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REGULATORY OVERREACHING: WHY THE FCC IS EXCEEDING ITS AUTHORITY IN IMPLEMENTING A PHASE-IN PLAN FOR DTV TUNERS

I. INTRODUCTION

As digital television progresses with higher quality and assumes a greater role in the broadcasting world,¹ analog television is on its way out.² While much of the technological progress is consumer-driven, there are still instances in which the government or its regulatory agencies have stepped in to encourage and assist the public's progression to newer, more advanced technologies through a process aptly termed "technology forcing."³ Promoting the public interest through "technology forcing" often requires a delicate balance between industrial and economic progress on the one hand, and embedded costs and vested commercial interests on the other. Certainly, the government has a legitimate interest in the goals of facilitating such transitions.⁴ However, this process should not be done arbitrarily and capriciously by passing laws, which, while purporting to achieve a greater good, opens up the floodgates for detriment.

One such instance where a government agency, the Federal Communications Commission ("FCC"), has stepped in to facilitate the move towards advanced technology in the name of public interest, is in the

1. See In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules, 13 FCC Rcd. 15,092, 15,105 (1998) [hereinafter Transmission Carriage Report].

2. A. Michael Noll, *A Misguided Campaign for Over-the-Air Digital TV*, N.Y.L.J., Sept. 16, 2002, at S12. Noll argues that over-the-air-television is dying; most consumers do not really care about broadcast digital television, as they rely on DVDs and DBS (Direct Broadcast Satellite). Because of this, "the remaining few viewers of over-the-air broadcast television may simply turn off altogether rather than purchase a costly new TV receiver to watch the same programming." *Id.*

3. See *Encouraging Capital Formation in Key Sectors of the Economy: Hearing Before the Subcommittee on Domestic Monetary Policy, Technology, and Economic Growth of the Committee on Financial Services*, 107th Cong. (2002).

4. See *id.*

realm of broadcast television.⁵ Until the 1950s, almost all television programming was broadcast over the VHF television band.⁶ Because the frequencies are limited, the VHF television spectrum, consisting of a total of twelve channels, had become exhausted.⁷ To promote growth of the television broadcast industry and to benefit the consumers, the FCC responded to this spectrum scarcity by opening a total of seventy new channels in the UHF band for broadcasters.⁸

Despite the new spectrum availability from the UHF band, the new programming available to consumers did not substantially increase.⁹ The reason behind this was a combination of factors, including a lack of channels available to the public, poor quality of over-the-airwaves broadcasts, absence of educational television, and something termed the “vicious cycle.”¹⁰ The “vicious cycle” was a phenomenon by which consumers did not have the television equipment (decoders) to receive the UHF channels and, thus, no incentive to purchase such equipment absent enticing UHF programming.¹¹ Meanwhile, faced with the fact that consumers did not have the necessary reception equipment, broadcasters refrained from constructing UHF stations.¹²

Market forces acting alone could not readily solve the problem faced by the viewers and the broadcasting industry. As a result, in 1963, Congress stepped in by enacting the All-Channel Receiver Act (“ACRA”),¹³ which gave the FCC the necessary authority to remedy the non-use of the UHF spectrum for television programming.¹⁴ The FCC, pursuant to its authority granted under ACRA, passed regulations requiring that television receivers include the capability to receive both VHF and UHF channels.¹⁵ This intervention eliminated the “vicious cycle” and brought the UHF television into contemplated use.¹⁶

5. See In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, 17 FCC Rcd. 15,978, 15,978–79, (2002) [hereinafter Digital Television Order].

6. See *All-Channel Television Receivers and Deintermixture, Hearings Before the Committee on Interstate and Foreign Commerce*, 87th Cong. 2 (1962).

7. See *id.* at 8.

8. See *id.* at 2.

9. See Digital Television Order, *supra* note 5, at 15,990.

10. See *id.*

11. See *id.*

12. *Id.*

13. All-Channel Receiver Act of 1962, Pub.L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. §303(s)).

14. Digital Television Order, *supra* note 5, at 15,990.

15. See *id.* at 15,989–90 n.45.

16. *Id.* at 15,990.

The FCC claims that a similar “vicious cycle” exists today with the advent of Digital Television (“DTV”).¹⁷ DTV is a mode of translating broadcast signals in digital form as opposed to the traditional analog form.¹⁸ Today, as in the 1960s, consumer equipment is generally incapable of realizing the full potential of new broadcasting.¹⁹ Due to these new advancements in technology, ACRA has resurfaced again, and so has the FCC in its regulation of television receivers.²⁰

On August 8, 2002, the FCC amended its own rules and adopted a requirement that new broadcast television-receiving equipment have the capability to receive DTV signals.²¹ It prescribed a gradual phase-in of digital tuners in television-receiving devices over a span of five years.²² According to the FCC schedule, by July 1, 2007, all new television receivers and “TV Interface Devices [videocassette recorders (VCRs), digital versatile disk (DVD) players/recorders, etc.]”²³ that are shipped in interstate commerce or manufactured in the United States must have the capability of receiving DTV signals.²⁴ Essentially, this means that television sets not equipped with the capability of receiving DTV signals will become obsolete once analog programming disappears and television broadcasts become all-digital. The FCC relied on ACRA to enact this regulation, despite the fact that forty years had elapsed and many other developments had occurred since ACRA was enacted in 1962.²⁵

This Comment argues that the FCC does not have the requisite power under ACRA to pass regulations forcing television receiver manufacturers to equip the prescribed products with DTV tuners and decoders. Section II provides background on DTV, the enactment of ACRA, and the application of ACRA in the past, as well as to the current DTV transition. Section III discusses why neither the legislative history, the caselaw, nor the general market tendencies warrant the FCC’s intervention *In regulating the DTV transition*. Furthermore, contrary to the FCC’s sophistry, the conditions existing at the time of ACRA’s enactment simply do not exist today. This Comment will also propose several alternative undeclared motivations that might have prompted the FCC to exceed its scope and adopt ACRA.

17. *Id.*

18. *Id.* at 15,979.

19. *See id.* at 15,980.

20. *See* Digital Television Order, *supra* note 5, at 15,980.

21. *Id.* at 15,979; *see also* discussion *infra* Part II.A–B.

22. *See id.* at 15,996–97.

23. *Id.* at 15,996.

24. *Id.*

25. *See id.* at 15,987–89.

Finally, this Comment will conclude that the expansion of ACRA under the auspice of facilitating this particular technological advance in the digital television broadcasting arena is not a valid exercise of the FCC's limited power under ACRA.

II. BACKGROUND

A. What Is DTV?

The Digital Television ("DTV") standard is the implementation of a digital, rather than analog, transmission of the broadcast signal.²⁶ It is assumed that an ordinary consumer would likely prefer digital transmission over analog because, as the FCC asserts in its report, the conversion of television broadcast from analog to digital "is generally associated with greatly improved sound and picture quality in the high definition and with better and more flexible reception in the standard mode."²⁷

The digital transmission itself is composed of a stream of bits, referred to as "data packets,"²⁸ which can be any kind of information, including video, audio, or data.²⁹ These data packets are identified with "headers and descriptors"³⁰ indicating their content, which allows for different types of information (e.g., audio and data) to be intermixed within the same stream.³¹

The digital television transmission system and related standards were established by the Advanced Television Systems Committee ("ATSC").³²

26. Digital Television Order, *supra* note 5, at 15,978-79.

27. Transmission Carriage Report, *supra* note 1, at 15,105. Still, quality might vary from "system to system," and it is possible that more channels would be offered without any significant enhancements in the quality of sound and picture due to variations in modulating techniques. *Id.*

28. *Id.* at 15,104 n.64.

29. *Id.*

30. *Id.*

31. *Id.* (Data amounts required to transmit a digital picture vary with the amount of motion in the picture.).

