform is commonly credited with facilitating popular use of the 900 MHz and 2.4 MHz unlicensed bands for cordless phones and Wi-Fi radios, among other devices.<sup>23</sup>

These developments leave regulators with three alternative approaches<sup>24</sup> for allocating spectrum use rights:

- traditional licenses that authorize particular services and technologies,
- liberal licenses that delegate spectrum sharing rules to licensees, or
- unlicensed bands with non-exclusive use rights limited by radio regulation.

Enthusiasm over the economic performance observed in unlicensed bands, as well as criticism of the perceived transaction costs associated with private property rights in spectrum, has led to claims that scarcity has—or soon will—disappear as a relevant constraint for spectrum users.<sup>25</sup> Pointing to advances in wireless technology that permit far greater traffic to be communicated over given bandwidth, and radios that are increasingly robust to interference from other radio emissions, some champion the notion that scarcity has been rendered moot.<sup>26</sup> If so, the costs of defining and enforcing property rights are not likely compensated by commensurate benefits.

This evolution serves as prelude to current regulatory choices being made with respect to use of the TV Band. Regulators have historically set aside extremely valuable bandwidth for video distribution services—terrestrial broadcast in 210 local markets—that now face low-cost substitutes in the form of cable and satellite TV networks.<sup>27</sup> With changing technologies and economics, the “proper combinations of resources”<sup>28</sup> are in flux. Allowing markets to reconfigure spectrum usage would produce enormous social gains.<sup>29</sup>

This Article describes and evaluates the response of U.S. regulators to these challenges. The analysis begins with an examination of the regime shift paradigm in radio spectrum. It then describes the twenty-two year transition from

23. Kenneth R. Carter, *Unlicensed to Kill: A Brief History of the FCC Part 15 Rules*, 11 INFO, no. 5, 2009, at 8, 11.

24. This is the standard approach taken by the FCC. FCC SPECTRUM POLICY TASK FORCE, REPORT OF THE EFFICIENCY WORKING GROUP 29–30 (2002). Broader reforms have been pursued in some countries, which attempt to reduce the discretion and regulatory delays inherent in a process of case-by-case allocations. See Hazlett, *supra* note 14, at 339, 474, 489, 507–08; see also Thomas W. Hazlett, *Property Rights and Wireless License Values*, 51 J.L. & ECON. 563 (2008).

25. See, e.g., LAWRENCE LESSIG, THE FUTURE OF IDEAS 116 (2001); Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25, 27 (2002); Werbach, *supra* note 7, at 959–65.

26. Werbach, *supra* note 7, at 913.

27. BRUCE M. OWEN, THE INTERNET CHALLENGE TO TELEVISION (1999).

28. Coase, Meckling & Minasian, *supra* note 11, at 99.

29. Richard Thaler, *The Buried Treasure in Your T.V. Dial*, N.Y. TIMES, Feb. 27, 2010, at BU7.

analog to digital broadcasting, completed with the final switch-off of analog stations on June 12, 2009.<sup>30</sup> It next focuses on the existing Federal Communications Commission plan to approve new radio devices to access TV Band “white spaces,” sharing spectrum with digital TV stations. Finally, the Article advances the perspective that the current policy path, mixing non-exclusive use rights with traditional TV licenses, condemns the spectrum allocation to “junk band” status. While evidence demonstrates that efficient contracts could move TV broadcasters to alternative platforms, creating hundreds of billions of dollars in net benefits, the investments necessary to achieve these bountiful gains from trade depend on the creation of exclusive spectrum ownership rights. This analysis strongly supports Michael Heller’s skepticism of policies that distribute “one-inch” rights.<sup>31</sup>

### I. THE PROPERTY RIGHTS OBSOLESCENCE ARGUMENT

There are two key components of the spectrum regime shift argument: (a) transaction costs, taken as largely eliminated in unlicensed allocations, are seen as inefficiently imposed under exclusive property rights; and (b) marketplace activity, evincing a perceived migration from licensed to unlicensed bands, is asserted to demonstrate that radios need progressively less in the way of property rules in order to peacefully coexist. In its strong form, the latter argument is taken to imply that new wireless technologies have effectively ended spectrum scarcity.

Neither component is compelling. The first argument is theoretically flawed, reflecting a misinterpretation of transaction costs. The second is empirically contradicted by evidence from developing wireless markets.

#### A. *Transaction Costs*

Taking a cue from Coase, who offered high transaction costs as a reason to potentially favor government regulation over the “price system,”<sup>32</sup> unlicensed spectrum is posited as a low-cost substitute for exclusive property rights. In unlicensed bands, “transactions” are alleged to disappear because “open access” obtains. Charles Jackson,<sup>33</sup> numerically illustrating the relatively high cost of small airwave access transactions, finds that sporadically used devices making tiny encroachments on other frequency users (such as garage door openers or wireless car locks) provide services whose value would be swamped by the expense of

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30. *The Switch-Off: Analog T.V. Gone for Good*, CBS NEWS, June 13, 2009, <http://www.cbsnews.com/stories/2009/06/13/tech/main5086305.shtml>.

31. HELLER, *supra* note 1, at 6–8.

32. Coase’s treatment of transaction costs, which regarded them as largely exogenous to the economic analysis, conflicted with his general explanation of markets and government rules. This is detailed in recent works by Harold Demsetz. HAROLD DEMSETZ, FROM ECONOMIC MAN TO ECONOMIC SYSTEMS 90–117 (2008); Harold Demsetz, *Ownership and the Externality Problem*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 282, 283, 290–96 (Terry L. Anderson & Fred S. McChesney eds., 2003).

33. Charles Jackson, *The Genesis of Unlicensed Wireless Policy*, 11 INFO, no. 5, 2009, at 1.

charging customers for each increment of spectrum access.<sup>34</sup> Unlicensed bands are said to avoid these costs of using the price system, as dedicated bandwidth is set aside for “free” use.<sup>35</sup>

This reasoning recalls the Pigouvian analysis that Coase sought to correct. A.C. Pigou saw costs (or benefits) as ignored by private actors to whom the consequences of certain actions were external.<sup>36</sup> This “market failure” was resolved when government imposed taxes or subsidies to reflect the magnitude of the external effects, altering prices facing economic decisionmakers and thereby forcing individuals to take proper account of all consequences of their actions. The public corrective was, by assumption, imposed without cost. Coase showed that when such an assumption was symmetrically employed for private sector activity, agents would transact to eliminate externalities *prior* to the imposition of taxes and subsidies. Pigou’s market failure and policy result were the product not of welfare analysis but of asymmetric assumptions.

Coase focused on why some externalities went unresolved.<sup>37</sup> Given that private parties seek to exploit gains from trade, the lack of a market solution suggested one of two possibilities. Either the existing “harmful effect” was not worth fixing, or the costs of bargaining to create an improvement outweighed potential gains. In the former case the efficient equilibrium obtained via the price system; in the latter, Coase suggested that transaction costs might be lowered by institutional reforms, including economic regulation.<sup>38</sup> The usefulness of such an approach would depend on the costs and benefits of the public policy intervention.

The argument that unlicensed spectrum categorically economizes on transaction costs reflects the Pigouvian asymmetry. Costs are incurred in coordinating the use of scarce resources under traditional licenses, liberal licenses, or unlicensed spectrum allocations. They, of course, differ in form and magnitude, depending on circumstances. Coase’s 1959 analysis, a theoretical treatment of the two leading institutional alternatives, concluded that traditional licenses incurred higher organizational costs than would liberal licenses, all else equal.<sup>39</sup> A similar analysis, fortified with the rich empirical evidence now available, is required in the current regime shift debate.

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34. The signals sent by these radios require very little bandwidth and last, in aggregate, only a few seconds per day per user.

35. See also Benkler, *supra* note 25, at 77; Carter, Lahjouji & McNeil, *supra* note 21, at 49.

36. A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

37. Coase did not use the term “externalities” in his 1960 article, consciously preferring the term “harmful effects.” He sought to generalize the cost concept, noting that all consumption negatively affects third parties (those not privy to transactions). What separated the problematic class of activity was that the process of bidding for resources was truncated, leading to suboptimal employments. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 18–20 (1960); RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

38. Coase, *supra* note 2, at 14.

39. *Id.* at 28.

In fact, unlicensed bands are not “open entry”<sup>40</sup> or “frequencies that no one controls.”<sup>41</sup> Regulators seek to control spectrum use, protecting against resource dissipation by imposing rules that incur significant social costs. Chief among these is the value of the services that would be available but for such unlicensed device rules.<sup>42</sup> While much of the policy discussion labels such bands “commons,” associating the non-exclusive use rights issued by regulators with “open access,”<sup>43</sup> unlicensed bands are not owned by users or other private actors but are creatures of public authority. Decisionmakers setting resource appropriation rules do not internalize the costs or benefits they create, but make choices to advance “public interest, convenience, or necessity.”<sup>44</sup>

The usage of unlicensed bandwidth is organized via governance rules.<sup>45</sup> The purpose and effect of these regulations is to limit rivalry so as to mitigate potential conflicts.<sup>46</sup> That the mechanism employed to control congestion is governance rather than exclusion—which delegates spectrum sharing rules to owners, as with the issuance of liberal licenses—alters the form of the rules but not the underlying fact that valuable opportunities are being sacrificed to obtain other objectives.

The coordinating mechanisms in unlicensed spectrum impose social costs by blocking transactions that would occur in their absence. The standard restrictions are characterized thus:

It is almost universal practice to postpone or avoid the effects of congestion by imposing limits on the purposes to which unlicensed spectrum can be put with respect to (i) use, including use to provide service to the public; (ii) equipment permitted; (iii) the power at

40. Werbach, *supra* note 7, at 901.

41. Benkler, *supra* note 25, at 30.

42. Faulhaber & Farber, *supra* note 16, at 18 (discussing the administrative and rent-seeking costs incurred in allocating unlicensed spectrum, but not, in the transactional context, the opportunity costs incurred by excluding valuable services available under alternative property regimes).

43. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). This recalls the error made by Garrett Hardin in associating “tragedy of the commons” with what was actually an open access environment. See Thráinn Eggertsson, *Open Access Versus Common Property*, in *PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 73* (Terry L. Anderson & Fred S. McChesney eds., 2003).

44. Unlicensed use rights are allocated by government regulators, not a group exercising control over resources they jointly own. This distinction is clear in the property rights literature: “In between open access and private property rights are a host of commons arrangements. Commons arrangements differ from open access in several respects. Under a commons arrangement only a select group is allowed access to the asset and the use rights of individuals using the asset may be circumscribed. For example, a societal group, e.g., a village, tribe or homeowner’s association, may allow its members to place cattle in a common pasture but limit the number of cattle that any member may put on the commons.” Lee J. Alston & Bernardo Mueller, *Property Rights and the State*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 573* (Claude Ménard & Mary M. Shirley eds., 2005).

45. Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. LEGAL STUD.* S453 (2002).

46. *Id.*

which the equipment may be used; and (iv) the enforcement of politeness protocols, which reduce interference.<sup>47</sup>

Jon Peha captures the simple regulatory choices in Table 1. Peha, an engineer who has served as Chief Technologist at the FCC, ties the distinct policy alternatives to differential “application requirements,”<sup>48</sup> a categorization that is broadly correct but which also features important deviations that yield further insight into the economics of alternative approaches.<sup>49</sup> The three regimes he identifies track those posited above: Traditional License, Band Manager, and Unlicensed.<sup>50</sup>

**Table 1**  
**Policy Options for Primary Spectrum Users<sup>51</sup>**

Application requirements	Regulator controls access	Licensee controls access
Guaranteed QoS	Traditional licensing	Band manager makes guarantees
No guarantee, coexist with other primary devices	Unlicensed band; regulator sets etiquette	Band manager sets etiquette; no guarantees
No guarantee, cooperate with other primary devices	Cooperative mesh network; regulator sets protocol	Cooperative mesh network; licensee sets protocol

The costs of using unlicensed bandwidth are not zero, but the value of the next best outcome. To employ unlicensed allocations to provide a protected environment for certain types of applications necessarily burdens certain others. In particular, case-by-case determinations by an agency such as the FCC form the core coordinating device for wireless deployments, blocking greater reliance on market allocations of spectrum via competition between owners of liberal licenses. Exclusive property rights, and the incremental benefits they host, are costs that

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47. MARTIN CAVE, CHRIS DOYLE & WILLIAM WEBB, *ESSENTIALS OF MODERN SPECTRUM MANAGEMENT* 207 (2007).

48. Jon M. Peha, *Approaches to Spectrum Sharing*, *IEEE COMM. MAG.*, Feb. 2005, at 10, 12.

49. It is possible for a particular service provider to use an unlicensed band to provide quality of service guarantees. The economic problem is that the network infrastructure to provide such services is relatively expensive given the constraints of regulation and the non-exclusive use rights issued. Likewise, where a licensee controls bandwidth, “best efforts” services (as opposed to those with Quality of Service promises—QoS) can be (and are) supplied as lower-cost delivery options. Indeed, wireless voice services do not attain the “5 9s” reliability of fixed line networks. Notwithstanding such exceptions, the general delineation of where different types of applications are accommodated—capturing rules of thumb used by engineers and reflecting common sense in the marketplace—illustrates that unlicensed bands are highly imperfect substitutes for liberal licenses.

50. Peha, *supra* note 48, at 12 tbl.1.

51. *Id.*

must be offset by demonstrated benefits in order for the administrative allocation system to claim transaction cost efficiencies.

This result cannot be categorically asserted. To wit, the Unlicensed Personal Communication Services (PCS) (U-PCS) band, allocated some 30 MHz in the early 1990s, has generated next to nothing in the way of productive services,<sup>52</sup> while adjacent Licensed PCS bandwidth has been intensely utilized (for more than a decade) by mobile phone carriers. Given that the value of a marginal 30 MHz in the latter employment is estimated at nearly \$70 billion over just seven years,<sup>53</sup> U-PCS allocations imposed social costs of very high magnitude. That the allocation mandated smart protocols (“listen before talk,” sometimes touted as cutting edge technology for organizing “spectrum commons”<sup>54</sup>) did not, on net, mitigate transaction costs.