32. Transmission Carriage Report, *supra* note 1, at 15,103.

The ATSC standards are generally discussed as including 18 scanning formats, although technically 36. The 18 formats are described in the Commission's *Fifth Further Notice of Proposed Rulemaking* in MM Docket No. 87-268, 11 FCC Rcd 6235, 6239 and in Annex A, Table 3 of the "ATSC Digital Television Standard" Doc. A/53. These specific formats were not incorporated into the Commission's digital television broadcast standards. See *Fourth Report and Order* in MM Docket No. 87-268, 11 FCC Rcd 17771, 17790. There are six video formats which are "high definition television": 1080-line by 1920-pixel formats at all picture rates (24, 30 and 60 pictures per second) and the 720-line by 1280-pixel formats at these same picture rates. All these formats have a 16:9 aspect ratio. The remaining twelve video formats, while representing some significant improvements over

The ATSC is an organization representing various facets of the video industry, including broadcasters, cable operators, and equipment manufacturers.³³ It has set out the standards for digital components of the transmission³⁴ consisting of the “video/audio layer, compression layer, transport layer, and the transmission layer.”³⁵ At the top of the ATSC hierarchy is the “uncompressed digital signal in one of the various video/audio formats,” which allows for a highly-mixed, high-quality transmission of various pictures, sound, and data, but not necessarily in consistent proportions.³⁶ The uncompressed digital signal is compressed in the next level, called the “compression layer.”³⁷ At this level, the elementary stream from the uncompressed level becomes compressed into a “bitstream with a lower data rate.”³⁸ The compression bitstream is then converted into a “transport layer”³⁹ by being “packetized and multiplexed with other bitstreams.”⁴⁰ Finally, the lowest layer is called the “transmission layer.”⁴¹

Presently, the ATSC has established standards for two modes of modulation of the digital signal utilizing vestigial sideband modulation (“VSB”).⁴² While there were some debates as to which standard should be used,⁴³ in January 2001, the FCC, as part of its periodic review, adopted the “8-VSB” as the official modulation system.⁴⁴

analog NTSC, are not high definition television. They are referred to as “standard definition television.” These are the 480-line by 704-pixel formats in 16:9 widescreen and 4:3 aspect ratios, at the picture rates listed above, and 480-line by 640-pixel format at a 4:3 aspect ration.

Id. at 15,103–04 n.63.

33. *Id.*

34. *Id.* at 15,103–04.

35. *Id.* at 15,104.

36. *Id.*

37. Transmission Carriage Report, *supra* note 1, at 15,104.

38. *Id.*

39. *Id.* at 15,104.

40. *Id.*

41. *Id.* at 15,104. In the transmission level, the multiplexed bitstream is “modulated onto a radio frequency (“RF”) carrier.” *Id.*

42. *Id.* “VSB is a form of amplitude modulation in which one sideband of the main modulated signal and a small part of the other sideband of the same signal are transmitted. The current analog television standard also uses VSB.” *Id.* at 15,104 n.66. The two modes are 16 VSB and 8 VSB. *Id.* at 15,104.

43. Richard E. Wiley, *Communications Law in 2001: A New Environment*, in 19TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS: POLICY & REGULATION 7, 41–42 (PLI Intell. Prop. Course, Handbook Series No. G-684, 2001). The Grand Alliance, a consortium of rival interests in the technology industry formed in 1993 recommends the “8-VSB” standard, while another group of broadcasters headed by the Sinclair Broadcast Group argued that the preferred modulation technique is “COFDM.” *Id.*

44. *Id.* at 42.

B. The FCC Regulatory Program

The FCC regulation in the realm of DTV decoders did not come as a surprise. Rather, the FCC has long been conducting hearings and investigations on DTV conversion to ensure its success. The first of these reviews took place on March 6, 2000.⁴⁵

Initially, the FCC established a DTV Table of Allotments,⁴⁶ which assigned a second channel to all full-power television stations.⁴⁷ The idea was that, while it may be too expensive for a television station to *buy* another channel solely for digital transmission, a *free* assignment would facilitate the transition to a digital standard.⁴⁸ Thus, while this additional channel would be used for a digital broadcast, the television station would simultaneously broadcast in analog format on the original channel.⁴⁹ Ideally, once the transition was completed, the station would relinquish and cease broadcasting its initial analog channel. However, the broadcaster may choose to retain the original channel and relinquish the newly-assigned one.⁵⁰ According to the 1997 Budget Act passed by Congress, the FCC is required to reclaim, market by market, the analog channel from television stations by December 31, 2006, “*unless fewer than 85% of the station’s viewers can receive the broadcaster’s digital service either off-air or through satellite or cable television.*”⁵¹ During this transitional period, the television stations will broadcast both analog and digital signals.⁵² At the end of the transition,

45. Digital Television Order, *supra* note 5, at 15,979.

46. Wiley, *supra* note 43, at 37.

47. *Id.*

48. *See generally id.* (discussing the FCC’s desire to facilitate the transition from analog to digital television).

49. *Id.*

50. *Id.*

51. *Id.* (emphasis in original).

52. Transmission Carriage Report, *supra* note 1, at 15,099. This report

(1) provides one 6 MHz channel for each DTV channel; (2) limits the initial eligibility for DTV licenses to existing full-power broadcasters; (3) requires DTV licensees to provide at least one free digital programming service that is at least comparable *In resolution* to today’s service and aired during the same time periods that their analog channel is broadcasting; (4) allows licensees to provide ancillary or supplemental services that do not derogate the mandated, free over-the-air program service; (5) gives broadcasters the discretion as to how much, if any, high definition television programming they will transmit; (6) licenses DTV and NTSC television facilities under a single, paired license; (7) states the Commission’s intent to give special relief to noncommercial broadcasters to assist in their transition to DTV, including providing them six years within which to construct DTV facilities; (8) allows equipment manufacturers at this time to determine which video formats DTV equipment will receive based on market and consumer demand; (9) postpones a decision whether to impose labeling requirements on receiver manufacturers; and (10) declines to limit the sale of NTSC-only display devices in

the broadcast licensee will cease transmitting the analog signal and will return the proscribed 6 MHz of spectrum to the government.⁵³ Once the FCC recovers the entire analog spectrum, 108 MHz in total, the frequencies will likely (and profitably) be sold for commercial purposes, such as wireless and Internet services.⁵⁴

The FCC's *Fifth Report and Order* contains "[t]he rules governing the transition from analog to digital broadcasting"⁵⁵ Despite the difficulties in the transition, as of December 2001 more than 200 DTV stations were already delivering digital broadcast.⁵⁶ Nevertheless, due to transitional difficulties, the FCC had to postpone the May 10, 2000 auction date for the spectrum from channels 60–69 (upper 700 Mhz band) five different times.⁵⁷

While the DTV conversion was being considered, the FCC heard arguments by the National Association of Broadcasters (NAB) and the North American Broadcasters Association (NABA).⁵⁸ NAB, NABA, and other concerned parties argued that DTV receivers were unavailable in the market in "sufficient volume to support a rapid transition to an all-digital broadcast television service."⁵⁹ In response to this argument, the FCC sought feedback on what impact requiring a DTV decoder would play on the difficulties encountered in the DTV conversion.⁶⁰ Upon requesting this information, the FCC also addressed the issue of cost to consumers, recognizing that DTV components were expensive, and that "it would not be economically feasible at this point to include DTV capability in smaller screen receivers."⁶¹ Due to the pricing issue, the FCC decided to phase in the requirement over time so as to "take advantage of the declining costs associated with increasing electronics manufacturing volumes."⁶²

In establishing its regulatory strategy, the FCC has relied heavily on feedback by interested parties such as Paxson, Motorola, Association for

the future. (citation omitted).

Id. at 15,099 n.42, .

53. See 47 U.S.C. §309(j)(14)(C) (2000) (concerning the reversion of the analog television spectrum to the Government).

54. See generally Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52–59), 16 FCC Rcd. 7278 (2001) (discussing the proposed method of reallocation for the 698–746 MHz spectrum band).

55. Transmission Carriage Report, *supra* note 1, at 15,099.

56. Wiley, *supra* note 43, at 36.

57. *Id.* at 38.

58. Digital Television Order, *supra* note 5, at 15,981.

59. *Id.*

60. *Id.* at 15,980.

61. *Id.* at 15,981.

62. *Id.*

Maximum Service Television, Inc. (MSTV), NAB, NABA, and Association of Local Television Stations, Inc. (ALTV).⁶³ On the other hand, it has also confronted vigorous opposition from Consumer Electronics Association (CEA) and Thomson Multimedia, Inc. (Thomson).⁶⁴ CEA and Thomson oppose the DTV tuner requirement on the grounds that it would “seriously impede the DTV transition through consumer reaction to the significantly higher prices of television sets that would result during the first few years.”⁶⁵ Instead of enacting this DTV phase-*In regulation*, CEA argues that the FCC should simply let the natural market forces guide the transition.⁶⁶ Further, CEA argues that a DTV tuner requirement would disrupt the normal market-incentive system where consumer desires dictate the features offered by manufacturers.⁶⁷ Instead, manufacturers would be coerced into providing consumers with features they do not want at prices they might not be able to afford.⁶⁸

Despite the arguments urging the FCC to abstain from regulating,⁶⁹ it declined to delay application of the DTV tuner requirement. Asserting its actions to be motivated by a desire to provide consumers with the capability to receive the digital signal, speed up the transition to the digital standard,⁷⁰ and to effectuate the intent of ACRA, the FCC imposed the following phase-in schedule:

Receivers with screen sizes 36” and above—50% of a responsible party’s units must include DTV tuners effective July 1, 2004; 100% of such units must include DTV tuners effective July 1, 2005;

Receivers with screen sizes 25” to 35”—50% of a responsible party’s units must include DTV tuners effective July 1, 2005; 100% of such units must include DTV tuners effective July 1, 2006;

63. *Id.* at 15,981–84. These organizations, in one way or another, are primarily concerned with supporting and providing various services to the broadcasting industry.