General improvements in wireless technology are increasing opportunities for communications but have not reduced the advantages evident via exclusive spectrum ownership. All relevant wireless options present trade-offs. More investment in one mechanism or technology can save costs elsewhere; restricting certain emissions can create better access or throughput for others. To paraphrase Mark Twain, the death of spectrum scarcity has been greatly exaggerated.<sup>55</sup>

Before leaving the issue of transaction costs, an empirical note is warranted. Spectrum owners<sup>56</sup> do not, in fact, price tiny increments of wireless activity. Rather, they create and market large packages. A typical cellular network customer will sign a two-year contract for spectrum/network access, and make thousands of “spectrum transactions” during that time (sending and receiving calls, texting, emailing, web surfing, etc.). Carriers package such purchases in bundles that reduce transaction costs.

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52. See generally Kenneth R. Carter, *Policy Lessons from Personal Communications Services: Licensed vs. Unlicensed Spectrum Access*, COMMLAW CONSPPECTUS, Fall 2006, at 93, 101–02.

53. Thomas W. Hazlett & Roberto E. Muñoz, *A Welfare Analysis of Spectrum Allocation Policies*, 40 RAND J. ECON. 424, 436 tbl.5 (2009).

54. LESSIG, *supra* note 25, at 77 (analogizing unlicensed spectrum use to Ethernet bandwidth sharing protocols).

When a machine on an Ethernet network wants to talk with another machine . . . the machine requests from the network the right to transmit. . . . It behaves like a (good) neighbor sharing a telephone party line: first the neighbor listens to make sure no one is on the line, and only then does she proceed to call.

*Id.*

55. Cave, Doyle & Webb, *supra* note 47; Charles Jackson, Raymond Pickholtz & Dale Hatfield, *Spread Spectrum Is Good, But It Does Not Obsolete* U.S. v. NBC!, 58 FED. COMM. L.J. 245 (2006).

56. While no U.S. licensee enjoys de jure ownership rights in radio spectrum, given federal law precluding this since December 1926, liberal licenses extend broad, flexible use rights to private parties that amount to de facto spectrum ownership. That is the sense in which *exclusive spectrum ownership* is referenced in this paper. See Thomas W. Hazlett & Matthew L. Spitzer, *Advanced Wireless Technologies and Public Policy*, 79 S. CAL. L. REV. 595 (2006).

These efficiencies, which occur because spectrum owners and their consumers internalize transaction costs, are widely distributed. Jackson is right to see the dedication of bandwidth for the use of certain radios as a potential economizing device.<sup>57</sup> But he is incorrect in characterizing this as a unique feature of unlicensed bands, and in omitting the opportunity cost of an unlicensed spectrum set-aside as an offset to the potential savings. In licensed bands, wireless phone carriers authorize equipment makers to construct devices that access the bands they control (and use the protocols necessary to communicate with network base stations and other radio devices).<sup>58</sup> The transaction-saving process is in evidence in the private property alternative, with the advantage that “band managers” offer rival services, networks, and technologies in a feedback environment that rewards efficiency.

### ***B. Market Migration***

Scientific advancement in wireless systems is currently profound—and has been for at least the past century.<sup>59</sup> Yet its trajectory has failed to undermine the cost-benefit calculus favoring decentralized private property. Indeed, the overwhelmingly dominant social value in the sector has emerged in the cellular telephone market, where 4.6 billion global subscribers now enjoy network access facilitated by the most liberal spectrum property rights issued by regulators.<sup>60</sup> Prime spectrum bands, as well as previously worthless frequencies, are becoming increasingly scarce as per improved radios.<sup>61</sup> Competing service providers bid more aggressively for access rights. With exclusivity, these demands register economically, moving resources to higher valued uses. For resource rights held by regulators, the bids are registered politically; that allocation process consists of government rule makings.

Spectrum, worthless in 1895 prior to Guglielmo Marconi’s radio innovation, is now highly prized and contentiously sought. The intensification of scarcity is empirically revealed in the (1) social values produced via the use of exclusively assigned spectrum inputs; (2) valuations in wireless license auctions; (3) relative levels of overall economic activity enabled by liberal licenses; and (4) high growth rates in investment and data flows over wireline networks, where spectrum is privately owned *de jure*. These points are considered in sequence.

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57. See *supra* notes 33–34 and accompanying text.

58. Not only do consumers purchase phones that, out of the box, work on specified wireless networks, but myriad other devices—including Amazon’s Kindle, GM’s OnStar, and emerging machine-to-machine (M2M) communicators—embed technology to access those airwaves controlled by private carriers.

59. “Father of the cell phone” Martin Cooper argues that spectrum capacity for useful communications increased about a million-fold, 1900–1950, and then increased at a similar rate, 1950–2000. Martin Cooper, *Antennas Get Smart*, SCI. AM., July 2003, at 48, 53. The rule—which is often called “Cooper’s Law”—reduces to the observation that wireless communications capacity doubles every 2.5 years. *Father of the Cell Phone*, ECONOMIST, June 6, 2009, at 84.

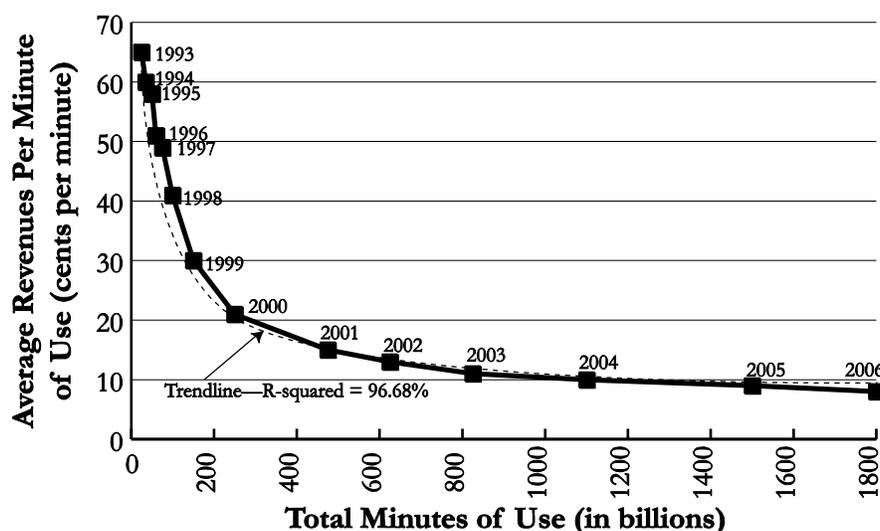
60. Sam Churchill, *4 Billion GSM Users: Sept. 2009*, DAILYWIRELESS.ORG (Aug. 21, 2009, 7:27 AM); <http://www.dailywireless.org/2009/08/21/4-billion-gsm-users-sept-2009>.

61. Hazlett & Leo, *supra* note 19, at 27–28.

*1. Liberal License Spectrum Inputs Have High and Increasing Social Value*

As seen in the U.S. mobile market, wireless wide area networks (WWANs) have produced extremely high usage growth rates over the past decade and a half.<sup>62</sup> Such networks rely critically on exclusive rights to control radio spectrum; neither traditional licenses nor unlicensed bandwidth are able to generate similar investments enabling mobile wireless connectivity.<sup>63</sup> Large mobile networks have materialized only with relatively liberal exclusive rights. Moreover, additional bandwidth allocated to liberal licenses results in lower service prices and greater outputs, revealing that large social benefits are available at the relevant policy margin.<sup>64</sup>

**Figure 1**  
**Retail Cellular Prices and Outputs in U.S., 1993–2006<sup>65</sup>**



These networks incorporate the “smart” radio technologies said to presage a rejection of private property rights, including spread spectrum (the innovation behind Qualcomm’s CDMA technology embedded in many 2G, and all

62. See *infra* Figure 1.

63. The primary social justification for property rights is to protect investors who create (or conserve) social value from appropriation. See generally Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

64. Hazlett & Muñoz, *supra* note 53, at 436.

65. *Semi-Annual Wireless Industry Survey*, CELLULAR TELECOMM. & INTERNET ASS’N, at 2–4, [http://files.ctia.org/pdf/CTIA\\_Survey\\_Midyear\\_2010\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Midyear_2010_Graphics.pdf) (last visited Jan. 24, 2010).

3G, networks), and TDMA (the technical essence of GSM phones dominant in digital voice).<sup>66</sup>

Voice minutes “consumed” by U.S. retail subscribers increased from under 100 billion annually in the mid 1990s to 1.8 trillion in 2006. The upsurge was caused in part by a sharp decline in the average price per minute of use, from over 50¢ in 1994 to 7¢ in 2006. But it was also attributed to the large increase in the scope and quality of networks and handsets used in the “mobile ecology.” These improvements, in turn, were a product of investments made by network carriers and the producers of complementary products.

Unlicensed bands do not specifically exclude WWANs or the mobile applications that are in high demand by consumers. Benkler suggests that mesh networks—where wireless local area networks (WLANs) using unlicensed wireless link themselves together—effectively substitute for WWANs and add to social efficiency by replacing network operators with user-owned investments.<sup>67</sup> This competitive substitution has been free to occur since the advent of cellular wireless networks; indeed, unlicensed bands were deregulated—permitted to accommodate spread spectrum radios in 1985—before cellular networks in 1987.<sup>68</sup> Mesh technologies have been deployed, in both licensed and unlicensed spectrum in network-centric configurations (generally for military and other government applications) since the 1980s. But there is no tendency for the networks using unlicensed devices to displace WWANs using licensed spectrum.

*2. A Market Migration Towards Increasingly Efficient “Spectrum Commons” Would Undercut the Social and Private Value Associated with Liberal Licenses*

Were the non-exclusive rights issued in unlicensed bands increasingly better substitutes for exclusively owned airwaves, service suppliers would shift their production to exploit the less-expensive inputs. Demand for liberal licenses would wane. This is not what is observed, however. In 1995, when only 50 MHz was available to cellular operators and a local service duopoly in cellular generated considerable industry rents, the FCC’s sale of PCS A and B block licenses—assigning licenses allocated a total of 60 MHz, and increasing per-market rivalry to

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66. CDMA (code division multiple access) packs more data into transmissions by reducing power, spreading signals over wider bandwidth, and then using sophisticated algorithms to untangle (de-code) messages occupying the same frequency space. TDMA (time division multiple access) leaves frequency channels exclusive for particular links (or conversations) but divvies up connections into short, alternating bursts, accommodating several calls per channel at one time. CDMA and TDMA are frequently cited as paradigmatic examples of the advanced wireless technologies rendering spectrum scarcity moot. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 184 (1999); Yochai Benker, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 397 (1998); George Gilder, *From Wires to Waves*, FORBES ASAP, June 5, 1995, available at [http://www.gilder.com/public/telecosm\\_series/wirewave.html](http://www.gilder.com/public/telecosm_series/wirewave.html).

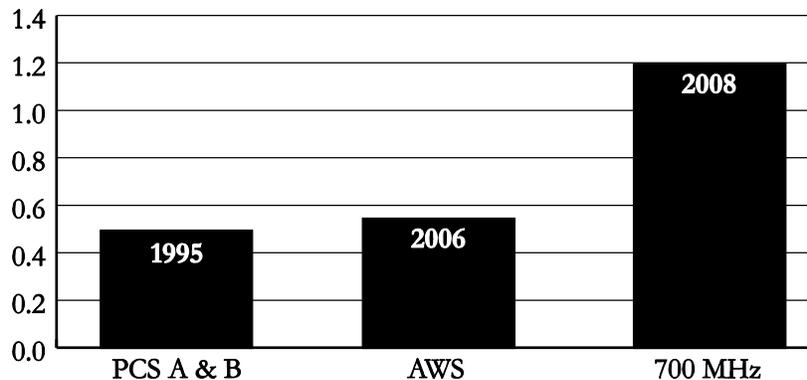
67. Benkler, *supra* note 25, at 62–64.

68. Marcus, *supra* note 22, at 33.

four carriers—garnered about \$7 billion in bids, or approximately \$0.49 per MHz per pop (capita), nationwide.<sup>69</sup>

After various fits and starts,<sup>70</sup> the next major FCC auction of liberal licenses occurred in the Advanced Wireless Services (AWS) sale in September 2006. The auction involved 90 MHz of bandwidth (in the 1.7 and 2.1 GHz bands) allocated to 1087 licenses. Winning bids totaled \$13.7 billion, implying an average market price equal to \$0.51/MHz/pop.<sup>71</sup> That sale was followed by the March 2008 license auction for 700 MHz, wherein licenses allocated 52 MHz of UHF spectrum were assigned.<sup>72</sup> Net auction receipts totaled \$19 billion, for an average price of \$1.2/MHz/pop.<sup>73</sup>

**Figure 2**  
FCC License Auction Prices (\$/MHz/pop)



The result is that, even with bandwidth available to mobile operators increasing from 50 MHz to about 409 MHz,<sup>74</sup> marginal values did not notably decline over the 1995–2009 period. The intervening introduction of Wi-Fi products in the late 1990s,<sup>75</sup> the FCC’s allocation of bandwidth for additional unlicensed devices in the 2002–2004 period (including an allocation for ultra-

69. *Auction 4, Broadband PCS A and B Block*, FCC (Oct. 29, 2007), [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_summary&id=4](http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=4).

70. Several PCS license auctions were conducted, 1996–2001, but price data are difficult to interpret in that the licenses auctioned by the FCC were not generally assigned to high bidders. The bidding credits extended to “designated entities” (small business and rural telephone companies) produced a series of defaults and bankruptcy, finally resolved with the resale of C block licenses in 2005.

71. Hazlett, Porter & Smith, *supra* note 10, app. 1, at 41–42.

72. *Id.*

73. *Id.*

74. Cellular Telecomm. & Internet Ass’n, WT Docket No. 09-66, Comments, *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Attachment A at 9 (FCC June 15, 2009) [hereinafter CTIA, Comments].

75. Marcus, *supra* note 22, at 31.

wideband technologies heralded as game changing<sup>76</sup>), has not triggered evidence of a property paradigm regime shift.

This cursory examination is not adjusted for inflation, band differentials (the quality of 700 MHz airwaves is relatively high, for example), or other factors. Yet, it is sufficiently compelling to counter the categorical claim that a technological revolution is sweeping away the social utility of exclusive property rights in spectrum. The bidding behavior by wireless service providers, continuing to offer billions of dollars to obtain bandwidth exclusivity, reveals that there do not exist zero-priced inputs available that today—or anytime soon—are expected to serve as productive substitutes.

*3. Investments in Networks Relying on Exclusive Spectrum Rights Dominate Those Made in Unlicensed Spectrum by Orders of Magnitude*

Table 2 displays global data estimates for wireless expenditures in 2006. Mobile networks enlist capital expenditures (for networks and handsets) of about \$226 billion, as against less than \$4 billion for WLANs. This dramatically undercounts the economic differential favoring licensed spectrum in three respects.