64. Digital Television Order, *supra* note 5, at 15,984. CEA represents over 1,000 corporate members involved in all facets of audio, video, and wireless electronics, as well as communication and information technology. Thomson is a provider of technologies, services, and products to the entertainment and media industries. Its sales reached 10.5 billion euros in 2001. It is the fourth-largest supplier in the world of consumer electronics products. Consumer Electronics Association, at http://www.ce.org/publications/books_references/digital_america/video/analog_tv.asp (last visited February 3, 2003).

65. Digital Television Order, *supra* note 5, at 15,984.

66. *Id.* at 15,984–85.

67. *Id.*

68. *Id.*

69. *Id.* at 15,984–86.

70. *Id.* at 15,979.

Receivers with screen sizes 13" to 24"—100% of all such units must include DTV tuners effective July 1, 2007;

TV Interface Devices (videocassette recorders (VCRs), digital versatile disk (DVD) players/recorders, etc.) that receive broadcast television signals—100% of all such units must include DTV tuners effective July 1, 2007.⁷¹

C. *The All-Channel Receiver Act (ACRA)*

The FCC regulates the television manufacturing arena pursuant to the authority granted it by Congress in 1962, through the enactment of ACRA.⁷² Although Congress ultimately delegated responsibility to the FCC, the authority behind the Act can be traced back to Congress' commerce power.⁷³ Since its passage in 1962, ACRA has come into the legislative and judicial arena on numerous occasions.

1. Legislative History of ACRA

The All-Channel Receiver Act (ACRA) came to life pursuant to a congressional bill⁷⁴ which, once enacted, amended the Communications Act of 1934. It gave the FCC the necessary authority to regulate television receiver capabilities, namely, to require that they be equipped at the time of manufacture to receive all television channels, including the seventy UHF and twelve VHF channels.⁷⁵ Following significant debate regarding the scope of the power granted to the FCC, ACRA was enacted, expressly giving the FCC

[the] authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.⁷⁶

71. Digital Television Order, *supra* note 5, at 15,996.

72. All-channel Receiver Act of 1962, *supra* note 13.

73. See S. REP. NO. 87-1526 (1962), reprinted in 1962 U.S.C.C.A.N. 1873, 1873 [hereinafter SENATE REPORT].

74. There were two identical bills: S. 2109 and H.R. 8031. They were introduced respectively in the Senate by Senator Warren G. Magnuson and in the House of Representatives by Representative Oren Harris pursuant to a request by the Federal Communications Commission. SENATE REPORT, *supra* note 73, at 1873.

75. *Id.* at 1873; see also H.R. REP. NO. 87-1559, at 2 (1962) [hereinafter HOUSE REPORT].

76. All-channel Receiver Act, *supra* note 13.

The above language was a product of an amendment, which inserted the word “adequately” between “capable of” and “receiving.”⁷⁷ The purpose of such an insertion was to ensure that the FCC not have blanket authority to prescribe performance standards.⁷⁸

The Senate Report indicated that the Committee on Commerce, as well as the House Interstate and Foreign Commerce Committee, conducted “extensive hearings”⁷⁹ on House of Representatives Bill 8031.⁸⁰ To reinforce the desirability of this proposed legislation and to demonstrate the broad spectrum of supporters, the congressional report referred to the parties presenting testimony on this bill as “all segments of the broadcast industry, manufacturers, Government agencies, and the general public”⁸¹ The House Report listed the supporters for the legislation as the “broadcasting industry, including television networks,”⁸² with the “most enthusiastic support for this legislation . . . com[ing] from the thousands of viewers who may be threatened with complete loss of television service if the only available VHF service were to be discontinued and less far-reaching UHF service substituted.”⁸³ Following these hearings, the House of Representatives passed H.R. Bill 8031⁸⁴ on May 2, 1962, by a vote of 279 to 90.⁸⁵

2. The Underlying Purpose of ACRA

The Senate’s primary considerations were the urgency and necessity of a solution to the particular problems surrounding the inadequate use of the UHF spectrum, reflected in its report on the decision to enact ACRA.⁸⁶ The Senate Report first addressed the statutory mandate of the FCC, namely, “to provide the people of the United States with a truly nationwide and competitive broadcasting system.”⁸⁷ The Report added that, although the FCC had allocated sufficient space for a total of 2,225 television

77. SENATE REPORT, *supra* note 73, at 1879. This amendment to the proposed legislation was adopted after congressional debate and pursuant to a dialogue with the FCC regarding the scope of power envisioned under ACRA. *Id.*

78. *Id.*

79. *Id.* at 1873.

80. *Id.*

81. *Id.*

82. HOUSE REPORT, *supra* note 75, at 8.

83. *Id.*

84. SENATE REPORT, *supra* note 73, at 1873.

85. *Id.*

86. *Id.* at 1874–75.

87. *Id.* at 1874.

stations for UHF and VHF channels, only 103 UHF channels were actually on air.⁸⁸ Since only seven percent of the potential UHF assignments were in use, the Committee on Interstate and Foreign Commerce declared that “[i]f the American people [were] to have the chance to enjoy the benefits of television service to the fullest degree, then a major portion of the UHF channels not now assigned must be put into operation.”⁸⁹

The House Report further indicated that the production of television sets capable of receiving UHF signals had actually slowed down.⁹⁰ According to the statistics presented before the Committee on Interstate and Foreign Commerce, “[i]n 1953 over 20 percent of the television receivers were equipped at the time of manufacture to receive UHF. In 1961, only about six percent of the receivers produced were so equipped.”⁹¹ The Senate Committee noted that the scarcity of all-channel receivers hindered effective competition between the UHF and the VHF stations.⁹² Additionally, of the licensees who have decided to switch to a UHF format, one hundred were forced to give up and “go dark.”⁹³

Furthermore, the House Report indicated the ultimate goal to be “a television system which will serve all the people, encourage local outlets, foster competition—particularly in the larger markets—and meet educational needs.”⁹⁴ One of the problems the Interstate and Foreign Commerce Committee found with the system at that time was that the allocation structure permitted a total of only three national networks.⁹⁵ Thus, irrespective of the number of parties wishing to enter the field or the amount of demand for additional network services, the allocation structure at that time would not permit additional networks.⁹⁶ The limitations imposed by the allocation structure were thought to impede the Committee’s and the FCC’s goal of a commercial television system designed to

- (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of

88. *Id.*

89. HOUSE REPORT, *supra* note 75, at 2 (emphasis added). By comparison, the Senate noted that the legislation’s “basic purpose is to permit maximum efficient utilization of the broadcasting spectrum space, especially that portion of the spectrum assigned to UHF television.” SENATE REPORT, *supra* note 73, at 1874.

90. HOUSE REPORT, *supra* note 75, at 2.

91. *Id.*

92. SENATE REPORT, *supra* note 73, at 1875.

93. HOUSE REPORT, *supra* note 75, at 3.

94. *Id.*

95. *Id.*

96. *Id.*

population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression.⁹⁷

3. The Legislative History of ACRA Clearly Sets Out the Scope of Permissible Legislation

While recognizing the need for legislation which would give the FCC the requisite regulatory power to create a solution to the problems surrounding the UHF spectrum, the House and the Senate Committees recognized that such a grant of power must be carefully tailored so as not to exceed the necessary scope.⁹⁸ Thus, in enacting ACRA, both the House and Senate Committees clearly stated their vision of the intended effects of the statute as well as the scope of its application.⁹⁹ The House Report, under a bold subheading reading "All-Channel Receiver Legislation Only Means To Achieve Adequate Television System,"¹⁰⁰ explained that the objective "of an adequate national television system can be achieved only through the utilization of the 82 channels now allocated for television broadcasting."¹⁰¹ It emphasized that more than twelve VHF channels were necessary to meet the nation's needs.¹⁰² The fact that only seven percent of the available spectrum was used and that ninety-three percent was not, resulted in an "inexcusable waste of one of the most valuable and limited natural resources to which this Nation and other nations have access—the radio spectrum."¹⁰³ Unless the public had television sets capable of receiving UHF programming, the UHF broadcasters would have no incentive to translate UHF programming.¹⁰⁴

In the absence of such programming, consumers in 1962 had no incentive to pay a premium for television receivers 'capable of receiving UHF signals.¹⁰⁵ Congress needed to break this "vicious cycle"¹⁰⁶ by

97. *Id.*

98. *See generally* SENATE REPORT, *supra* note 73 (discussing the need for and scope of the proposed legislation).

99. *See generally* HOUSE REPORT, *supra* note 75 (discussing the need for and scope of the proposed legislation); *see also* SENATE REPORT, *supra* note 73.

100. HOUSE REPORT, *supra* note 75, at 4.

101. *Id.*

102. *Id.* at 5.

103. *Id.*

104. HOUSE REPORT, *supra* note 75, at 5; *see also* SENATE REPORT, *supra* note 73, at 1876.

105. *See* SENATE REPORT, *supra* note 73, at 1876.

106. *Id.*

enacting appropriate legislation in order for the UHF television band to be developed in the name of the public interest.¹⁰⁷ Because all other feasible approaches at breaking this cycle had failed, the Committee “wholeheartedly agree[d] with the [FCC] that a long-range policy of developing an 82-channel VHF and UHF television system should be followed.”¹⁰⁸

The House Report also addressed the issue of what it envisioned in ACRA. The FCC would authorize all television sets shipped in commerce to “be capable of receiving” both VHF and UHF channels.¹⁰⁹ The House Report interpreted the quoted language to mean

that all receivers shipped in interstate commerce or imported will be constructed with equipment inside its cabinet which will have performance characteristics sufficient to permit satisfactory and usable reception of each of the present 12 VHF and 70 UHF channels in any location where, in the light of the normal state of receiver development at the time, such reception can be expected. The performance capabilities of such sets for receiving UHF signals should be adequate to assure that the purchasers of these sets will in fact get comparable reception from UHF and VHF stations.¹¹⁰

Similarly, the Senate Report emphasized “that the aim of this measure is an intermixed television system using both 12 VHF and 70 UHF channels.”¹¹¹

There was substantial debate as to the breadth of ACRA, with concerns voiced about the dangerous precedent that it might set in the regulation of manufacturers.¹¹² One such opinion quoted Justice Brandeis: “Experience teaches us to be most on our guard to protect liberty when the Government’s purposes are beneficent.”¹¹³ The record indicates that the FCC itself has recognized and addressed this concern. For example, the FCC assured the Committee on Commerce “that the practical need for procuring authority which would permit effective enforcement of this legislation would not involve the Commission broadly in the dealings of television set manufacturers.”¹¹⁴ The Committee explained that the FCC’s

107. HOUSE REPORT, *supra* note 75, at 5.

108. *Id.* at 7.

109. *Id.* at 5.

110. *Id.*

111. SENATE REPORT, *supra* note 73, at 1879.

112. *Id.*

113. *Id.* at 1881.

114. *Id.* at 1880.

“authority, restrictive as it would be of section 303(s), would be most limited and narrow.”¹¹⁵ Subsequent to the FCC’s recognition of its limited power under ACRA, the Committee on Commerce agreed with the FCC that the legislation was “narrow in scope.”¹¹⁶

4. Interpretation of ACRA in Caselaw

Since its enactment, ACRA has been called into question several times.¹¹⁷ Although few cases directly address DTV regulation, when interpreted collectively, these cases provide a framework for analyzing the power granted to the FCC under ACRA.

In *Association of Maximum Service Telecasters v. FCC*,¹¹⁸ the Court of Appeals for the District of Columbia Circuit affirmed that the FCC’s regulatory authority is limited under ACRA.¹¹⁹ The court examined the limitations inherent in ACRA’s language when Sanyo Manufacturing Corporation manufactured a receiver, the Specific Signal Display Device (“SSDD”), incapable of receiving *all* FCC-allocated television frequencies.¹²⁰ This device was intended for use with home computers, video games, cable television systems, and video tape recorders.¹²¹ Specifically, the SSDD differed from ordinary television receivers in that it was capable of receiving only two VHF frequencies (channels 3 and 4), enabling it to function with cable television or any other device that sends a signal within the narrow two-channel range.¹²² Because the SSDD was not capable of receiving all the channels prescribed by ACRA, Sanyo requested a waiver from the FCC to allow Sanyo to market the SSDD in the United States, which was subsequently granted.¹²³ The Association of Maximum Service Telecasters (“Association”) challenged the FCC’s decision. The Association contended that ACRA’s meaning mandated that “any device, such as the SSDD, ‘capable’ of receiving television pictures broadcast

115. *Id.*

116. *Id.*

117. *See Ass’n of Maximum Serv. Telecasters v. FCC*, 853 F.2d 973, 981 (D.C. Cir. 1988) (affirming the FCC’s determination that Sanyo’s “specific signal display device” did not fall within the terms of ACRA); *Elec. Indus. Ass’n Consumer Elecs. Group v. FCC*, 636 F.2d 689, 698 (D.C. Cir. 1980) (vacating the FCC’s order establishing a 12dB standard for television tuners, as it was based on faith, rather than fact).

118. 853 F.2d 973 (D.C. Cir. 1988).

119. *Id.* at 981.

120. *Id.* at 975.

121. *Id.*

122. *Id.*

123. *Id.*

simultaneously with sound”¹²⁴ be required to comply with ACRA.¹²⁵ Granting the waiver, the FCC interpreted ACRA as applying only to devices that are “intended for reception of over-the-air signals.”¹²⁶ The FCC reasoned that, because the SSDD was not intended to receive over-the-air signals, the statute was inapplicable.¹²⁷ The court of appeals agreed with the FCC’s more limited view of ACRA’s language and ruled that the FCC’s grant of waiver to Sanyo was permissible.¹²⁸

In making its decision, the *Association* court went to great lengths to decipher the legislative intent in the passage of ACRA.¹²⁹ To understand the scope of ACRA, the court looked to the established guidelines for statutory interpretation as originally enunciated in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*¹³⁰ In the *Chevron* two-part test, the first prong analyzes a congressional statute and requires a court to ask “whether Congress’ intent is clear as to the precise question at issue.”¹³¹ In interpreting Congress’ intent, the court must employ “traditional tools of statutory construction.”¹³² If the court determines that sufficient evidence exists to support Congress’ intent, then the congressional intention “is the law and must be given effect.”¹³³ The *Association* court emphasized that, although traditionally governmental agencies enjoy deference from the courts, such deference will not “be applied to alter the clearly expressed intent of Congress.”¹³⁴

The second prong of the *Chevron* test requires that, if the examining court determines that “the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency’s answer is based on a permissible construction of the statute.”¹³⁵ In this case, the *Association* court determined that Congress’ intent on the precise issue was unclear and went on to determine whether the agency’s construction was “‘reasonable’

124. *Ass’n of Maximum Serv. Telecasters*, 853 F.2d at 975 (emphasis added).

125. *Id.* Although the court failed to indicate why the Association of Maximum Service Telecasters would want to contend the FCC decision, it is highly likely that some of the parties whose interests it advocated stood to lose sales due to approval of Sanyo’s product.

126. *Id.* (citing Mem. Op. and Order, FCC 84-261, at 4 (released July 20, 1984), J. A. at 24).

127. *Id.*

128. *Id.* at 981.

129. *Id.* at 978-81.

130. 467 U.S. 837 (1983).

131. *Ass’n of Maximum Serv. Telecasters*, 853 F.2d at 975.

132. *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

133. *Id.* at 976 (quoting *Chevron*, 467 U.S. at 843 n.9).

134. *Id.* (quoting *Bd. of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986)).

135. *Id.* (quoting *Chevron*, 467 U.S. at 843).

or 'permissible.'"¹³⁶ In analyzing the FCC's interpretation of ACRA, the court focused on the congressional intent, which seemed to be maximizing the efficiency of the broadcast spectrum, particularly the UHF portion of the spectrum.¹³⁷ The court reiterated that Congress sought to achieve effective competition between UHF and VHF channels when it enacted the statute.¹³⁸ The *Association* court saw the SSDD as

yet another one of those *luxury items*, what Justice Catron long ago may have presciently had in mind when he spoke of "*real or supposed extravagance[s]*" . . . that is to say, consumers who suffer from limited wherewithal in this electronic age are singularly unlikely to purchase an SSDD in lieu of a TV set.¹³⁹

The *Association* court further agreed with the FCC's reasoning that "[t]he logic and necessity of applying one set of technical standards does not dictate the application of other technical standards to which logic and necessity do not apply."¹⁴⁰ As a result, the court concluded that the FCC's conclusion that the SSDD did not fall within the terms of ACRA was reasonable under the *Chevron* guidelines.¹⁴¹

In *Electronic Industries Ass'n Consumer Electronics Group v. FCC*,¹⁴² the court of appeals further scrutinized the statutory limits on the FCC's regulatory authority under ACRA. The plaintiff, an electronics manufacturer, disputed the FCC's authority under ACRA to impose certain noise standards.¹⁴³ The FCC enacted these standards to improve the overall performance of television receivers by regulating for higher sound quality.¹⁴⁴ Thus, the issue turned on whether the FCC could set a television tuner noise standard that was unattainable using existing technology.¹⁴⁵ According to the court's findings, the FCC implemented the new noise standard believing that this and other similar actions would lead to a technical progress that would permit the televisions of the future to comply with the newly-ordered requirement.¹⁴⁶ The court also noted that a factor considered by the FCC was the "need for significant technical

136. *Id.* at 978 (quoting *Chevron*, 467 U.S. at 843, 845).