First, it omits mobile service revenues, which are much larger than annual capital expenditures (“capex”). U.S. consumers, for example, spend about \$150 billion annually for mobile services.<sup>77</sup> While these retail payments overlap equipment revenues to some degree (payments to carriers are then used to pay for handsets and capex), the service revenues are far higher. Conversely, service revenues for wireless services provided in unlicensed spectrum, e.g., at “hot spots,” are comparatively insignificant.

Second, this approach partitions investments into the respective band allocations. While this may serve as a useful first approximation as to incremental spectrum values, it over-counts the contribution of unlicensed bands, where services rely heavily on the networks they complement. Wide area broadband services are supplied by privately owned bandwidth—“spectrum in a tube.” The same is true of voice telephone networks. As cordless phones do not displace telephone exchange facilities but complement and extend the network, so Wi-Fi connections complement and extend Ethernet, cable modem, and DSL services. The mobile wireless network does not similarly rely on complements<sup>78</sup> provided by non-exclusive (or unlicensed) spectrum use rights.<sup>79</sup>

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76. See Werbach, *supra* note 7, at 894. The FCC UWB allocation occurred in 2002. *Id.*

77. Total service revenues for U.S. mobile service for the first half of 2009 were calculated to be \$75.8 billion. CELLULAR TELECOMM. & INTERNET ASS’N, CTIA’S WIRELESS INDUSTRY INDICES: MID-YEAR 2009 RESULTS 1 (2009).

78. Unlicensed devices do add to wide area network value at the margin, but not to the same degree as the reverse situation. It is possible to think of a telephone network without cordless phones (which we had for many decades), but not vice versa.

79. Baby monitors, garage door openers, remote controls, and other non-network wireless devices are not complements to such systems. Yet, the value of such services does not rely on unlicensed allocations, as they could be supplied by spectrum access rights

Third, expenditures on equipment and services for broadcasting and other important radio services are excluded. These applications are supplied partly via traditional licenses rather than liberal licenses.<sup>80</sup> But the economic value created could be *wholly* produced via frequency rights purchased from liberal license holders. Unlicensed bands do not afford the same opportunities.

**Table 2**  
**Global Expenditure on Wireless Equipment, 2000–2005<sup>81</sup>**  
 (\$ millions, constant currency units)

	2001	2002	2003	2004	2005*	2006*
<b>Mobile Carrier Capex</b>	84,883	73,560	69,408	81,474	92,175	97,435
<b>Mobile Handsets</b>	95,859	95,513	105,095	112,304	123,773	128,790
<b>Total Mobile Investment</b>	180,742	169,073	174,503	193,778	215,948	226,225
<b>WLAN</b>						
	1405	1696	2194	2802	3881	3783
<b>SO/HO/Home</b>						
	533	898	1310	1591	1887	2211
<b>Enterprise</b>						
	872	798	884	1211	1994	1572

\* estimated

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negotiated with liberal license holders. This is not a hypothetical arrangement but describes how hundreds of devices are produced for wireless carriers' networks including cell phones, smart phones, netbooks, and 3G modems. It also mimics the M2M market where wireless connectivity is supplied by mobile carriers for third party applications including a rich array of monitoring and telematic devices. Revenues paid to U.S. cellular carriers by M2M service providers in 2006 were an estimated \$2 billion. John W. Mayo & Scott Wallsten, *Enabling Efficient Wireless Communications: The Role of Secondary Spectrum Markets*, 22 INFO. ECON. & POL'Y 61, 65 (2010).

80. See *infra* Table 3.

81. Global Technology Research Team, *Q1 2006 Global Technology Databook*, MORGAN STANLEY, 22, 24 (Mar. 3, 2006), [http://www.morganstanley.com/institutional/techresearch/pdfs/global\\_techdatabook0306.pdf](http://www.morganstanley.com/institutional/techresearch/pdfs/global_techdatabook0306.pdf); Global Technology Research Team, *Q2 2005 Global Technology Databook*, MORGAN STANLEY, 18, 20 (June 1, 2005), [http://www.morganstanley.com/institutional/techresearch/pdfs/global\\_techdatabook0605.pdf](http://www.morganstanley.com/institutional/techresearch/pdfs/global_techdatabook0605.pdf).

**Table 3**  
**Wireless Consumer Devices Sold in the U.S. (2008)**<sup>82</sup>

Item	Bandwidth	Units (mil.)	Average Price (\$)	Total Sales (\$ bil.)
Cordless Phones	Unlicensed	16.6	21.00	0.34
Smart Phones	Liberal licenses	28.6	398.00	11.39
Cell Phones*	Liberal licenses	102.8	110.00	11.31
Digital Televisions	Traditional 10%, cable/sat 90%	32.74	823.00	26.94
Satellite TV Dishes	Traditional/liberal licenses	13.17	82.00	1.08
Satellite Radios	Traditional/liberal licenses	n.a.	n.a.	0.09
Walkie Talkies	Unlicensed	8.35	10.00	0.08
Home AM/FM Radios	Traditional licenses	12.80	20.00	0.269

\* estimated

Even with these exclusions a stark verdict emerges: the overwhelming economic activity in the wireless sector, as measured by equipment expenditures, occurs with efforts to utilize bandwidth supplied by liberal licenses.

U.S. markets also reveal that the vast bulk of expenditures for wireless consumer electronics (ignoring service revenues and capex by service providers) are for devices that rely on embedded licensed spectrum access capability. Table 3, with data from the Consumer Electronics Association (CEA), suggests that consumer purchases of cell phones, smart phones, and digital television sets dominate this market segment. The latter are, in over 90% of U.S. TV viewing, connected to cable or satellite connections,<sup>83</sup> delivered via exclusive spectrum rights.<sup>84</sup> Cordless phones, the only important product relying on unlicensed bandwidth for connectivity that CEA tracks, represents only a small and declining fraction of sector revenues. Smart phones, meanwhile, are growing very rapidly in unit sales and in total receipts.

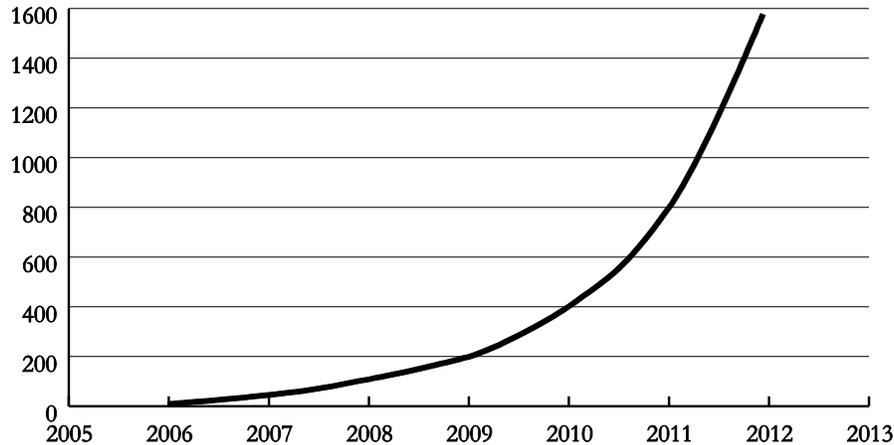
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82. CONSUMER ELECS. ASS'N, CEA HISTORICAL SALES DATA (2010) (on file with Author).

83. CONSUMER ELECS. ASS'N, DTV TRANSITION IMPACT 2 (2009). Figure 1, *supra*, shows that, as of a July 2009 survey, only 9% of U.S. households used “antenna only” for the reception of video signals. *Id.*

84. Cable TV operators own system bandwidth de jure. Such rights as are extended in satellite broadcasting licenses lie between traditional and liberal licenses in a “flexibility of spectrum use” continuum.

**Figure 3**  
**Projected Global Data Traffic in Mobile Networks (PB/mo.)**<sup>85</sup>



These trends appear to be accelerating. In mobile markets, the build-out of 3G and 4G networks is in its early stages and is expected to continue the rapid expansion of applications and usage.<sup>86</sup> The confluence of innovative devices and rising demand for mobile computing is anticipated to drive more and more traffic.<sup>87</sup> The trend underway is for market forces to place greater reliance on licensed spectrum, not less.

Regulators in the U.K. have estimated the economic values generated across spectrum allocations. Using 2006 data, the most recently compiled, Ofcom (Office of Communications)<sup>88</sup> found that licensed allocations dominated.<sup>89</sup> Economic projections indicate that wireless telephony (“public mobile”) accounts for about £22 billion in annual welfare gains, terrestrial broadcasting about £15 billion, and fixed wireless (including local Wi-Fi links) about £0.3 billion.<sup>90</sup>

85. *Approaching the Zetabyte Era*, CISCO, 21 (June 16, 2008), [http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white\\_paper\\_c11-481374.pdf](http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481374.pdf).

86. FCC, NATIONAL BROADBAND PLAN 76 (2010), *available at* <http://www.broadband.gov/plan/5-spectrum/>.

87. *Id.*; *see supra* Figure 3.

88. Ofcom is the independent regulator and competition authority for the UK communications industries.

89. *See infra* Table 4.

90. This accounting likely over-counts the net value of terrestrial broadcasting, in that the opportunity cost of TB band spectrum and alternative delivery platforms—specifically, satellite broadcasting—are potential low-cost substitutes. These factors may also bias the fixed wireless value estimate upwards to some degree, yet they are not likely to influence the mobile telephony projections where alternative low-cost platforms are not available.

**Table 4**  
**Estimated Economic Value of Wireless Services by Application (U.K.)<sup>91</sup>**

Sector	2002		2006	
	Value (£ bil.)	%	Value (£ bil.)	%
Public mobile	14.4	51	21.8	49
Broadcasting	5.9	21	14.7	33
Satellite links	2.9	10	2.8	6
Fixed links	3.8	14	3.9	9
Wireless broadband	-	-	0.3	1
Private mobile radio	1.1	4	1.2	3
Other	0.1	0	0.1	0
<b>Total</b>	<b>28.2</b>	<b>100</b>	<b>44.8</b>	<b>100</b>

*4. Growth in Services Delivered via Exclusively Owned Bandwidth Is Robust*

Were new wireless technologies equipping consumers with the tools to replace networks and applications that rely on owned spectrum inputs, not only would unlicensed bands be economically eclipsing licensed bands, fixed networks—where spectrum ownership falls under traditional property rights uncomplicated by the “public interest” directives of spectrum allocation—would relatively decline. This is not observed. Instead, the broadband market is growing rapidly, dominated by cable TV operators and telephone carriers.<sup>92</sup>

The argument for regime change includes a prediction that unlicensed bands will out-compete such expensive centralized networks as consumers avail themselves of smart radios. With spectrum scarcity rendered obsolete, the logic is clear: even cheap user devices will have capacity to spare. With internet access provided by Wi-Fi or ultra-wideband devices, and WLAN nodes linked in ad hoc, user-operated meshes, the market spontaneously tilts to favor the emerging lower-cost opportunities. The argument has been sufficiently persuasive as to push policy makers to allocate additional unlicensed bandwidth.

In setting aside 50 MHz (3.65 GHz to 3.70 GHz) for non-exclusive use rights in March 2005, the FCC reasoned that the band—the most popular for licensed WiMax deployments globally—would “provide last mile broadband access in competition with cable, DSL and T1 services.”<sup>93</sup>

91. European Economics, *Economic Impact of the Use of Radio Spectrum in the UK*, OFCOM (Nov. 27, 2006), [http://stakeholders.ofcom.org.uk/market-data-research/spectrum-research/economic\\_spectrum\\_use/](http://stakeholders.ofcom.org.uk/market-data-research/spectrum-research/economic_spectrum_use/).

92. See *infra* Table 5 and accompanying text.

93. *In re* Wireless Operations in the 3650–3700 MHz Band, 22 FCC Rcd. 10,421, 10,426–27 (Mar. 16, 2005).

Yet, unlicensed bands have proven poor hosts for competitive “last mile” services. Mobile telephone networks face no effective competition from Wi-Fi or cordless phones, and the FCC’s calculated industry concentration ratios reflect this fact. Operators using unlicensed spectrum links are not considered relevant market participants. Conversely, in supplying high-speed wireless data connections, liberal licenses have proven effective as inputs, relative to unlicensed alternatives. Mobile carriers, investing in 3G technologies, have turned high-speed Internet access into a mass market service.<sup>94</sup>

According to the FCC, as many as 8000 Wireless Internet Service Providers (WISPs) operate as “medium-range wireless communications networks,”<sup>95</sup> and many primarily rely on unlicensed spectrum to deliver services. At the end of 2007, some 705,000 customers were counted by the FCC for the entire category defined as “Fixed Wireless.”<sup>96</sup> Clearwire, the largest WISP, uses licensed spectrum in the 2.5 GHz band. Clearwire reported some 350,000 subscribers at the end of 2007,<sup>97</sup> leaving just 350,000 for remaining WISPs. Assuming (unrealistically) that each of them uses unlicensed frequencies for service delivery, their aggregate total would be matched by Clearwire alone. After investing several billions of dollars in wireless infrastructure in order to build-out a nationwide WiMax service, Clearwire is the only WISP to attempt any project even close to such magnitude. The fact that the company, which abandoned its original reliance on unlicensed spectrum, has attracted strategic partners (including Sprint, Intel, Motorola, Google, Comcast, and Time Warner) and substantial investment capital<sup>98</sup> is entirely consistent with the view that exclusive spectrum ownership rights continue to yield great advantages in the deployment of advanced wireless technologies.

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94. See *infra* Table 5.

95. Speaking of 802.11x devices, the FCC writes: “These networks have met with tremendous success, and increasingly have been used by Wireless Internet Service Providers (WISPs)—which may number as many as 8,000 providers—to provide a facilities-based alternative to wireline (e.g., DSL) and cable services to millions of Americans over networks that may range in size from small communities, to multiple counties, to multi-regional geographic areas or even larger.” Ass’n for Maximum Serv. Television, Reply Comments, *In re* Wireless Broadband Access Task Force, GN Docket No. 04-163, at 3 (FCC Feb. 2005).

96. See *infra* Table 5.

97. *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 24 FCC Rcd. 6185, 6202 (Jan. 16, 2009) [hereinafter Annual Report].