137. *Ass'n of Maximum Serv. Telecasters*, 853 F.2d at 979 (quoting S. REP. NO. 1526, 87th Cong. (1962)).

138. *Id.*

139. *Id.* at 980 (citation omitted).

140. *Id.* at 981 (quoting Brief for FCC at 11 n.6) (internal quotation marks omitted).

141. *Id.*

142. 636 F.2d 689 (D.C. Cir. 1980).

143. *Id.* at 693-94.

144. *Id.* at 690.

145. *Id.*

146. *Id.*

improvements to reach 12dB [the new minimum noise standard].”¹⁴⁷

When considering the scope of the FCC’s power, the court paid particular attention to the legislative intent behind ACRA, as evidenced by its legislative history.¹⁴⁸ Particularly important was language noting that “all receivers . . . be constructed with equipment inside its cabinet which will have performance characteristics sufficient to permit satisfactory and usable reception of each of the present 12 VHF and 70 UHF channels”¹⁴⁹ In considering the validity of the noise standard requirement, the court was mindful of the fact that ACRA was passed primarily to integrate the UHF spectrum.¹⁵⁰ Additionally, the court noted various other limitations on the FCC’s legislative power under ACRA and also noted the fact, admitted by the FCC, that the lower noise figure could not currently be achieved without increasing the susceptibility to interference while maintaining a reasonable cost.¹⁵¹ The court, noting that “faith is not enough”¹⁵² and that the “mandate [of congressional commission embodied in ACRA] does not authorize the Commission to go beyond assuring ‘adequate’ UHF reception,”¹⁵³ found that the FCC lacked the authority to set standards for the future which the existing technology cannot attain¹⁵⁴ and vacated the FCC’s order.¹⁵⁵

III. DISCUSSION

A. Legislative History Demonstrates That ACRA Does Not Apply to DTV and That the FCC Has No Authority Under ACRA to Regulate

As mandated under *Chevron*, where the language of a statute is unclear, the principles of statutory interpretation require a careful look at legislative intent.¹⁵⁶ Accordingly, the language of ACRA should not be

147. *Id.* at 693. Two commissioners dissented during the adoption of this new standard. Commissioner Robert E. Lee stated that he sees the 12dB standard as representing “wishful thinking” which “does not [really] make it happen.” *Id.* (citing UHF Television Receiver Noise Figures, 69 F.C.C.2d 1866, 1885 (1978)).

148. *See Elec. Indus. Ass’n Consumer Elecs. Group*, 636 F.2d at 694.

149. *Id.* (citing HOUSE REPORT, *supra* note 75).

150. *See id.*

151. *Id.* at 697 (citing UHF Television Receiver Noise Figures, 70 F.C.C.2d 1176, 1180–81 (1978) (memorandum, opinion, and order)).

152. *Id.* at 698.

153. *Id.*

154. *Elec. Indus. Ass’n Consumer Elecs. Group*, 636 F.2d at 698.

155. *Id.*

156. *See Ass’n of Maximum Serv. Telecasters v. FCC*, 853 F.2d 973, 976 (D.C. Cir. 1988).

read in isolation without taking into consideration the true motivations and concerns of the legislators. Analyzing the circumstances surrounding the enactment of ACRA will clearly demonstrate that it is simply *not applicable* to DTV.

The Senate and House Reports clearly indicate the issues that prompted the hearings and research that led to ACRA's enactment.¹⁵⁷ The House Report unambiguously states the dire need for an improved state of broadcast television, namely, in the realm of increasing the number of channels available to the general public.¹⁵⁸ By making the UHF spectrum available to the general public, Congress tried to remedy a seriously-fragmented allocation structure that limited competition.¹⁵⁹ At the time, "278 so-called television markets" broke down into the following categories: 127 markets broadcasting only one television station, 70 markets broadcasting two stations, 57 markets broadcasting three stations and 24 markets broadcasting four or more stations.¹⁶⁰ "Consequently, under the television market term, almost three-fourths of the television markets have a choice of one or two local stations."¹⁶¹

Congress saw these channels as too few—especially in light of the available spectrum—to successfully promote the growth and development of educational television.¹⁶² It sought to remedy this by requiring all television receivers to include the capability to receive all VHF and UHF channels.¹⁶³ In fact, ACRA itself was considered to be "educational television legislation,"¹⁶⁴ aimed primarily at solving the current and future needs of educational television, and not for making technological advances in a system already capable of supporting educational television.¹⁶⁵

Furthermore, the Senate Report indicates that Congress passed this legislation for the very narrow purpose of remedying the lack of television stations available to the public due to the absence of UHF programming: "We emphasize that the aim of this measure is an intermixed television system using both 12 VHF and 70 UHF channels."¹⁶⁶

157. See generally SENATE REPORT, *supra* note 73; HOUSE REPORT, *supra* note 75.

158. See HOUSE REPORT, *supra* note 75, at 2.

159. See SENATE REPORT, *supra* note 73, at 1875.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1874.

164. *Id.* at 1875.

165. See SENATE REPORT, *supra* note 73, at 1874.

166. *Id.* at 1879.

*B. The Debates Regarding the Amendment of ACRA Evidence a
Contraction of the Regulatory Authority It Imparts to the FCC*

Perhaps some of the more compelling evidence for the limited scope of ACRA comes from the amendment adopted pursuant to the initial legislation.¹⁶⁷ Requiring that the word “adequately” be inserted between “of” and “receiving” in the statute,¹⁶⁸ Congress addressed the concern that the original proposal (absent the word) would have given “the Commission blanket authority to prescribed [sic] ‘minimum performance standards’ for all television receivers shipped in interstate and foreign commerce.”¹⁶⁹ One of the concerns was that such authority would give the FCC the permission to “adopt standards covering the manufacture of color television receivers.”¹⁷⁰ Consequently, the FCC itself agreed that the authority granted it under House Bill 8035 was “broader than was necessary” and the provision was amended.¹⁷¹ The House Committee deleted the language giving the FCC authority to mandate “minimum performance capabilities”¹⁷² and limited the language of ACRA to the specific purpose of insuring UHF reception capabilities.¹⁷³ Such a deletion of language from a bill “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”¹⁷⁴

The Committee on Commerce further assuaged the Senators’ fears regarding what might appear as too broad a power granted to the FCC by including in its report the FCC’s own concession that it realized the limitations of power granted under ACRA.¹⁷⁵ The FCC made assurances to the Committee that “[t]he authority given to the Commission to require that all channel receivers ‘be capable of adequately receiving’ UHF channels is narrow in scope,”¹⁷⁶ adding further that the legislation’s aim is

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. SENATE REPORT, *supra* note 73, at 1879.

172. See *Elec. Indus. Ass’n Consumer Elecs. Group*, 636 F.2d 689, 694 (D.C. Cir. 1980) (quoting *All-Channel Television Receivers and Deintermixture: Hearings on H.R. 8031 Before the House Comm. on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 274 (1962) (testimony of W. Walter Watts, RCA Corp.)).

173. HOUSE REPORT, *supra* note 75, at 2.

174. Consumer Electronics Association, *White Paper Regarding Television Tuner Requirement*, at 7 (2002), available at <http://www.fcc.gov> [hereinafter CEA White Paper] (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)).

175. See SENATE REPORT, *supra* note 73, at 1880.

176. *Id.* (emphasis added).

an intermixed system.¹⁷⁷ Consistent with the FCC's report, the current version of ACRA was enacted.¹⁷⁸ The reiteration of the legislation's limited power to remedy the UHF problem, and the FCC's own concession that this is the range and *limit* of the powers granted it under ACRA, demonstrate that nothing gave the FCC the far-reaching powers it usurped in passing legislation mandating DTV phase-in.

Proponents of the FCC's current regulation might argue that certain advances in technology and the general progress associated both with equipment and broadcasting warrant the FCC's intervention in the DTV realm. For instance, there were once concerns of ACRA being so broad as to cover "the manufacture of color television receivers,"¹⁷⁹ but currently, the majority of TVs manufactured are in fact in color,¹⁸⁰ and yet the UHF regulation still applies to them. Thus, in a sense, one could argue that the natural progression of technology has been absorbed in the meaning of ACRA.

Although such an interpretation could be made, it is merely facetious and flouts the realities of the explicit limitations inherent in ACRA's legislative history and in its express meaning. Once the intended limitations of ACRA are realistically assessed, the following point remains: The only way the matter addressed in the amendment could be justified is if ACRA is interpreted to mean that Congress passed it solely to remedy the specific VHF/UHF related problem and to extend ACRA no further.

Apart from the history of ACRA—which through creative interpretation could permit the DTV regulation—there is explicit and unambiguous evidence that the FCC simply does not have the power to enact DTV regulation.¹⁸¹ In 1997, Representative Edward Markey, the ranking Member of the House Telecommunications and Internet Subcommittee, proposed that the Communications Act be amended to require that television receivers receive DTV signals,¹⁸² but this proposed amendment was rejected on a roll call vote with a count of 31-11.¹⁸³ In addition, Jeff Sagansky, the President and CEO of Paxson Communications

177. *Id.* at 1879.

178. *See generally id.* (discussing the enactment of ACRA).

179. *Id.* at 1879.

180. Consumer Electronics Association, *Analog TV Keeps Its Lead*, at http://www.ce.org/publications/books_references/digital_america/video/analog_tv.asp (last visited February 3, 2003) (explaining a "98 percent penetration of color TV").

181. *See* CEA White Paper, *supra* note 174, at 8.

182. *Id.*

183. *Id.*

Corporation, a strong proponent of the FCC's digital tuner phase-in plan,¹⁸⁴ made the following statement to the Senate Committee on Commerce, Science and Transportation: "We need a *digital All-Channel Receiver Act* that would require that all television sets sold to the American public be capable of receiving both analog and digital signals."¹⁸⁵ There is no conceivable reason why the CEO of Paxson would ask the Senate Committee to pass an act that would delegate to the FCC the requisite power to enact DTV regulation if it already had this power under ACRA. A digital ACRA was not passed and thus, the FCC has no authority to regulate.

C. The Current Lack of Urgency Does Not Justify Extending ACRA to DTV

The FCC's regulation of television manufacturers in 1963, pursuant to the passage of ACRA, should not be viewed in isolation. There was a sense of urgency in the realm of broadcasting that prompted congressional legislation to expand the FCC's power.¹⁸⁶ In addition, there was clear evidence indicating that, absent congressional and, subsequently, FCC intervention, the problem regarding the non-use of the UHF spectrum was not going to be solved of its own accord.¹⁸⁷ Currently, with respect to the DTV transition, there is no such evidence. This lack of urgency is precisely why the FCC should forbear legislation, and instead let market forces dictate the time and terms of progress.

Back in 1962, Congress could not hope for a natural, market-driven transition to the UHF spectrum, as the figures indicated to the contrary.¹⁸⁸ Specifically, congressional findings indicated that in the nine-year span beginning in 1953, the number of television receivers equipped to receive UHF had dwindled: "In that year [1953], over 20 percent of television receivers were equipped at the time of manufacture to receive UHF; by 1961 that percentage had declined to 6 percent."¹⁸⁹ In effect, this prevented an "effective competition between UHF and VHF stations."¹⁹⁰ Currently there is no such pressing issue of a lack of competition between the UHF

184. See *Hearing on the Transition to Digital Television Before the Senate Comm. on Commerce, Science and Transportation*, 107th Cong. (2001) (written testimony of Jeff Sagansky, President and CEO, Paxson Communications Corporation) (emphasis added).

185. *Id.*

186. See SENATE REPORT, *supra* note 73, at 1876.

187. *Id.*

188. See *generally id.* (discussing the need for legislative intervention in expanding the broadcast spectrum).

189. *Id.* at 1875.

190. *Id.*

and the VHF spectrum, which existed before the enactment of ACRA. The issue before the FCC when it implemented the phase-in plan was not a lack of programming as in the 1950s and 1960s. Rather, the FCC's actions were motivated by a desire to bring the public more technologically-advanced television.¹⁹¹ This is *not* permissible under ACRA.

The competition among DTV, UHF, and VHF spectrums is conspicuously not mentioned in the FCC's report outlining the necessity for DTV. During ACRA's enactment, the declining manufacturing rates of television receivers capable of UHF reception were clear evidence that, absent congressional intervention, the integration of the UHF spectrum and the goals associated with it were not going to happen.¹⁹² There is no such evidence in the instance of the current transition to DTV. The current manufacturing rates of DTV-ready receivers would only serve to compel the FCC to abstain from regulation and to allow the natural force of consumer demand to facilitate and guide the transition.¹⁹³

FCC Commissioner Kevin J. Martin's dissenting opinion in the *Digital Television Order* affirms the notion that market-based forces are preferable to government intervention, particularly "when regulation imposes a cost to consumers . . . to purchase a product they may not use."¹⁹⁴ Instead of ruling for the DTV transition, Martin said that the Commission should focus on cable inter-operability and other cable carriage issues, which are more likely to benefit consumers since *seventy percent* of these consumers receive their television programming from cable or satellite providers.¹⁹⁵ Emphasizing that if the government does believe that it is necessary to interfere, "it must be clear that the benefits outweigh the costs."¹⁹⁶ Martin is not persuaded that imposing the costs of the transition on those who will not benefit from it is "the right step," because, even if the transition to digital is made, cable and satellite consumers will probably wish to continue receiving their services from

191. *Fourth Report and Order* in MM Docket No. 87-268, 11 FCC Rcd. 17,771, 17,772-73 (1996).

192. See SENATE REPORT, *supra* note 73, at 1875-76.

193. Consumer Electronics Association Press Room Release, *DTV Product Sales Flourish in July* (Sept. 5, 2002) at http://www.ce.org/press_room/press_release_detail.asp?id=10024. CEA president and CEO Gary Shapiro notes that "[t]he DTV transition, in terms of product sales, is progressing at an astounding pace . . . Compared to the same period last year, we have sold nearly double the DTV products in 2002." *Id.* The press release adds the following projections: "2.1 million DTV products—including integrated sets and displays—will be sold in 2002, 4 million in 2003, 5.4 million in 2004, 8 million in 2005 and 10.5 million in 2006." *Id.*

194. *Digital Television Order*, *supra* note 5, at 16,025 (dissenting statement of Comm'r Martin).

195. *Id.*

196. *Id.*

cable and satellite.¹⁹⁷

In addition to the legislative intent expressed during the enactment of ACRA, there is a substantive body of caselaw supporting the inapplicability of ACRA to the present issue.¹⁹⁸

The proper standard for interpreting whether an administrative agency has overstepped its regulatory authority was first enunciated as a two-prong test in *Chevron U.S.A. v. Natural Resources Defense Counsel*.¹⁹⁹ According to this test, the initial inquiry is “whether Congress has expressly spoken to the precise question at issue.”²⁰⁰ As applied to the current circumstances, the “precise question at issue” is the order of the FCC forcing the television manufacturers into a mandatory transition to the DTV standard by including digital tuners in manufactured television sets. Nothing in either the House or the Senate Report addresses this precise question at issue.²⁰¹ On the contrary, the issue addressed as being the primary consideration in enacting ACRA is the adequate reception of the UHF spectrum, with emphasis on the fact that this authority “*given to the Commission . . . [be] narrow in scope.*”²⁰² DTV legislation, which would allow the FCC to order the transition, was only discussed in 1997 when it was defeated.²⁰³

Since Congress did not address DTV in enacting ACRA, the analysis must proceed to the second prong of the *Chevron* test.²⁰⁴ The second prong requires that if the court determines that “the statute is silent or ambiguous with respect to the specific issue, the question [to be posed] . . . is whether the agency’s answer is based on a permissible construction of the statute.”²⁰⁵ In *Perrin v. United States*,²⁰⁶ the Supreme Court asserted that, “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”²⁰⁷ Therefore, the portion of ACRA, which must be scrutinized under this standard, is the phrase “all frequency,”²⁰⁸ as it is the present frequency of the broadcast, which shall be

197. *Id.*

198. *Ass’n of Maximum Serv. Telecasters v. FCC*, 853 F.2d 973, 975–76 (D.C. Cir. 1988).

199. 467 U.S. 837, 842–43 (1984).

200. *Id.* at 842.

201. See generally SENATE REPORT, *supra* note 73; see also HOUSE REPORT, *supra* note 75.

202. SENATE REPORT, *supra* note 73, at 1880 (emphasis added).

203. See CEA White Paper, *supra* note 174, at 8 (citing House Comm. on Commerce, 105th Cong. Amendment to the Comm. Print of June 10, 1997 (offered by Rep. Markey)).

204. *Chevron*, 467 U.S. at 843.

205. *Id.* at 843; see also *Ass’n of Maximum Serv. Telecasters*, 853 F.2d at 976.

206. 444 U.S. 37 (1979).

207. *Id.* at 42.

208. All-Channel Receiver Act of 1962, P.L. No. 87-529, 76 Stat. 150 (1962).

altered through the adoption of a DTV standard.²⁰⁹ Without a doubt, even the staunchest proponent of the DTV regulation would not argue that in 1962, when ACRA was enacted, its framers intended to include the frequencies utilized in digital technology. Rather, the frequencies discussed were UHF and VHF analog television signals, as expressly affirmed in the Senate Report addressing all VHF and UHF channels.²¹⁰ Thus it would be outside of the “ordinary, contemporary, common meaning” to include within the meaning of “all frequencies” the digital signal which at the time was “mere science fiction.”²¹¹ The *Electronic Industries* court emphasized that ACRA was adopted following the Commission’s commitment to “avoid extreme or unreasonable performance specifications . . . [and] select standards which are in the realm of the average characteristics of UHF receivers available on the open market today.”²¹² Most UHF receivers are made to receive just that—UHF signals. DTV is not UHF, and since “the logic and necessity of applying one set of technical standards does not dictate the application of other technical standards to which logic and necessity do not apply,”²¹³ the FCC should not impose a DTV standard which is outside the realm of ACRA.