98. *Clearwire, Inc. – Company History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/Clearwire-Inc-Company-History.html> (last visited Jan. 17, 2011).

**Table 5**  
**U.S. Wireless High-Speed Internet Subscribers<sup>99</sup>**

Technology	2005	2006		2007	
	December	June	December	June	December
<b>ADSL</b>	19,515,483	22,584,255	25,412,883	27,561,867	29,451,719
<b>SDSL and Traditional Wireline</b>	878,973	948,134	1,030,698	1,071,996	86,269
<b>SDSL</b>	368,782	337,412	344,759	319,987	293,974
<b>Traditional Wireline</b>	510,191	610,722	685,939	752,009	592,295
<b>Cable Modem</b>	26,558,206	29,174,494	31,981,705	34,404,368	36,497,284
<b>Fiber</b>	448,257	685,823	1,035,677	1,403,729	1,850,695
<b>Satellite and Wireless</b>	3,812,029	11,872,998	23,344,106	36,560,869	52,474,070
<b>Satellite</b>	426,928	495,365	571,980	668,803	791,142
<b>Fixed Wireless</b>	257,431	361,113	484,377	586,813	705,014
<b>Mobile Wireless</b>	3,127,670	11,016,520	22,287,749	35,305,253	50,977,914
<b>Power Line and Other</b>	4571	5208	4776	5420	5274
<b>Total Subscribers</b>	<b>51,217,519</b>	<b>65,270,912</b>	<b>82,809,845</b>	<b>101,008,249</b>	<b>121,165,311</b>

While Wi-Fi is a popular WLAN technology, it largely complements rather than displaces the broadband access services provided by privately owned cable and telephone operators. Hence, the success of in-home, in-business, and on-campus WLANs is economically leveraged on the investments made by firms that—in creating networks governed by private property—employ exclusive rights to protect investments from appropriation. The fewer than 350,000 unlicensed WISP subscribers recorded by the FCC<sup>100</sup> compare to the more than sixty-nine million broadband subscribers served by cable modem and DSL services, and over fifty million high-access customers paying for mobile internet access.<sup>101</sup> The

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99. FCC INDUSTRY ANALYSIS AND TECHNOLOGY DIVISION, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2007, at 6 tbl.1 (2009).

100. See Annual Report, *supra* note 97.

101. See *supra* Table 5; *infra* Table 6.

services depending on exclusive spectrum rights are, as yet, growing rapidly and evince no indication of being displaced by unlicensed WISPs.

**Table 6**  
**Cable Modem and DSL Subscribers, 1Q 2009**<sup>102</sup>

Broadband Internet Provider	Subscribers at the End of 1Q 2009	Net Adds in 1Q 2009	% of Total Net Adds
Cable	37,755,701	837,114	54.5
Phone (DSL)	31,512,629	775,326	45.5
<b>Total Cable+DSL</b>	69,268,330	1,612,440	

In short, the rapid technological progress in wireless communications is not shifting market activity from exclusive rights. Robust growth throughout the communications sector is most pronounced where private ownership over frequency inputs accommodates complex network coordination, including that between long-term investors and future customers, and the most intense spectrum sharing. This trend appears not to be waning but accelerating, as entrepreneurial platforms such as the RIM Blackberry, Apple iPhone, Palm Pre, and the Google gPhone contract with carriers to launch new devices and innovative applications in competitive rivalry with each other. The “mobile ecology” is rapidly growing in terms of new investment, usage, and widening scope in the service menu.

Wireless services provided via unlicensed bandwidth have enjoyed the sectoral trend. The services thus accommodated are regulated, constrained by power limits and technology mandates, affording only non-exclusive use rights. This has made such bands serviceable for certain applications, but handicapped for others. The activities that such bands support are largely limited to short-range radio services that either need no network or can simply plug into one. More sophisticated architectures inevitably favor the economic environment yielded by exclusive spectrum ownership. As such, market activity today strongly supports Coase’s 1959 view of the efficacy of spectrum markets.

## II. THE DIGITAL TV TRANSITION

### A. History

Broadcast television allocations were made by the FCC between 1939 and 1953 when large parts of the VHF and UHF bands were set aside.<sup>103</sup> Each station license was allocated 6 MHz; there would be room for eighty-one channels (channels 2 to 83, with channel 37 allocated to non-TV services), or 486 MHz.<sup>104</sup>

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102. LEICHTMAN RESEARCH GROUP, RESEARCH NOTES 2Q2009, at 7 (2009) (Note: Leichtman data track cable and telephone companies that account for 94% of the broadband market.).

103. Thomas W. Hazlett, *The U.S. Digital TV Transition: Time to Toss the Negroponte Switch* 3 fig.1 (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No. 01-15, 2001).

104. *Id.*

Despite the generous allocation, only three national broadcast networks were accommodated (ABC, CBS, NBC), a product of the system of “localism” used to create stations in many smaller markets. This led the FCC to leave the vast majority of local channels blank or “taboo.”<sup>105</sup>

In 1985–1986, Motorola and public safety agency officials, spying the little-used UHF TV airwaves and the burgeoning development of cellular networks, requested that additional frequencies be reallocated by the FCC from TV to “land mobile.”<sup>106</sup> The cellular allocation—two 25 MHz bands in the 800 MHz frequencies—had been peeled away from the original TV allocations. That reallocation, which began formally in 1968, stripped TV channels 70 to 83, or 84 MHz (14 \* 6 MHz) from the TV Band; 50 MHz of this total was allocated to cellular. Cellular operators (two in each of 734 local markets) were then licensed in the 1983–1989 period, primarily by lotteries.<sup>107</sup>

By July 1987, the FCC had developed a proposal to further reallocate UHF TV airwaves allocated to channels 60 to 69.<sup>108</sup> These assignments hosted few broadcast TV stations, all of which could be moved to other channels. To preempt official action on the matter, however, broadcasters forced a policy option that would leave idle TV frequencies undisturbed: “advanced television.”<sup>109</sup> Unused channels might be needed for the transition; the band was frozen pending implementation of the new plan.<sup>110</sup> The 402 MHz then allotted to terrestrial broadcasting would be left in place so as to accommodate the transition.<sup>111</sup>

### ***B. Technology Transition via Spectrum Allocation***

The FCC appointed an advisory committee to develop a new standard for advanced television.<sup>112</sup> The Advanced Television Systems Committee (ATSC), headed by former FCC Chairman Richard Wiley, allowed competing consortia to submit rival standards.<sup>113</sup> After much contentiousness, a Grand Alliance was formed.<sup>114</sup> It adopted a digital broadcasting standard, an innovation representing considerable technical advance.<sup>115</sup> Originally, the FCC’s mandate included a

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105. Two stations, broadcasting from the same location, can use adjacent frequencies and have their transmissions clearly translated by simple receivers; the same two broadcasts, sent from different locations in the same (or adjacent) geographic market(s), cause substantial interference for many TV receivers.

106. The current agency terminology is CMRS, for Commercial Mobile Radio Services. This license category encompasses cellular, PCS, and Specialized Mobile Radio (SMR) licenses as mainly held by Nextel (now part of Sprint).

107. JAMES MURRAY, JR., *WIRELESS NATION: THE FRENZIED LAUNCH OF THE CELLULAR REVOLUTION* (2001).

108. JOEL BRINKLEY, *DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION* 1–2 (1997).

109. *Id.* at 65–66.

110. *Id.* at 27.

111. *Id.*

112. *Id.* at 231–35.

113. *Id.*

114. *Id.* at 238–39.

115. *Id.* at 258–63.

directive that stations broadcast high definition (HD) signals.<sup>116</sup> This was relaxed in 1996, when stations were permitted the freedom to broadcast digital video programs either in HD or in standard definition (SD).<sup>117</sup> The latter would allow other services, including multiplexed SD signals or data streams, to be offered in the 19.4 mbps capacity of the ATSC broadcast format.

Congress enacted rules in the 1997 budget to guide the DTV transition.<sup>118</sup> TV licensees were given a second “digital” channel,<sup>119</sup> and stations were required to simulcast, on a phased-in schedule, both analog and digital formats.<sup>120</sup> Most important was the analog cut-off date: analog TV stations were to cease operations by the end of 2006 except in markets where fewer than 85% of households could receive off-air digital broadcast signals.<sup>121</sup> This 85% standard was virtually impossible to meet, given that cable and satellite TV subscribers had little incentive to buy off-air digital tuners, and that cable and satellite subscription services were not counted towards the 85% even when such firms would have carried digital broadcast signals after analog signals went dark.

With few customers buying digital off-air tuners, the transition lagged. In 2005, Congress responded by enacting legislation that called for a “firm deadline” transition on February 17, 2009.<sup>122</sup> This was further delayed, to June 12, 2009, in legislation passed in the opening days of the Obama Administration.<sup>123</sup>

### C. Receivers

In 2002 the FCC mandated that TV sets sold in the United States include digital signal (off-air) receivers according to a phased-in schedule.<sup>124</sup> The rules were fully in place by July 2007.<sup>125</sup> This forced buyers of new sets to purchase equipment that was unnecessary when receivers were connected to cable or satellite video services.

To further encourage the deployment of digital receivers, subsidies funded the purchase of consumer devices to translate digital off-air signals for

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116. *In re* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Report and Order, 12 FCC Rcd. 12,809, 12,824–26 (Dec. 24, 1996); TV Transmission Standards, 47 C.F.R. § 73.682(d) (2008).

117. *In re* Advanced Televisions Systems and Their Impact Upon the Existing Television Broadcast Service, Fourth Report and Order, 12 FCC Rcd. at 12,826.

118. Communications Act of 1934, *as amended* by Balanced Budget Act of 1997, 47 U.S.C. § 309(j)(14) (2006).

119. *In re* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd. 12,830 (Apr. 21, 1997).

120. *Id.*

121. *Id.*

122. Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (codified in Title III in the Deficit Reduction Act of 2005, 47 U.S.C. § 309 (2006)).

123. DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

124. *In re* Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, Second Report and Order, 17 FCC Rcd. 15,978, 15,996 (Aug. 9, 2002).

125. *Id.*

analog TV sets. The 2005 legislation provided \$1.5 billion; this was augmented in the Obama Administration's "stimulus" plan by another \$650 million. The \$2.15 billion was then distributed to applicants in the form of \$40 vouchers (redeemable for set-top digital TV converter boxes), limit two per household. Low-end DTV boxes were (are) available for about \$40. The coupons were not means tested nor were they targeted to homes that did not subscribe to cable or satellite.<sup>126</sup>

#### *D. Carriage of Broadcast Signals on Cable and Satellite*

Cable TV operators in the United States provide carriage, without payment, of all local TV stations, supplying them to customers on their lowest-price tier.<sup>127</sup> This policy, known as "must carry," is mandated by terms of the 1992 Cable Act<sup>128</sup> and was upheld by the U.S. Supreme Court as constitutional, in a 5–4 decision, in *Turner Broadcasting v. FCC*.<sup>129</sup> (Stations may, alternatively, elect to negotiate fees—that is, cable operators pay a broadcast station to retransmit the broadcasters' signal).<sup>130</sup> Network affiliates and the stronger independent broadcast stations generally negotiate such "retransmission consent" agreements, which risks non-carriage if the negotiations fall through, while small independent stations use "must carry."<sup>131</sup>

A controversy has emerged over whether the digital TV broadcaster enjoys must-carry rights over multiple sub-channels. Thus far, the FCC has interpreted its mandate as applying "must carry" only to the station's "primary" program feed. The effect is that stations that elect to multiplex are broadcasting to a very thin audience for the sub-channel programming beyond the main channel. About 91% of homes,<sup>132</sup> and well over 91% of TV viewers, will not generally receive programming as they are watching subscription service content rather than receiving off-air terrestrial signals.<sup>133</sup>

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126. 47 U.S.C. § 309.

127. See Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 102, 165 n.10 (1996).

128. See *id.*

129. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

130. This is called "retransmission consent." See Lubinsky, *supra* note 127, at 102.

131. *Id.* at 145–46, 153. Satellite "must carry" operates similarly. See 47 U.S.C. § 338(a)(1). All local TV stations in a market are guaranteed carriage on a satellite system that provides some local channels from that market to local subscribers—"carry one, carry all." *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 354 (4th Cir. 2001). The policy helps the marginal broadcast station gain free carriage on the multi-channel video program distribution network.

132. CONSUMER ELECS. ASS'N, *supra* note 83. The statistic refers to "antenna only" households.

133. Of course, broadcasters are free to negotiate retransmission with cable operators. This is an option available to any potential programmer, not just broadcast stations. Customers are also able to use "A/B" switches that permit them to flip back and forth from an off-air antenna to cable/satellite connections. Such switches are embedded in low cost remote controls.

“Must carry” is an important policy. In particular, it gives a TV station the incentive to continue broadcasting in order to maintain their “free” access to the most important distribution platforms. Ironically, many TV stations turned off their analog broadcasts prior to 2009 in order to obtain a “new & improved must-carry right,” awarded by virtue of the larger footprint associated with digital signals in FCC computer models.<sup>134</sup> The loss of all of their over-the-air viewers was more than compensated for by the gain they realized via extra cable and satellite coverage.

### *E. Results of the Transition*

The June 12, 2009 analog switch-off was essentially a non-event.<sup>135</sup> Given that high-demand video consumers, and the great majority of low-demand viewers, subscribe to cable or satellite systems where broadcast station programming is seamlessly carried to customers via alternative platforms, the loss of analog broadcasting went largely unnoticed. It was likened to Y2K: a hyped disaster that passed without incident.<sup>136</sup>

By the time the twenty-two year transition was over, terrestrial TV broadcasting was nearly finished as a transmission mechanism. Household migration to subscription Multi-channel Video Program Distribution (MVPD) services was nearing completion. Moreover, the incremental transition could be economically achieved, given multiple MVPD platforms with national coverage and the relatively small number of homes lacking connections.

### *F. The State of Play*

Across 210 TV markets, there are about 1750 full-power stations—just over eight per market.<sup>137</sup> Before the analog switch-off in June 2009, with sixty-seven allocated TV channels in every market, average channel utilization was just 12%.<sup>138</sup> With the move to all-digital programming, half of the broadcast transmissions ended—and all those in channels 52 to 69. The digital channels that remain imply a utilization rate of 16%.