D. DTV Phase-In Is Not Financially Viable to the Consumer

Consistent with the court’s pronouncement in *Association of Maximum Service Telecasters v. FCC*,²¹⁴ a DTV tuner is nothing more than “yet another one of those luxury items,” and indeed, “consumers who suffer from limited wherewithal [sic] in this electronic age”²¹⁵ are just as unlikely to purchase a TV set with a DTV tuner as they are an SSDD, which became the center of controversy in *Association*. Currently, DTV-capable television sets are arguably only for the wealthy, and do not fall within the language or the aims of ACRA.

The increase in price of a television set has troubled many groups and individuals alike.²¹⁶ While the FCC cites to studies proposed by Arthur D.

209. See Digital Television Order, *supra* note 5, at 15,983–84, ¶ 13.

210. See SENATE REPORT, *supra* note 73, at 1874–76.

211. CEA White Paper, *supra* note 174, at 2 (quoting *Report and Order* (Separate Statement of Comm’r Furchgott-Roth)).

212. *Elec. Indus. Ass’n Consumer Elecs. Group*, 636 F.2d at 696.

213. *Ass’n of Maximum Serv. Telecasters*, 853 F.2d at 981.

214. 853 F.2d 973 (D.C. Cir. 1988).

215. *Id.* at 980.

216. *FCC Mandates DTV Tuner; CEA to Appeal*, T.V. DIGEST, Aug. 12, 2002. Some of the groups opposing the mandate are “CFA, Consumer Action, Seniors Coalition, National Farmers Organization, American Corn Growers [and] Cato Institute.” Florida Consumer Action Network

Little, Inc. (“ADL”),²¹⁷ there are equally-reputable sources that indicate profound flaws in ADL’s assessment of future costs and projections.²¹⁸ In *Electronic Industries*, the issue turned on the fact that the FCC was regulating *In reliance* on standards that were “not presently attainable with existing technology.”²¹⁹ In other words, the FCC was regulating in hopes that technology would eventually evolve to fill its expectation. Despite the FCC’s assertion that there is “need for significant technical improvements”²²⁰ in this area of regulation, the court ruled against the Commission, noting that such expectation constituted “wishful thinking,” which does not make it a reality.²²¹

Until the FCC can ensure that market forces in combination with the DTV regulation will lower prices of DTV-capable television sets to a range that is within the grasp of the average consumer, it should abstain from regulation. By passing the burden of achieving FCC-envisioned goals onto the customer, the contemplated purpose of ACRA is frustrated, along with the intentions of its framers.

Currently, the FCC’s price projections are essentially based on faith in the projected decline of DTV-component prices, and faith is not enough.²²² As mentioned in Part II above, MSTV, NAB, and Thomson have commissioned studies to be conducted by economic assessing the financial impact of the DTV regulation.²²³ Subsequently, both sides—those supporting the regulation and those opposing it—submitted various economist studies, purporting to predict or simply appraise the impact such regulation would have on the market.²²⁴ MSTV and NAB submitted a study by ADL which created estimates for the costs of integrating DTV-

states that “[a]ny such [DTV-carrying] requirement will raise the costs of television sets [and will affect] large populations of elderly, immigrants, agricultural laborers, and poor rural families, students and minorities.” *Id.*

217. ADL is a management consulting firm with considerable experience in its field. Arthud D. Little, Global Management Consulting, at <http://www.adl.com/default.asp> (last visited Feb. 3, 2003).

218. Digital Television Order, *supra* note 5, at 15,983–84, ¶ 13. See generally Letter from David R. Siddall, Paul, Hastings, Janofsky, & Walker, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 1, 2002) (submitting “Comments of Coleman D. Bazelon and T. Christopher Borek Relating to Arthur D. Little, Inc.’s Assessment of the Impact of DTV on the Cost of Consumer Television Receivers,” Analysis Group/Economics, at <http://www.fcc.gov> (last visited Feb. 3, 2003)) [hereinafter Bazelon Comments].

219. *Elec. Indus. Ass’n Consumer Elecs. Group*, 636 F.2d at 690.

220. *Id.* at 693 (quoting UHF Television Receiver Noise Figures, 69 F.C.C.2d 1866, 1880 (1978) (report and order)).

221. *Id.* (quoting Comm’r Lee, dissenting).

222. *Id.*

223. Digital Television Order, *supra* note 5, at 15,983–84.

224. *Id.* at 15,982–84.

decoders into television sets, as well as projections purporting to indicate how these costs would decline with time due to a larger volume of DTV receiver sales.²²⁵ The ADL study projects that the cost of a baseline DTV-capable receiver would decline from \$380 in 2001, to between \$195–\$218 in 2006.²²⁶

Neither CEA nor Thomson agreed with such an optimistic projection, and, in turn, submitted their own studies.²²⁷ CEA submitted a study by the Analysis Group/Economics, which found substantial flaws with the ADL Study.²²⁸ According to the Analysis Group Study, the first flaw in the ADL study is that the projections failed to consider the effects that DTV regulation will have on television prices, and, as a result, on overall television sales.²²⁹ Additionally, the study noted that the ADL seems to imply that “the number of televisions sold is invariant to the price of televisions.”²³⁰ Such analysis contradicts the economic theory of the “Law of Demand,” which mandates that once the price of a product increases, the

225. *Id.* at 15,983–84.

226. *Id.* ADL has analyzed three varying scenarios of DTV transition:

1) a baseline case, where DTV receiver introduction is driven solely by market forces; 2) a mandate case, where the government requires inclusion of a DTV receiver in all new TV sets sold after January 1, 2004; and 3) a phased mandate case, where the government would first require that high-end receivers include a DTV receiver and then extend the requirement to include lower-end models over time such that all new TV receivers sold in the year 2006 would have a DTV receiver. The DTV capable receivers considered under each of these scenarios would provide standard definition (SDTV) level quality of video service, with initial prices of from \$169 (high-end models) to \$180 (low-end models) higher than comparable analog receivers. Based on its assessment of costs and expected rate of consumer acceptance of DTV (*i.e.*, that DTV will be accepted at the same rate as color television), the ADL Study finds that under the baseline case, DTV receiver penetration would reach only 8.5% by 2006, with the price of a DTV capable receiver about \$35–38 higher than a comparable analog set. Under the mandate case, DTV penetration would reach 75.5% by 2006 and 85%+ by 2007, with the price of a DTV capable receiver about \$14–15 higher than a comparable analog set. Under the phased mandate case, the ADL Study predicts that DTV penetration would reach 65% by 2006 and 85% by 2007, with the price of a DTV capable receiver about \$15–16 more than a comparable analog set. With regard to transverters (it assumes these devices can also receive cable service), the ADL Study estimates that a DTV capable set-top box would cost approximately \$380 in 2001, and by 2006 would decline to \$218 under the baseline case and \$195 under the mandate case. Under the study’s assumptions, the price of analog addressable set-top boxes would be about \$180. The ADL Study further concludes that the retail prices of DTV capable receivers could be dramatically lower in the initial years of production if manufacturers would adopt a “forward pricing” strategy.

Id.

227. *See generally* Bazelon Comments, *supra* note 218 (describing the shortcomings of the ADL Study and the results of Bazelon and Borek’s independent analysis).

228. *Id.* at 1–2.

229. *Id.*

230. *See id.*

unit sales of the product decrease.²³¹

The second flaw follows from the first. Specifically, because the ADL Study overestimates the number of television sets to be sold once the regulation is in place, its estimates of the subsequent decreases in price, due to higher volume of sales, is also overstated and unrealistic.²³² The per-unit costs tend to decline with an increase in volume; however, if high volume is not achieved, a price decrease will not take place despite expectations.²³³ In other words, ADL overstates the decline in production costs, and, subsequently, in television set prices as a result of the FCC's regulation.²³⁴

The third shortcoming is that ADL assumes that doubling the sales of television sets with digital decoders will reduce the decoder installation cost by twenty-five percent, irrespective of how much time it takes for the sales to double.²³⁵ Analysis Group sees this figure as too narrow a view in light of other factors influencing price, such as the amount of time required to learn the best or most efficient way to integrate a digital receiver into a television set.²³⁶ Analysis Group does not believe that this amount of time is directly related to sales volumes, and instead considers it an independent factor.²³⁷ Thus, it sees the proposed reduction in cost of installing the digital receiver into a television set as overly optimistic.²³⁸

Finally, the fourth shortcoming of the ADL Study, as determined by the Analysis Group Study, is that the study may understate the manufacturers' costs of integrating digital receivers.²³⁹ Thomson's findings, reflected in the *Digital Television Order*, support the Analysis Group Study's comment on ADL understating the costs of integrating receivers.²⁴⁰

The ADL and AGS studies disagree on various points, but they diverge most on the ultimate cost to the consumer. The FCC's *Digital Television Order* does not explicitly state which study it deems correct,²⁴¹ nor does it cite any independent study completed on its own initiative. Rather, the order avoids the debate altogether and simply stresses the need

231. *See id.*

232. *Id.* at 5.