The move from analog to digital TV broadcasting has allowed the FCC to reallocate 108 MHz (402–294) for alternative services. This process succeeded in moving some 70 MHz into licenses assigned by auction between 2002 and 2008.<sup>139</sup>

134. Thomas W. Hazlett, *Would the Last TV Station Please Turn Out the Lights?*, THE HILL, Mar. 23, 2004, at 16.

135. See Matthew Lasar, *U.S. Declares Victory as DTV Transition Goes Rather Smoothly*, ARS TECHNICA, June 14, 2009, <http://arstechnica.com/tech-policy/news/2009/06/us-declares-victory-as-dtv-transition-goes-rather-smoothly.ars>.

136. Thomas W. Hazlett, *Analog Switchoff Goes Unnoticed*, FIN. TIMES, Feb. 28, 2009, <http://www.ft.com/cms/s/0/51d7ce52-052b-11de-8166-000077b07658.html#axzz1BGc89ffl>.

137. Adjusted for population, the mean is higher as the most populous markets (New York, Los Angeles, San Francisco, etc.) have been assigned more TV stations.

138. This is derived from total TV stations (1750) into the number of TV channels allocated to 210 local markets (each with 67 allocated channels).

139. See *FCC Auctions: Factsheet: Auction 44*, FCC, [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_factsheet&id=44](http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=44) (last updated Aug. 17, 2007); FCC

The largest took place via the March 2008 FCC auction when licenses allocated 52 MHz generated \$19 billion in winning bids.<sup>140</sup> Licenses were sold as overlays, encumbered with incumbent TV station broadcasters. The new licensees could pay the incumbents to accept interference from new emissions or (what amounts to the same thing) go dark. Failing such agreement, the incumbents broadcast TV signals until June 12, 2009, and then went dark, releasing unencumbered bandwidth.<sup>141</sup>

Qualcomm won 700 MHz licenses to supply MediaFlo (mobile video) services launched in January 2007. This service transmits about twenty video channels to mobile handsets via a pay service marketed through wireless carriers. In moving this spectrum (TV channel 55) into MediaFlo, Qualcomm contracted with existing TV stations (on channels 54, 55, and 56) to permit entry prior to the mandated 2009 analog turn-off.<sup>142</sup>

The remaining 64 MHz allotted 700 MHz licenses is largely controlled by AT&T and Verizon, the two largest U.S. wireless carriers.<sup>143</sup> These carriers have announced that the bandwidth will be used in conjunction with 4G network upgrades using new LTE technologies,<sup>144</sup> yielding faster and more capacious broadband data connections. While wireless network investors had been hoping to see a reduction in capital outlays—the industry invested some \$219 billion over the 1998 through 2008 period, excluding spectrum acquisition costs<sup>145</sup>—the rapid growth in wireless applications and usage, combined with market dynamics compelling rival networks to compete on service quality, continue to drive such expense.

Spectrum is both a complement to and a substitute for telecommunications infrastructure. A given network can provide better service with given network assets by accessing greater bandwidth. This frequency space complements existing infrastructure, while substituting for new investments (such as cell splitting).

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*Auctions: Factsheet: Auction 49*, FCC, [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_factsheet&id=49](http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=49) (last updated Aug. 20, 2007); *FCC Auctions: Factsheet: Auction 60*, FCC, [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_factsheet&id=60](http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=60) (last updated Aug. 20, 2007); *FCC Auctions: Factsheet: Auction 73*, FCC, [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_factsheet&id=73](http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73) (last updated Mar. 20, 2008).

140. See Press Release, FCC, Statement by FCC Chairman Kevin J. Martin (Mar. 18, 2008), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-280887A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280887A1.pdf).

141. Cf. Thomas W. Hazlett, *A Law & Economics Approach to Spectrum Property Rights: A Response to Weiser and Hatfield*, 15 GEO. MASON L. REV. 975, 1002 (2008).

142. *Id.* at 1002–04.

143. See *FCC 700 MHz Band Auction: Auction ID: 73: Winning Bids*, FCC (Mar. 19, 2008), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-595A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-595A2.pdf) (announcing results of Auction 73).

144. LTE (long term evolution) technologies are the standard 3G upgrade path for wireless carriers. They compete directly with WiMax, which is often adopted by de novo entrants (such as Clearwire).

145. CELLULAR TELECOMM. & INTERNET ASS'N, *supra* note 77, at 129–30.

Service operators continually reconsider the complex mix of options that allows them to improve their competitive position. That operators have bid intensively to acquire new bandwidth in the last two major FCC auctions of mobile licenses—FCC Auction 66 held in September 2006 and FCC Auction 73 held in March 2008<sup>146</sup>—suggests that spectrum is very valuable to networks at the margin. Indeed, these two license sales account for a total of \$33 billion in receipts, over 60% of all FCC license revenues between 1994 and 2010.<sup>147</sup>

Carriers remain hungry for additional bandwidth. This is seen not only in the license auction prices, but also in the lobbying position taken by Cellular Telecommunications & Internet Association (CTIA), the carriers' trade association. CTIA pressures regulators to make more spectrum available for auction.<sup>148</sup> This is a noteworthy development. The traditional approach by broadcast licensees has been for regulators to limit new allocations, protecting incumbents from competitive entry.<sup>149</sup> New auctions open a pathway for entrants. This is what happened in the 2006 AWS auction, where a consortium of cable TV operators won a 20 MHz nationwide block,<sup>150</sup> and where the smallest of four incumbent networks obtained the capacity to build a wireless broadband (3G) network, increasing rivalry in data services.

That wireless operators see a lack of spectrum as an impediment flags the reality that carriers would prefer to obtain future spectrum inputs at lower cost than to seek to protect their existing infrastructure from competitive entry. CTIA complains that there is only 50 MHz in the FCC pipeline for new mobile licenses (AWS-2, AWS-3), and urges regulators to find more airwave space to accommodate wireless networks.<sup>151</sup> There exists 294 MHz of prime spectrum that supplies almost no social dividend—the DTV Band.<sup>152</sup>

### III. REALLOCATING THE TV BAND FOR PRODUCTIVE USE

There are two striking aspects of the DTV transition from a consumer welfare perspective. The first is that the analog-to-digital transmission upgrade has had little direct impact on the market for video distribution, which fundamentally shifted to MVPD subscription services due to market forces.<sup>153</sup> The second is that the emergence of wireless voice and data services over the past two decades makes

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146. Press Release, FCC, *supra* note 140; *FCC Auctions: Factsheet: Auction 66*, FCC, [http://wireless.fcc.gov/auctions/default.htm?job=auction\\_factsheet&id=66](http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=66) (last updated Apr. 28, 2009).

147. Hazlett, Porter & Smith, *supra* note 10, app. 1 at 41–42.

148. CTIA, Comments, *supra* note 74; Cellular Telecomm. & Internet Ass'n, Reply Comments, *In re* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, WT Docket No. 09-66 (FCC July 13, 2009) [hereinafter CTIA, Reply Comments].

149. Owen, *supra* note 27.

150. Jeremy Bulow, Jonathan Levin & Paul Milgrom, *Winning Play in Spectrum Auctions* 21, 23 (Nat'l Bureau Econ. Research, Working Paper No. w14765, 2009), available at <http://economics.uchicago.edu/pdf/AWS%2002192009.pdf>.

151. CTIA, Comments, *supra* note 74; CTIA, Reply Comments, *supra* note 148.

152. See Thaler, *supra* note 29.

153. See *id.*

DTV spectrum extremely valuable for alternative services and, hence, extremely expensive to continue using for off-air video delivery. Attention naturally turns to the proposition that the DTV Band be made available for alternative services such as two-way wireless broadband.<sup>154</sup>

This would maintain a long-term historical pattern. For well over a half-century, the most valued airwave space has been allocated to over-the-air television broadcasting.<sup>155</sup> And for virtually that entire time, competitive technologies and service providers have lobbied the FCC to peel off TV Band airwaves to accommodate new services.<sup>156</sup> With long lags, key reallocations have ultimately been made. Figure 4 briefly summarizes.

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154. In 1996, then U.S. Senator John Ashcroft (R–MO), noted: “My commitment is to maintain free television, but I do not have a commitment to maintain free television if that misallocates a valuable resource of the country, namely, spectrum.” See Thomas W. Hazlett, Comments, *In re* National Broadband Plan for Our Future, 4 n.6, GN Docket 09-51 (FCC Dec. 18, 2009). As a trade journal reported:

Sen. John Ashcroft (R–Mo.) is struggling to find a way to bring TV broadcasters into the digital age. Rather than giving TV stations new spectrum, Ashcroft has proposed migrating TV stations to cable and selling off their current spectrum to the highest bidder. The Federal Communications Commission estimates the spectrum’s value at between \$20 billion and \$132 billion. Proceeds from the spectrum sale would go toward wiring every unserved home to cable. Former broadcasters would evidently become a new class of cable programmer afforded free access to cable systems. Many details of the plan remain murky, but Ashcroft’s idea is designed to free up spectrum for mobile communications, which, in his view, are the highest and best use of a finite resource, while protecting broadcasting as a free service to all Americans.

Ted Hearn, *Sen. Mulls Migrating Broadcasters to Cable*, MULTICHANNEL NEWS, July 1, 1996, at 20. In 2001, former FCC Chief of Staff (during the Clinton Administration) Blair Levin was reported as publicly explaining that:

TV stations were not in immediate danger of losing their spectrum. But political forces could shift if cable and DBS penetration climbs above 90 percent, if Japan and Europe race ahead of the U.S. in the advanced wireless-data market and if lawmakers need to patch big holes in the budget with spectrum-auction revenue.

Ted Hearn, *Could TV Stations Lose Their Spectrum?* MULTICHANNEL NEWS, June 18, 2001, at 56. (It is noteworthy that Levin now serves as the FCC’s “Broadband Czar.”) FCC Chair Michael Powell, an appointee of George W. Bush, followed up with the following 2003 statement: “it seems clear to me that at some point on the horizon, all Americans—perhaps in 10 years—will have pay-TV. . . . [A]s an entity, [over-the-air TV broadcasters] may and probably will be there but as a program supplying interest more than a distribution platform.” *FCC’s Powell Sees Big Change in Broadcast Environment*, COMM. DAILY, Oct. 23, 2001, at 1–2.

155. Hazlett, *supra* note 103, at 3.

156. See, e.g., GEORGE CALHOUN, DIGITAL CELLULAR RADIO 45–49 (1988); BRINKLEY, *supra* note 108, at 35.

**Figure 4**  
**TV Band Shrinkage Through History**<sup>157</sup>

— 1953: 486 MHz	<ul style="list-style-type: none"> <li>• 81 TV channels (6 MHz each)</li> </ul>
— 1982: 402 MHz	<ul style="list-style-type: none"> <li>• 67 TV channels</li> <li>• 84 MHz reallocated → 50 MHz to cellular licenses</li> </ul>
— 2009: 294 MHz	<ul style="list-style-type: none"> <li>• 49 channels</li> <li>• 108 MHz reallocated → 70 MHz to liberal licenses</li> </ul>
of which ~64 MHz are for LTE, ~6 MHz for MediaFlo <sup>158</sup>	

Today, the opportunity cost of using the TV Band for television broadcasting—294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 3G and 4G technologies—is conservatively estimated to exceed \$1 trillion.<sup>159</sup> These projections are based on the issuance of liberal licenses, which enable the most intense demands to be supplied.

#### **A. FCC's Unlicensed Approach**

With the modest utilization of TV Band airwaves there is widespread consensus that more wireless services can be accommodated.<sup>160</sup> The basic policy choice is how to allow additional “band sharing.” The FCC, in a decision tentatively announced in December 2002,<sup>161</sup> then formally ordered in November 2008,<sup>162</sup> and then confirmed and adjusted in September 2010,<sup>163</sup> has chosen to leave digital TV broadcasts in place and to arrange for unlicensed devices to use vacant airspace, also known as “white spaces.” Such radios are regulated via an

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157. See Hazlett, *supra* note 103, at 3.

158. Thomas W. Hazlett, Unleashing the DTV Band: A Proposal for an Overlay Auction, NBP Public Notice #26, GN Docket 09-51, Comment, *In re A National Broadband Plan for Our Future*, at 5 (FCC Dec. 18, 2009) [hereinafter Hazlett, Unleashing the DTV Band].

159. Hazlett, *supra* note 15, at 113. See generally Hazlett & Muñoz, *supra* note 53.

160. FCC, *supra* note 86, at 73–105.

161. *In re Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Notice of Inquiry, 17 FCC Rcd. 25,632, 25,632 (Dec. 20, 2002).

162. *In re Unlicensed Operation in the TV Broadcast Bands*, Second Report and Order, 23 FCC Rcd. 16,807, 16,808 (Nov. 16, 2008).

163. *In re Unlicensed Operation in the TV Broadcast Bands Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, Second Memorandum Opinion and Order, 51 Commc'ns Reg. (P&F) 578, 578 (FCC Sept. 23, 2010).

equipment approval process.<sup>164</sup> To be authorized for manufacture and sale, devices must locate frequencies not in local use by broadcasters and then avoid emissions that might degrade TV reception.<sup>165</sup>

Rather than conduct an economic analysis, the Commission signaled its selection of the unlicensed path thus:

The Commission's rules for unlicensed transmitters have been a tremendous success . . . . The success of our unlicensed device rules for the ISM bands shows that there could be significant benefits to the economy, businesses and the general public in making additional spectrum available for unlicensed transmitters.<sup>166</sup>

The categorical endorsement lacks an analysis of the relevant margins. The "tremendous success" conclusion, as applied to the historic performance of previous unlicensed allocations, is curiously incomplete, as allocations for unlicensed services beyond those made for Industrial, Scientific, and Medical devices (ISM) have often proven—by the Commission's own findings—to be unsuccessful. These include the U-PCS bands noted above. Even were the previous allocations a "tremendous success," the issue under consideration is whether the allocation of *additional* bandwidth would yield further results that dominate alternative options for achieving *other* "tremendous successes."

That implies, first, important incremental services that the constraints of the existing allocations do not accommodate.<sup>167</sup> Some economists and engineers argue that unlicensed TV white spaces are unlikely to generate substantial economic value because incremental demand for unlicensed access is low.<sup>168</sup> Others note that DTV Band frequencies, *by virtue* of their excellent propagation characteristics, will prove of little value for unlicensed device use.<sup>169</sup> When signals easily flow through walls and fade only slowly, conflicts between users are potentially more rampant; device regulation (power limits, etc.) will have to be concomitantly more severe.<sup>170</sup> This skepticism is buttressed by the fact that no firm, including those lobbying for additional unlicensed allocations, has bid for 700 MHz licenses with the intention of making naked spectrum (without a wireless network) available for approved devices.