233. Bazelon Comments, *supra* note 218, at 5–6.

234. *Id.*

235. *Id.* at 6.

236. *Id.*

237. *Id.*

238. *See id.*

239. Bazelon Comments, *supra* note 218, at 7.

240. *Id.* at 6.

241. *See generally* Digital Television Order, *supra* note 5 (resolving several issues regarding DTV).

for DTV service and its capability to receive it.²⁴² However, electronics manufacturers, who would seem to benefit from the regulation, also oppose FCC intervention. For example, Mitsubishi Electric, one of the world's largest producers of electronic equipment, submitted a letter to the FCC declaring that, despite its expenditure of millions of dollars in direct grants underwriting over-the-air HDTV broadcasts, it believes an Advanced Television Systems Committee ("ATSC") tuner mandate "would result in a fundamental resource misallocation and would harm most consumers, as they would be forced to pay a premium for a feature they do not need or use."²⁴³ Focusing on the fact that TV antennas are dwindling in numbers,²⁴⁴ while analog, cable TV, digital cable, prerecorded media, and satellite antennas are growing, it would seem fruitless to regulate in this realm as "no government tuner mandate will whip back this tide or cause antennas to grow back on roofs."²⁴⁵

Additionally, there is the issue of redundancy—a "cable tuner" replicates the circuitry in a "TV" tuner, thus creating a redundancy in having two components executing a similar function.²⁴⁶ Unfortunately, due to the additional security and performance features in a cable tuner, a cable subscriber would still be required to rent a DTV-capable tuner from the cable provider. Since digital cable subscribers must already pay for a digital tuner, the mandatory inclusion of a digital tuner in television sets, pursuant to the FCC's regulation, will create an unnecessary redundancy at the consumer's expense.²⁴⁷

Furthermore, DTV technology is simply a luxury, much like the SSDD, which fell outside the scope of ACRA because the Commission was not addressing technology which threatened the usefulness of the UHF spectrum. As the FCC's report made clear,

[Congress'] concern was to remedy a situation where the UHF television allocations were progressively being rendered less useful because fewer and fewer television sets could receive anything but the VHF channels. Here, we are not dealing with a technology that poses any real threat directed particularly to the

242. *See id.* ¶ 34.

243. Letter from Robert A. Perry, Vice President, Marketing, Mitsubishi Electric, Mitsubishi Digital Electronics America, Inc., to Hon. Michael K. Powell, Chairman, Federal Communications Commission (Aug. 1, 2002) (on file with author).

244. *Id.*

245. *Id.*

246. *Id.* at 2.

247. *Id.* Mitsubishi further insists that forcing manufacturers to include the digital decoder will be "arbitrary and capricious" and might "even constitute an unconstitutional taking." *Id.* at 5.

use of the UHF spectrum, but rather one that provides consumers with a less expensive way to take advantage of the general display capabilities of the cathode-ray tube.²⁴⁸

In the present case, the inclusion of a DTV tuner provides consumers with a *much more expensive* way to utilize their cathode-ray tube, and therefore, as in *Association*, the choice of whether to purchase this technology or to dispense with it should be left up to the consumer rather than the FCC.²⁴⁹ To illustrate, a price increase of \$200–\$300 is quite substantial. After all, if the FCC is really concerned with providing higher quality television to viewers, then it should allow them to decide whether or not the quality of television they watch needs improvement. In sum, because television itself is a luxury, the consumer should be the one to determine how much luxury he wants, and whether or not he wants to pay for an upgrade.

E. The FCC Is Legislating Despite a Lack of Requisite Power

The FCC has constructed an elaborate and seemingly feasible plan to go from analog to digital.²⁵⁰ It has already distributed the digital channel, and, along with Congress, is very anxious to reclaim and auction off the analog spectrum.²⁵¹ Despite the FCC's anxiety, the transition has not been smooth and, along with the "unique circumstances"²⁵² surrounding the transition, the FCC postponed the May 10, 2000 auction date for the spectrum from channels 60–69 (upper 700 MHz band) five times.²⁵³ Without an auction, there are no sales, and, consequently, no profit is generated. It seems likely that this state of affairs will force Congress to pressure the FCC to take positive steps to reclaim the analog spectrum. The revenue generated from the auction is expected to serve "as a measure to

248. *Ass'n of Maximum Serv. Telecasters*, 853 F.2d at 979 (quoting FCC's Mem. Op. and Order, FCC 84-261, at 4 (released July 20, 1984), J.A. at 24, 31).

249. See generally *id.* (discussing the fact that Congress intended all televisions to have access to UHF signals).

250. See discussion *infra* Part II.B.

251. *Id.*

252. Wiley, *supra* note 43, at 38. In its effort to facilitate the transition, the FCC is forced to confront the fact that it may be several years until the bidders in a specified auction schedule will be able to utilize the spectrum they are expected to buy. *Id.* Meanwhile, the FCC wants to ensure that its potential bidders have enough time to develop their business plans along with their bidding strategies. *Id.* Furthermore, to accommodate the full-power DTV stations, the FCC had to displace secondary broadcast stations, which service smaller areas. *Id.* at 38–39. The FCC had to provide relief to these displaced secondary stations. *Id.* at 39.

253. *Id.* at 38.

reduce the budget deficit and to avoid spending cuts and tax increases."²⁵⁴

Additionally, there is the mystical way in which this DTV regulation favors broadcasters. Already, broadcasters are essentially squatting on \$70 billion worth of spectrum.²⁵⁵ As CEA president Gary Shapiro aptly noted, it needs "no more [extra] favors."²⁵⁶ Even FCC Chairman Powell conceded that the "move was 'industrial policy.'"²⁵⁷ His concession leaves open the question of why the additional costs are being imposed on the American public.

IV. CONCLUSION

The FCC may not legislate in any manner it sees fit merely because the aspired goals are within the general realm of its authority. The above-described transition is within the general legislative authority of the FCC, insofar as it relates to spectrum regulation, which is a national asset. However, the FCC's phase-in plan entails regulation of television manufacturers, which are private entities, and thus the plan requires the FCC to have a specific grant of power.²⁵⁸ ACRA was one such specific grant of power, in that it explicitly permitted the FCC to achieve a system of intermixed television using both the VHF and UHF channels. On the other hand, this is where the power to regulate under ACRA ends.

Thus, as the extensive amount of factual data indicates, there is

254. Eli Noam, *Spectrum Auctions: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism. Taking the Next Step to Open Spectrum Access*, 41 J.L. & ECON. 765, 772 (1998). Auctions were not always the norm. The reality is that they faced "years of opposition . . . by powerful congressional barons and the broadcast industry." *Id.* In fact,

[a]round the world, countries aim to advance the national *infrastructure*. In the United States, there seems to be a widespread agreement that this should be done without government money. But the spectrum sales end up as the opposite of making public investments. Through auctions, the United States has been taking money away from *infrastructure*-providing private firms and throwing it into the black hole of the budget deficit. For decades, America's telecommunications system was superior to that of other countries, often because these countries used telecommunications as a cash cow for general government expenses. Now we have embarked on the same road, just as other countries have left it at our urging.

Id. at 773.

255. *CEA Opposes FCC Mandate of DTV Tuners*, APPLIANCE, Oct. 2002, at 19, available at LEXIS, News Library, All.

256. *FCC Orders Set Manufacturers to Include DTV Tuners by 2007*, AUDIO WEEK, Aug. 12, 2002, available at LEXIS, News Library, All.

257. *FCC Orders Set Manufacturers to Include DTV Tuner*, 24 PUBLIC BROADCASTING REP., Aug. 23, 2002, available at LEXIS, News Library, All.

258. See generally Digital Television Order, *supra* note 5 (discussing the FCC's DTV phase-in plan).

simply no permissible excuse for the FCC regulation mandating the DTV phase-in plan. The regulation contravenes the express intentions of ACRA's framers, exceeds the FCC's authority under ACRA, imposes an additional government tax on television sets, and is not wanted by consumers. For these reasons, either the FCC or the judiciary needs to halt this outrageous regulation.

*Eugene Rome**

* With infinite love and gratitude to my parents, Robert and Lydia Rome.