Second, and reflecting the last point, the incremental allocation must be shown to face opportunity costs—namely, the welfare gains available from liberal

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164. *Id.* at 594–601.

165. *Id.*

166. *See In re Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, 17 FCC Rcd. at 25,634.

167. The "end of scarcity" argument is repudiated by the lobbying efforts of advocates for additional "spectrum commons." That unlicensed devices would productively utilize additional bandwidth taken from other productive employments reveals the underlying resource constraints.

168. Coleman Bazelon, *Licensed or Unlicensed: The Economic Considerations in Incremental Spectrum Allocations*, IEEE COMM., Mar. 2009, at 110, 115–16.

169. Charles Jackson & Dorothy Robyn, Comments, *In re Unlicensed Operation in the TV Broadcast Bands*, ET Docket No. 04-186, at 30 (FCC Jan. 31, 2007).

170. *Id.* at 1.

licenses—of less than the proffered benefits. While auction bidders must, the FCC’s methodology simply fails to evaluate the trade-offs involved. Most ominously, by ignoring the benefits of property rights in moving TV broadcasters out of the DTV Band, the Commission ensures that the decades-old misallocation of spectrum will prevail for generations to come. This offers a textbook illustration of the tragedy of the anticommons.<sup>171</sup>

### *B. Implicit Economic Trade-offs in the Unlicensed Allocation*

Perhaps the easiest way to see the basic problem is to consider the FCC’s efforts to accommodate DTV Band spectrum sharing. Specifically, regulators seek to permit the use of unoccupied frequencies by approving radio devices that will leave TV reception unaffected.<sup>172</sup> This approach catastrophically errs in missing the key misallocation—that the *technically occupied* DTV channels are not *economically employed*. It then compounds the error by seeking to create new, non-exclusive use rights that will render rational reorganization of the band impossible. Once truncated, overlapping, non-exclusive use rights are distributed, TV stations will be frozen in place. The transactions required to efficiently relocate them will be lost in a sea of extreme rights fragmentation.

Economic agents with incentives to invest in enhancing resource value are needed to engineer band reallocation. Exclusive overlay holders have such incentives, and would offer to buy out TV stations to make the underlying bandwidth more valuable:

One of the purposes of the legal system is to establish that clear delimitation of rights on the basis of which the transfer and

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171. Kevin Martin, FCC Chair 2005–09, testified before the U.S. Senate that the FCC was unable to allocate the white spaces via licenses because it would have created delays:

It would be more difficult and potentially actually even delay a little bit the full utilization of the white spaces to try to actually license off the white spaces, because it would first require us, from a technical standpoint, to identify exactly what all the white space was. Whereas, if we could adopt general rules which said, ‘We think you can operate under these parameters without causing interference, and then you can do so as long as you’re not causing interference,’ it would be more easily able to allow the technological innovations that are occurring in unlicensed to more fully utilize that spectrum.

*Assessing the Communications Marketplace: A View from the FCC: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 110th Cong. (2007) (statement of Kevin Martin in response to question from Sen. John Sununu), available at [rtp://avs.senate.gov/commerce020107.rm](http://rtp://avs.senate.gov/commerce020107.rm) (archived video at 1:16:59). The statement stands as a sterling example of the results-based reasoning that FCC rulemakings are rightly famous for. The FCC long ago began issuing overlay rights for TV white spaces in the 700 MHz band, and those rights have supported many transactions and services. Conversely, the unlicensed devices that the Commission is pursuing for the DTV Band have, since the Commission announced its intention to authorize them in 2002, not led to any approved devices over the intervening years. That delay is to “identify exactly what all the white space was.” The FCC elects to ignore these delays, treating them as free.

172. *Id.*

recombination of rights can take place through the market. In the case of radio, it should be possible for someone who is granted the use of a frequency to arrange to share it with someone else, with whatever adjustments to hours of operation, power, location and kind of transmitter, etc., as may be mutually agreed upon; or when the right initially acquired is the shared use of a frequency (and in certain cases the FCC has permitted only shared usage), it should not be made impossible for one user to buy out the rights of the other users so as to obtain an exclusive usage.<sup>173</sup>

The potential to create problem-solving residual claimants, however, is obliterated by the insertion of wholesale non-exclusive use rights. Gains from trade disappear. TV broadcasters, who would lose little by abandoning over-the-air transmissions and unleash far superior profit opportunities by making VHF/UHF airwaves available for alternative services, cannot share in the benefits—now allocated to limitless unlicensed users. The investments necessary to produce social gains are preempted by the tragedy of the anticommons.

In short, the FCC has chosen to extend administrative allocation. With non-exclusive use rights, it falls to the Commission to resolve conflicts by defining white spaces and determining what devices may be used to access them. The aim is to approve White Space Devices (WSDs) that will not substantially conflict with DTV reception.<sup>174</sup> Because TV channel assignments vary from market to market (for example, Channel 2 is used in New York City and Baltimore but not in Philadelphia or Washington, D.C.) and because FCC-approved devices are likely to be used nationwide, device emissions must be alert and agile, steering clear of local broadcasting signals. In the FCC's words:

An important consideration in the proceeding is how to ensure that unlicensed devices operate only on vacant frequencies. One approach under consideration is for the WSD to employ "smart radio" features that would use a "detect and avoid" or "spectrum sensing" strategy. An alternative approach would rely on accessing a database of licensed services to identify active services near the device's location. The device location would be determined by an integral geo-location technology, such as GPS.<sup>175</sup>

To engineer devices to detect and avoid the broadcasts of the interspersed TV stations increases the costs of device manufacture, shortens battery life, and reduces bandwidth.<sup>176</sup> Indeed, the purpose of detection technology is to restrict

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173. Coase, *supra* note 2, at 25.

174. "The FCC's latest tests 'confirm what NAB [National Association of Broadcasters] and others have long contended, that the portable, unlicensed devices proposed by high-tech firms can't make the transition from theory to actuality without compromising interference-free television reception,' said NAB executive vice president Dennis Wharton in a prepared statement." Mark Long, *Plan for Broadband on Unused TV Spectrum Hits Snag*, NEWSFACTOR.COM (Aug. 3, 2007), [http://www.newsfactor.com/story.xhtml?story\\_id=0110012XV7N5](http://www.newsfactor.com/story.xhtml?story_id=0110012XV7N5).

175. FCC OFFICE OF ENG'G & TECH., FCC/OET 08-TR-1005, EVALUATION OF THE PERFORMANCE OF PROTOTYPE TV-BAND WHITE SPACE DEVICES PHASE II 2 (2008).

176. Hazlett & Leo, *supra* note 19, at 18.

access to various channels. These involve co-channel spectrum (on which TV stations broadcast locally) and adjacent channel spectrum (co-channel neighbors). All these restrictions truncate the incremental value available to consumers.

One standard limitation is to constrain unlicensed devices to fixed usage on the grounds that conflicts between rival users become more difficult to predict (and mitigate) when radios are on the move. Hence, the FCC plans to limit fixed WSD operations differently than nomadic (“personal/portable”) devices.<sup>177</sup> Reflecting various economic tradeoffs, the FCC set the following rules:

- Fixed usage devices:
  - may access any TV channel between 2 and 51, except channels 3, 4, and 37;
  - must avoid co-channel and adjacent channel operations;
  - may operate at a maximum power of 4 watts.
- Personal portable usage devices:
  - may access any unoccupied channel between 21 and 51, except channel 37;
  - must avoid co-channel operations;
  - may operate at a maximum power of 100 milliwatts;
  - operation limited to just 40 milliwatts on adjacent channels.<sup>178</sup>

Because no avoidance system works perfectly, standards must be set to determine whether a given technology works well enough. This analysis has many dimensions; the key policy issues here involve adjacent channel protection (imposed for fixed devices) and power limits (sharply reduced for nomadic devices, which can use adjacent channels).

Available bandwidth shrinks. How much will depend on the devices and technologies ultimately approved, and then on the effectiveness of the approved devices in competing with other applications in providing services to consumers. If the power limits and operating-overhead burdens prove too onerous to be worth the cost (even to buyers who do not have to outbid competing uses of the spectrum), the white spaces may continue to lie idle. Perhaps worse yet is the prospect that some devices will access the allocated spectrum but provide incremental consumer value that is less than the opportunity cost of the DTV band. Such activity masks the tragedy of the anticommons.

### ***C. Spectrum Reallocation***

Rival models (incorporating distinct assumptions about airwave conflicts) estimate different levels of bandwidth availability in the white spaces. Yet, as a starting point, a study entered into the FCC record by Qualcomm in January 2007 is of interest.<sup>179</sup> The paper projected that—assuming 95% coverage in each

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177. FCC OFFICE OF ENG'G & TECH., *supra* note 175, at 1.

178. *In re* Unlicensed Operation in the TV Broadcast Bands, Second Report and Order, 23 FCC Rcd. 16,807, 16,808–09 (Nov. 14, 2008).

179. Charles Jackson & Dorothy Robyn, ET Docket No. 04-186, Comments, *In re* Unlicensed Operation in the TV Broadcast Bands (FCC Jan. 31, 2007).

market—only as much as 24 MHz would be available for new services if adjacent channel taboos were retained to protect broadcast TV signals.<sup>180</sup> In three scenarios with tighter assumptions about protections afforded existing TV stations, 0 MHz of white space are available nationwide.<sup>181</sup>

Under any likely scenario, only a modest fraction of the “unoccupied” frequency space in the TV Band will be made available for new applications. This is a product of the fact that *DTV broadcasting itself represents economically “unused” spectrum*,<sup>182</sup> given that broadcast content can be inexpensively delivered via alternative platforms. Not only have 91% of U.S. households already contracted out of the “free,” off-the-air TV delivery system by electing to pay for subscription services using coaxial cables or satellite transmitters—systems that include locally available off-air TV channels in their program menus—but three competing service options are available for connecting the last ten million households which do not yet subscribe to such services.<sup>183</sup> These three competing delivery systems are (a) the local cable TV operator, which passes over 99% of U.S. households;<sup>184</sup> (b) two satellite operators, DirecTV and EchoStar, each of which has a national footprint; and (c) emerging competition in local video wireline service. Local video wireline service is now present with telephone carrier build-outs, most importantly by AT&T and Verizon, creating a fourth video subscription option for over one-fourth of U.S. households.<sup>185</sup>

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180. *Id.* at 15.

181. *See id.* at 17 tbl.7.

182. This demonstrates the difference between *technical efficiency*, as measured by engineering studies that look at how the capacity of a band is being used, and *economic efficiency*, which measures the net social value generated. TV stations blast high-power emissions, “using” a large amount of band capacity. But the emissions waste both spectrum and electricity, given that the incremental gain to customers provided by the transmitted radiation is (much) less than the opportunity cost of the inputs.

183. There are currently 114 million U.S. households. CONSUMER ELECS. ASS’N, *supra* note 83 (citing the U.S. Census). Thus, the 9% of antenna-only homes constitute 10.26 million households.

184. FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Thirteenth Annual Report, 24 FCC Rcd. 542, 555 tbl.1 (2009).

185. CRAIG MOFFETT ET AL., BERNSTEIN RESEARCH, U.S. TELECOM AND CABLE: WHAT EXPECTATIONS ARE EMBEDDED IN RELATIVE VALUATIONS? RAISING TWC TO \$60 AND CMCSA TO \$21, at 17 (2009).

**Table 7**  
**TV Band “White Space” with Adjacent Channel Protection**

	White Space (MHz)	% Utilized TV	% New Services
QCOM 2007 – low	0	100	0
QCOM 2007 – high	24	92	8
Raw Occupancy <sup>186</sup>	216	27	73
Overlays with Reallocation Option	294	0	100

Broadcast content delivery over MVPD links, already the primary distribution system, can accommodate increased coverage at low incremental cost. Marginal households can be connected to existing networks for less than \$300 each, an estimate that includes customer premises equipment (set top boxes, dishes, internal wiring) and installation.<sup>187</sup> To expand MVPD coverage to ~100% of households would require adding ten million connections,<sup>188</sup> or \$3 billion in aggregate. Indeed, costs could well be much less were the task of connecting these households put out for bid.<sup>189</sup> Rival firms or consortia could offer to assume the obligation for distributing broadcast video programming to the defined subset of households. Marginal costs (including royalties) for broadcast content transmission would be nil; an existing platform simply expands to replace existing over-the-air distribution. MVPD suppliers also benefit by establishing customer relationships with millions of new households, and their bids in a procurement auction reflect anticipated profits from up-selling additional content.

Hence, \$3 billion is an upper-bound estimate of the cost of completing the transition of terrestrial broadcasting to alternative media. The value of the DTV Band, allocated to liberal licenses, is at least two orders of magnitudes greater.<sup>190</sup> Yet, by keeping TV stations in place and burdening unlicensed devices to detect and avoid broadcast signals that few are watching and that *none gain by watching over-the-air*, the DTV Band will remain economically dormant.

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186. The FCC has estimated that, population-adjusted, the mean U.S. TV market hosts thirteen channels. This estimate is used, rather than the unadjusted mean of eight stations per market.

187. Goldman Sachs analysts estimate the Subscriber Acquisition Cost (SAC) for a new satellite TV customer on the DISH (EchoStar) network at \$455. Of this, \$60 is for marketing and \$100 for commissions. Under the household connection program here, such costs would be avoided. The net wholesale cost for the provider is \$295, of which \$25 is for one “low-end” set-top converter box and one satellite dish. JASON ARMSTRONG ET AL., GOLDMAN SACHS, COMBINING TELCO/CABLE 40 (2009).

188. CRAIG MOFFETT, BERNSTEIN RESEARCH, COMCAST – THE SAFEST PORT IN A STORM FOR 2009? (2008) (estimating that there would be approximately 12.6 million non-MVPD homes in 2009).

189. Costs would also be driven down by means-testing household eligibility.

190. Hazlett, *supra* note 15, at 113, 119.

*D. The Policy Alternative: Overlays*

Overlay rights have been crafted by the FCC in several proceedings. The mechanism assigns exclusive control of designated bandwidth to new owners contingent on the protection of existing rights holders. A DTV Band overlay would, in this mode, grandfather existing full-power TV stations, permitting them to continue to broadcast without encroachment. Rules establishing “harmful interference” could be prescribed under existing regulatory rules and enforcement procedures, or via alternatives such as time delimited baseball arbitration (wherein both sides submit proposed solutions, the arbitrator selecting one of the two). The overlay licensee would then own the white spaces in the band and be positioned to negotiate with incumbents to expand them.<sup>191</sup>

The most sweeping contractual bargains of this nature relocate incumbents altogether. Borders are expensive to define and enforce, and they have repeatedly led regulators to impose power limits, restraints on mobility, limits on services or business models, and restrictions on technology. Border control also results in the widespread practice of imposing taboo channels and “guard bands,” using vacant frequencies as buffers. In the DTV Band, the great majority of spectrum capacity is used this way.<sup>192</sup>

Regulators do not internalize the costs of such measures, overlay owners do. The value created by the end of the encumbrance must exceed the cost of the relocation. This unleashes Coasean reallocation.

Overlays were used in PCS licenses issued via auction in 1995.<sup>193</sup> The underlying spectrum had been subject to a regulatory quagmire since 1989, when 4500 incumbent microwave users argued that their operations were essential to public safety, that the bands would not accommodate new applications, and that they could not be moved to alternative bands.<sup>194</sup> These NIMBY assertions proved false, but they nonetheless delayed productive new cellular phone services for several years.<sup>195</sup> This anticommons tragedy was eventually resolved by PCS licenses. Incumbent microwave operators had the right to continue for a fixed period, and then to deploy comparable communications at the expense of the overlay licensee.<sup>196</sup> Variations on this policy have been instituted in the AWS licenses auctioned in 2006, and the 700 MHz licenses issued in a series of auctions from 2002 to 2008.<sup>197</sup>

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191. Hazlett, *Unleashing the DTV Band*, *supra* note 158, at 9–11.

192. *Id.* at 18.

193. Peter Cramton, Evan Kwerel & John Williams, *Efficient Relocation of Spectrum Incumbents*, 41 J.L. & ECON. 647, 661 (1998).

194. *Id.* at 668–69.

195. EU countries were issuing 2G (digital voice) licenses from 1989 to 1992. U.S. PCS licenses, analogous to 2G, were then issued in 1995 and thereafter, creating a lag in the development of wireless networks.

196. Cramton, Kwerel & Williams, *supra* note 193, at 662, 668–69.

197. *See* Hazlett, *Unleashing the DTV Band*, *supra* note 158, at 9.

There are many possible formats to use in reallocating the DTV Band. Here is one plan<sup>198</sup> that translates current U.S. policy into an alternative structure designed to overcome the common interest tragedy dissipating TV Band value:

- Divide the 294 MHz DTV Band into seven overlay licenses;
- allocate each overlay seven TV channels (42 MHz);
- allot overlays broad property rights, subject to encumbrances;
- grandfather DTV broadcast incumbents indefinitely;<sup>199</sup>
- require DTV stations to distribute video content free-to-viewer, but the with a platform-neutral mandate;<sup>200</sup>
- sell overlay licenses at auction, limit one per customer;<sup>201</sup>
- FCC simultaneously holds a reverse auction to equip ten million non-MVPD households with, say, ten-year MVPD “broadcast TV” service.<sup>202</sup>

The overlays shift the spectrum reallocation task from administrative allocation to asset owners operating under market constraints. Incumbents would bargain with entrants (overlay holders) to capture gains generated by relocating. Because the number of transactors in each deal is small, and the potential economic gains in freeing broadcast TV spectrum for alternative services are large, the strong likelihood is that the market will soon renovate the DTV Band. Hold-out problems are not likely to be serious because the marginal gains from unanimous, as opposed to near-unanimous, broadcaster relocation do not overwhelm bilateral gains. To buttress this result, rules analogous to the “paid-for” relocations of PCS microwave users could be instituted, accompanied by streamlined arbitration procedures.

### ***E. Junk Band Endogeneity***

The ISM bands that host cordless phones and Wi-Fi devices are often referenced as junk bands, in which popular new devices have been accommodated at little social cost.<sup>203</sup> There is considerable truth in the claim, conditional on the

198. *Id.* at 9–11.

199. Protections for incumbents (contour borders) can be defined as in the 700 MHz licenses. Those licenses, and subsequent FCC rules, permitted Qualcomm to buy interference permission from scores of analog TV stations so as to launch MediaFlo in 2007.

200. TV stations are not required to continue broadcasting currently. They are only required to continue broadcasting—emitting one-way broadcast content across all 6 MHz allocated to their licenses—in order to retain control of their license. They are free to forfeit the license to the FCC without penalty. The necessary feature of the overlay innovation is that an overlay licensee retains control of the allocated bandwidth in the event of a TV license forfeiture.

201. Obviously, other “spectrum cap” rules can be used. This provision highlights that the market concentration issue can be addressed by competition policy remedies, including antitrust regulation. It cannot appropriately be an objection to the overlay policy in principle.

202. See Hazlett, *Unleashing the DTV Band*, *supra* note 158, at 9–11.

203. Philip J. Weiser, *The Untapped Promise of Wireless Spectrum* 11 (Brookings Institution Hamilton Project, Discussion Paper No. 2008-08, 2008), *available at*

regulatory choices already made. The frequencies in question have historically hosted many emitting devices (both for communications and non-communications purposes, as with microwave ovens) via non-exclusive use rights.<sup>204</sup> In this environment, coordination is left to administrative process. Residual claimants are excluded, and capital markets cannot be used to finance improvements, as occurs when cellular networks migrate their customers from analog to digital phones, increase quality of service by relocating incumbent wireless users, or expand spectrum capacity by buying additional licenses.

In the TV white spaces allocation, the FCC characterizes the opportunity to add additional economic value through the authorization of unlicensed devices as a free lunch.<sup>205</sup> Opportunity costs are ignored; the DTV Band is seen to be producing little of value and is riddled with idle white spaces. That outcome is determined not by nature but by regulation. Moreover, to infuse the TV Band with non-exclusive use rights is to forego the fix that could be created by spectrum owners. Efficiency-creating transactions that relocate TV stations and clean up the DTV Band are preempted. With unlicensed allocations, relocations depend on administrative rule makings—exactly the process that created tragedy.

Unlicensed users cannot pay TV stations to relocate to cable and satellite platforms because limitless “owners” would capture future benefits. This ensures that the DTV Band maintains its junk status. Alternatively, liberal license overlays enable residual claimants to move resources into higher valued uses, analogous to when the 700 MHz license bidders paid \$19 billion for a “reallocation” of spectrum in Auction 73.

Overlay transactions reveal the opportunity costs of VHF/UHF radio spectrum, and this knowledge facilitates efficiency in further allocations, including those that may be made for unlicensed devices. If public authorities were to determine that the value of additional bandwidth for unlicensed devices would generate a social net of opportunity costs, some fraction of the overlays could be acquired—through purchase, taking, or regulatory set aside—for the purpose.<sup>206</sup>

Suppose, for instance, that the FCC decided that one overlay should provide 20 MHz of cleared bandwidth for unlicensed use.<sup>207</sup> The license would be

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[http://www.brookings.edu/~media/Files/rc/papers/2008/07\\_wireless\\_weiser/07\\_wireless\\_weiser.pdf](http://www.brookings.edu/~media/Files/rc/papers/2008/07_wireless_weiser/07_wireless_weiser.pdf).

204. Carter, Lahjouji & McNeil, *supra* note 21, at 50 n.93.

205. *In re* Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, Notice of Inquiry, 17 FCC Rcd. 25,632, 25,634 (Dec. 20, 2002).

206. The selection among the choices is not without efficiency implications. The more transparent methods reveal costs and benefits such that more informed decisions are likely to be made. That argues strongly, as a general matter, for purchases over takings and for takings over regulatory set-asides. See Richard A. Epstein, *In and Out of Public Solution: The Hidden Perils of Forced and Unforced Property Transfer*, in PROPERTY RIGHTS: COOPERATION, CONFLICT, AND LAW 307, 308–41 (Terry Lee Anderson & Fred S. McChesney eds., 2003).

207. As this policy analysis is nested within current FCC practices and procedures, the regulatory set-aside path is assumed. The economically superior approach

sold with this encumbrance. The license holder would then relocate TV station broadcasts, realizing its obligation. The license price would reflect the expected cost of the band clearing operation and could be negative—the government would pay the overlay licensee. However, I have constructed the policy to avoid that effect—offsetting the obligation, the licensee captures the value of 22 MHz of DTV spectrum. In any event, the result would be that unlicensed devices could access dedicated, nationwide bandwidth, shedding the overhead of detection and avoidance of interspersed TV broadcasting signals.

Of course, bandwidth could be purchased by a private bidder at auction and used for “naked spectrum” (non-network) access financed via a device license fee.<sup>208</sup> Alternatively, device makers could, individually or as a consortium, cut out the broker and integrate into spectrum ownership. Finally, public agencies could directly acquire bandwidth through market purchase or government taking.

Perhaps the most important institutional advantage of overlays lies in the remedy they supply for the must-carry hold-up: ending policy gridlock. Broadcasters have a strong incentive to continue off-air transmissions simply to retain “must carry.” The suggestion is made that Congress should redo the rights, granting them to broadcasters in perpetuity but not making them dependent on off-air transmissions. That approach would not be credible. Station owners understand that stand alone must-carry rights would be insecure. Indeed, the constitutionality of “must carry” was premised, by the Supreme Court in *Turner*, on maintaining the economic viability of free, over-the-air television. Removing the rationale for the policy directly undercuts public support and its legal standing, threatening its long-run viability. This recalls one of the striking features of water misallocation. Irrigation districts often refuse to make profitable water sales because the farmers (who control the irrigation districts) understand that their assets would likely be appropriated were they to give up the activity for which they were awarded the property right.<sup>209</sup> So here with broadcasters, who see that no regulator can write a contract that guarantees broadcaster carriage rights in a post-broadcast environment.

Negotiated agreements among private parties often achieve what regulation cannot.<sup>210</sup> Private contracts can easily be written to guarantee long-term

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would be to auction overlays and to make purchase choices based on those prices. Indeed, the choice could be made during the auction as prices are revealed.

208. Kwerel & Williams, *Rapid Transition*, *supra* note 15, at v. The emergence of this business model is more than speculation. Licensed spectrum has allowed radio makers, such as Apple (with its iPhone), to contract for access to wireless networks, a bargain that allows the vendor’s customers (iPhone users) to enjoy ready access to both frequencies and wireless network services. Other service suppliers, such as Amazon (with its Kindle e-reader) or OnStar (with its emergency auto communications) routinely contract for spectrum access with carriers using licensed bandwidth. Mayo & Wallsten, *supra* note 79, at 54–64; Thomas W. Hazlett, *Modular Confines of Mobile Networks: Are iPhones iPhony?*, 19 SUP. CT. ECON. REV. (forthcoming 2011).

209. C. Carter Ruml, *The Coase Theorem and Western U.S. Appropriative Water Rights*, 45 NAT. RESOURCES J. 169, 183–85 (2005).

210. See Joseph Doucet & Stephen Littlechild, *Negotiated Settlements and the National Energy Board in Canada*, 37 ENERGY POL’Y 4633, 4633 (2009).

carriage of TV signals on cable and satellite systems. In fact, this contractual form is commonplace; hundreds of cable TV program networks are distributed to 100 million MVPD subscribers via long-term contracts.

The value-creating terms of the “broadcast” delivery guarantee are simple to outline. Overlay owners evince demand for carriage, as this helps to eliminate broadcast emissions, increasing spectrum value. MVPD providers have the capacity to supply such carriage and, indeed, already do. Shifting an existing (must-carry) liability to a long-term commitment, in exchange for consideration, improves the position of the operator. The price paid would likely be modest, in that local TV station content is valuable to viewers and the MVPD is competitively constrained. This retail rivalry preempts hold-up; a failure to secure long-term access to broadcast programming risks loss of market share. The potential of the DTV Band airwaves—\$107 billion in license value, at March 2008 prices<sup>211</sup>—provides ample demand for band-clearing cooperation.

Overlay licenses could effect the efficient band reorganization that the FCC has not. The non-exclusive access model, however, will preempt this reallocation and, by littering the DTV Band with disaggregated and overlapping use rights, perpetuate anticommons tragedy. The contracts that need to be consummated are unsupported by the truncated operating permits issued to TV stations on the one side, and non-exclusive access rights issued to device users on the other. The value-destroying pollution of terrestrial broadcasting will remain in place as the gains to pollution-abatement cannot be captured.

In short, the rent-seeking equilibrium seeks *to extend and protect* broadcast television. So it is that champions of unlicensed white spaces cited in the FCC’s 2008 Order oppose overlays *because* they would threaten to move over-the-air broadcast stations. In response to the argument that overlay “licensees would be able to negotiate with TV broadcasters to relax the interference requirements in individual situations, and thereby allow greater use of the white spaces,”<sup>212</sup> the proponents of unlicensed allocations argue that:

[A]llowing broadcasters to negotiate to allow greater interference from white space devices would be contrary to broadcasters’ public interest obligations to provide free TV service to viewers because some TV viewers would lose the ability to receive over the air TV service.<sup>213</sup>

Hence, to make the argument for WSDs, proponents propose to freeze TV stations in place and block efforts to “unjunk” the band. That the argument is analytically incorrect—the “broadcasters’ public interest obligations to provide free TV service” could be met at far lower social cost by shifting to alternative delivery platforms—is less interesting than the regulatory strategy revealed. The policy of rights fragmentation under the unlicensed model opposes market mechanisms that would preempt administrative allocation. This mandate is

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211. Hazlett, *Unleashing the DTV Band*, *supra* note 158, at 3 n.2.

212. *In re* Unlicensed Operation in the TV Broadcast Bands, Second Report and Order, 23 FCC Rcd. 16,807, 16,832 (Nov. 16, 2008).

213. *Id.*

sufficiently powerful as to lead to a defense of an antiquated TV broadcasting structure that destroys social wealth and blocks the great majority of the rich bandwidth that white space device users now seek to access, if only in slivers.

***F. Protecting Non-MVPD Households and Non-TV Incumbents***

A constraint on the clean-up operations of overlay licensees is the aforementioned “broadcasters’ public service obligation to provide free TV service.” In fact, the political demand to make “free” broadcast TV programs available to nearly all U.S. homes can be achieved with platform neutrality.<sup>214</sup> The structural components of a system of all-MVPD household coverage are already in place. The shift could be completed by an increase in subscribership of only about ten million households (or a 10% increase on the approximately 100 million subscribers).

Connecting ten million additional households to MVPD platforms would require less than \$3 billion, as noted. Overlay licenses, discounted for the encumbrances, would attract auction bids far exceeding this amount. A highly conservative methodology produces estimates of white space license revenues of between \$9.4 billion and \$24.4 billion, depending on the protections afforded broadcast station incumbents and the number of channels allocated to the licenses.<sup>215</sup> Given that licenses allocated 52 MHz of TV bandwidth sold for \$19 billion in March 2008, even as auction bids were highly constrained (by perhaps \$5 billion) by regulatory requirements imposed on the 22 MHz C license,<sup>216</sup> the aggregate value of the overlays described herein is very likely much higher.

There are incumbent users of the TV Band other than full-power TV stations, specifically low-power TV stations and wireless microphones. LPTV licensees could be vested in the same manner as full-power stations, and then relocated by overlay licensees. Given their small footprints, tenuous financial position, and the high desirability of shifting programming to local cable TV systems,<sup>217</sup> transactions (overlays paying cable operators to guarantee carriage in exchange for a cessation in broadcasting) would be likely. To ensure timely

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214. Broadcast signals have never been made available to all homes, and a good percentage of households (well above 10%) have subscribed to MVPD services because they are not able to receive many, or any, off-air signals. There has also been a healthy debate among broadcasters over the issue of whether the ATSC format provides good over-the-air reception. Because many urban, suburban and rural households have great difficulty receiving analog or digital off-air broadcasts, it is not clear how much of terrestrial TV reception problems are due to the selection of the FCC’s DTV standard. *See Money for Nothing: The FCC Is Forcing You to Buy Digital Tuners that May Not Even Work*, SLATE, Oct. 7, 2002, <http://www.slate.com/id/2071935/>.

215. Charles Jackson & Dorothy Robyn, ET Docket No. 04-186, Comments, *In re Unlicensed Operation in the TV Broadcast Bands*, at 2 (FCC Jan. 31, 2007).

216. Coleman Bazelon, *Too Many Goals: Problems with the 700 MHz Auction*, 21 INFO. ECON. & POL’Y 115, 116, 127 n.53 (2009).

217. LPTV stations already seek, and in some instances, obtain, cable carriage, a far superior video delivery platform than low-power broadcasting. A cable channel carriage deal delivering an LPTV station’s content for two hours per day—or per week—may produce higher ad revenues than 24/7 off-air broadcasting.

negotiations and prompt transitioning, overlay licenses could impose arbitration time lines as with PCS licenses.

Wireless microphones are a more interesting problem. Given the vast unoccupied space in the TV Band over the past many decades, rights to use wireless microphones in unoccupied UHF frequencies were granted by the FCC.<sup>218</sup> This application was used by broadcasters in televising events, including sports programs, and has been extended to other entertainment venues such as live stage shows.

Wireless microphones have been used as white space devices, free to roam through vast, unutilized stretches of the TV Band.<sup>219</sup> FCC allocation of taboo channels dictated that only one in six channels could be used for TV station broadcasts within a given market.<sup>220</sup> Possessing no exclusive spectrum ownership rights, wireless microphone makers and users faced no opportunity costs in wasting spectrum. Wireless microphone technology stagnated. Now, permitting new devices to access idle TV Band spectrum is characterized as having dire consequences for existing services. The Sports TV Alliance has vigorously lobbied the FCC against it:

If FCC field tests cannot demonstrate a failsafe environment for incumbent wireless microphones, the FCC must be prepared to rule that the current state of technology doesn't justify moving forward with these white spaces proposals at this time, according to the filing.

More than 300 wireless microphones are routinely used at large events like the Super Bowl, the Daytona 500, and the NCAA Basketball Championship Tournament. "Any interference caused by wireless white spaces devices would seriously impair US sports event programming, affecting hundreds of millions of sports fans – denying them full enjoyment of these events . . . if the FCC fails to protect wireless microphones," [said a spokesman for the Sports Technology Alliance].<sup>221</sup>

Far lower cost spectrum inputs for wireless microphones are easily found. Former FCC Chief Engineer Michael Marcus sees AWS spectrum—where, in 2006, 90 MHz (in the 1.7 GHz and 2.1 GHz bands) was allocated to licenses sold

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218. John Dunbar, *Airwave Concerns Prompt Proposal to Ban Some Wireless Microphones*, WASH. POST, Aug. 22, 2008, at D2.

219. Wireless microphones are licensed by the FCC but licensees are not assigned exclusive control over specific bandwidth. Moreover, "[t]he FCC rarely enforces the licensing requirements on the microphones because there have been so few complaints. The microphones are programmed to avoid television channels." *Id.*

220. Michael J. Marcus, ET Docket No. 04-186, Comments re: Ex Parte Comments of Sports Technology Alliance, at 2 (FCC May 5, 2008).

221. *Top Sports Leagues, Program Network Find Fault White Space Proposals* [sic], SPORTS VIDEO GROUP (May 1, 2008, 3:45 PM), [http://www.sportsvideo.org/portal/artman/publish/article\\_10748.shtml](http://www.sportsvideo.org/portal/artman/publish/article_10748.shtml).

by the FCC—as a cheap alternative.<sup>222</sup> U.K. regulators have elected to pack wireless microphone transmissions into one 8 MHz TV channel (UHF channel 69 in the U.K.).<sup>223</sup> To achieve efficient migration, U.S. regulators could vest wireless microphone users with spectrum access rights in one specified, delimited, frequency space. An exclusive licensed band of no more than 8 MHz would suffice; other arrangements are possible. A recognized *wireless microphone industry group* should then be authorized to bargain with the overlay owner to adjust boundaries.<sup>224</sup>

That such an application<sup>225</sup> could preempt deployment of exponentially more valuable services brings the NIMBY problem in radio spectrum to clarity. Proponents of unlicensed use of U.S. white spaces correctly note that wireless microphones squander resources, arguing that migrating these devices to less costly alternatives “would result in better long-term spectrum utilization.”<sup>226</sup> But the stated cause of the problem is misconstrued: “*Free licensed spectrum with economic externalities usually results in lower direct costs to users than spectrum use based on marketplace forces . . .*”<sup>227</sup> The fact that rights have been granted without charge is not the problem, nor is the presence of “economic externalities.”<sup>228</sup>

Rather, the lack of exclusive property rights over the spectrum preempts the auction process wherein those suffering harmful effects outbid the current users of the band. The wireless microphone makers and their customers own a non-exclusive right to pollute, and this pollution blocks a great deal of productive activity. Were they to actually own the resources in question they would maximize the value of the band. This would not end “economic externalities,” but exclude

222. See Michael Marcus, *UK's Ofcom Proposes Unlicensed TV White Space Devices*, SPECTRUMTALK (Dec. 14, 2007), <http://spectrumtalk.blogspot.com/2007/12/uk-ofcom-proposes-unlicensed-tv-white.html>.

223. *Id.*

224. Of course, the industry could be selected as the licensee.

225. See Michael J. Marcus, *Comments re: Ex Parte Comments of Sports Technology Alliance*, ET Docket No. 04-186 (FCC May 5, 2008).

Use of hundreds of channels for a few hours a week at a few sports venues and at other entertainment locations like the Las Vegas Strip and the New York Theatre District does not add up to much spectrum use at all if averaged over time and space. The positions advocated by [the Sports Technology Alliance] and others in the wireless microphone community will result in vast amounts of spectrum lying fallow but being available for this narrow community for instant access with obsolescent technology independent of marketplace forces.

*Id.* at 3.

226. New Am. Found. et al., ET Docket 04-186, Technical Comments, *In re Unlicensed Operation in the TV Broadcast Bands*, at 21 (FCC Feb. 1, 2007), *as cited in* Charles L. Jackson & Dorothy Robyn, Reply Comments, ET Docket No. 04-186, at 4 (FCC Mar. 2, 2007).

227. *Id.*

228. Coase, *supra* note 11, at 577–80. Coase explains just this misunderstanding of “economic externalities,” some of which has appeared in the discussion and application of his widely read 1960 article on social cost.

just those beneficial applications worth less than their cost. In short, the tragedy caused by wireless microphone is a product of the rules issued under administrative allocation of radio spectrum—precisely the regime that the unlicensed white-space devices would radically expand.

#### IV. CONCLUSION: PLANTING AND NURTURING A “JUNK BAND”

*It is, of course, most important that we ensure that new unlicensed devices do not interfere with the incumbent licensed services in the TV Bands.*

– *Federal Communications Commission*<sup>229</sup>

The current TV Band proceeding begins with the premise that TV broadcast stations are the most valuable use of 294 MHz of radio spectrum and that whatever additional communications can be squeezed in via unlicensed devices are a free lunch. But white spaces or taboo channels are not natural artifacts. They are a product of the administrative allocation system. The spectrum is, by the FCC’s historical record, a buffer space needed to reduce potential conflicts. But the buffers offer little value; much greater social gains would result from alternative approaches to policing conflicts. The resulting economic tragedy is widely recognized, but not sufficiently well as to avoid gridlock in the solution.

The idea that TV broadcasting occupies the DTV Band is an optical illusion. In economic terms, TV broadcasting wastes the DTV Band. The white spaces do not occupy 24 MHz nationwide, but 294 MHz.

Advocates for unlicensed devices insist that, “The whole point . . . is to build a device that *doesn’t* interfere with TV signals.”<sup>230</sup> The FCC agrees. The administrative allocation regime is now freezing TV stations in place, intending to sprinkle tiny, fragmented, overlapping non-exclusive use rights all around them. The tragedy of the anticommons is leveraged. The transactions necessary for efficiency cannot be realized because residual claimants are needed to make the necessary band-clearing investments.

Instead, a rent-seeking rivalry rages. Since 2002, the FCC has sought to craft rules permitting spectrum sharing; it has yet to approve a single device.<sup>231</sup> Indeed, despite the high intelligence of smart radios, FCC tests have consistently found that prototypes submitted for approval have difficulty attaining perfect detection of existing TV signals, particularly on adjacent channels.<sup>232</sup> This creates an opening for incumbents to insist that wireless devices be “failsafe.” Cost is no

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229. *In re* Unlicensed Operation in the TV Broadcast Bands, Second Report and Order, 23 FCC Rcd. 16,807, 16,821 (Nov. 16, 2008).

230. Cade Metz, *TV Giants Lock Horns with Microsoft and Google over White Space Wireless Play*, REGISTER, Oct. 13, 2008, [http://www.theregister.co.uk/2007/10/13/big\\_four\\_tv\\_networks\\_attack\\_google\\_microsoft\\_wireless\\_proposal/](http://www.theregister.co.uk/2007/10/13/big_four_tv_networks_attack_google_microsoft_wireless_proposal/) (reporting on the comments of Ed Thomas, former FCC Chief Engineer).

231. *In re* Unlicensed Operation in the TV Broadcast Bands Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, Second Memorandum Opinion and Order, 51 Comm’n Reg. (P&F) 578 (FCC Sept. 23, 2010).

232. FCC OFFICE OF ENG’G & TECH., *supra* note 175, at vi.

object.<sup>233</sup> With nary a household watching, a lengthy “angels on the head of a pin” debate proceeds. Broadcasters lobby Congress to vote for the interference rules of their liking, running television advertisements warning viewers that they will lose their “free” TV signals should unlicensed devices be permitted to use white spaces. WSD proponents are dismayed:

Ed Thomas, a former FCC chief engineer who represents the White Spaces Coalition, calls this nothing more than “a scare campaign.” “It lacks a scientific base . . . . What they’re trying to do is create a political environment where science doesn’t prevail, and I think that’s appalling.”<sup>234</sup>

Thomas’s opinion is an informed one and his perspective reveals much. Most informative is that the larger truth is entirely missed. “Science” will not prevail because it cannot prevail. Despite the “technical” nature of the device approval process, the planning process is economic in nature. Government officials are actually evaluating costs and benefits, economic trade-offs dressed up as protocol choices. Policymakers have elected to make these choices among competing values rather than delegating them to markets. As Coase, Meckling & Minasian explained in 1962:

The *range* of alternative combinations is determined by technology—the state of the arts—and is an engineering problem. The ‘proper’ combination actually to use to achieve a given goal is, however, an economic problem and is not (properly) soluble solely in terms of engineering data.<sup>235</sup>

There is no scientific basis for preferring unlicensed white space devices to liberal license overlays. It is not a technical determination to seek to protect broadcast TV stations from transitioning to more efficient content delivery platforms. Engineering principles cannot reveal whether the FCC’s 4-watt power limit produces greater social benefit than the 20-watt power limit suggested by a group lobbying for WSDs because, “operations in the [other] unlicensed bands

233. Or, conversely, the very object. Raising rivals’ costs is a common strategy in political competitions.

234. Metz, *supra* note 230.

Microsoft, Dell, Google and the Wireless Innovation Alliance declared yesterday “White Spaces” Day, to pitch the idea of using spectrum partially freed from the migration to digital TV to offer a new form of inexpensive wireless broadband. The lobbying fight on this front has been heavy, with the National Association of Broadcasters and incumbents, wary of new competition, using PR campaigns to suggest the new devices will cause wireless armageddon. Google Co-Founder Larry Page yesterday raised the rhetoric bar by declaring the FCC’s tests of these new devices were “rigged.” . . . With so much lobbying muscle on both sides of this debate, the policy rhetoric overshadowed the technical discussion some time ago.

Karl Bode, *Google: White Space Tests Were ‘Rigged’; White Space Rhetoric War Continues...*, DSL REPORTS (Sept. 25, 2008), <http://www.dslreports.com/shownews/Google-White-Space-Tests-Were-Rigged-97984>.

235. Coase, Meckling & Minasian, *supra* note 11, at 23.

have proliferated to the point where congestion and ‘noise’ have created a ‘tragedy of the commons’ that prevent[s] WISPs from continuing to serve existing customers with reliable signals.”<sup>236</sup>

The task before the Commission is to select the best competing values. We know quite a bit about the alternative institutional arrangements for making such choices. The planning process selected for white spaces is not market competition but administrative allocation. Therein lies the scientific problem.

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236. *ISP Organization Tries to Inject Sanity into White Space Debate*, RBR.COM (Oct. 23, 2008, 6:28 PM), [http://www.rbr.com/tv-cable/isp\\_organization\\_tries\\_to\\_inject\\_sanity\\_into\\_white\\_space\\_debate.html](http://www.rbr.com/tv-cable/isp_organization_tries_to_inject_sanity_into_white_space_debate.html).