

**TELEVISION AND FM TRANSLATORS:  
A HISTORY OF THEIR USE AND REGULATION**

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**I. INTRODUCTION**

"I don't understand it," the woman on the telephone told the television engineer. "I live in Taos and I moved here from Evanston, Illinois three months ago. I've been watching Jay Leno every night on your station. Except the TV Guide says it's on channel four."

"That's right," said the KOB-TV engineer. "We are Channel Four."

The woman was puzzled. "For some reason, though, I'm getting it on channel six. I don't know what's going on. I don't have cable. Is there something wrong with my TV?"

"Channel six is the translator," answered the engineer.

"Translator?" Now, the woman was even more puzzled. "But Jay and all his guests speak English--and I am an American."

"No, no, no. The translator relays our signal on a different frequency," the engineer explained.

"Frequency? I'm not sure what you mean," the woman said.

"Let's just say you don't really have a problem," said the engineer.

"There's nothing wrong with my TV?"

"Nothing at all. That's the way it's supposed to be."

"But why does the TV Guide say Jay Leno's on channel four?"

"Because KOB is Channel Four in Albuquerque."

"But channel six in Taos."

"You got it!"

"I still don't understand why."

"Let's just say this: If it weren't for the translator, you wouldn't get KOB on channel four or six. You wouldn't get it at all."

"Well, I'm glad for that. I think Edd Hall is positively dreamy,"<sup>1</sup> the woman swooned.

As the above hypothetical conversation shows, explaining TV translators may be hard, but their function is simple: Translators are low-power "station[s] in the broadcast service operated for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude, for the purpose of providing television reception to the general public."<sup>2</sup>

In sparsely populated, mountainous areas, particularly in the West, translators often deliver the only available TV signals. FM radio uses similar translators.<sup>3</sup> FM translators sometimes provide radio listeners with choices other than just

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<sup>1</sup>Edd Hall is the announcer on The Tonight Show starring Jay Leno.

<sup>2</sup>FCC Television Broadcast Translator Station Definition, 47 C.F.R. § 74.701(a) (1992).

<sup>3</sup>See id.

the local stations. This paper will explore the use and regulation of translators.

## II. HISTORY

The National Translator Association (NTA), whose membership includes stations, local governments, individuals, and manufacturers, was formed in the late fifties.<sup>4</sup> The association adopted the slogan: "To better over-the-air TV in rural America."<sup>5</sup> The Federal Communications Commission (FCC) considers translators to be "major parts of our national television service, in urban as well as rural areas."<sup>6</sup>

In the early days, many operators put translators on the air without regard to regulation.<sup>7</sup> "It was all unregulated in the beginning,"<sup>8</sup> NTA President Darwin Hillberry remembered. Regulation and enforcement is not all that has changed. Chief Engineer Sam Tikkanen has worked with translators, among other equipment, for all of his twenty-eight years at KOB-TV.<sup>9</sup> Tikkanen explained that translator technology has become more

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<sup>4</sup>Telephone Interview with Darwin Hillberry, President of the National Translator Ass'n (Feb. 23, 1993) [hereinafter Hillberry].

<sup>5</sup>Id.

<sup>6</sup>The Future Role of Low-Power Television Broadcasting, Notice of Proposed Rulemaking, 82 F.C.C.2d 47, 54 (1980) [hereinafter Notice].

<sup>7</sup>Id.

<sup>8</sup>Hillberry, supra note 4.

<sup>9</sup>Interview with Sam Tikkanen, Chief Engineer at KOB-TV, in Albuquerque, NM (Feb. 23, 1993) [hereinafter Tikkanen].

sophisticated. For example, translators originally received their signals from either the station's transmitter or another translator. Now, microwave systems sometimes feed translators.<sup>10</sup>

#### A. Television

To be profitable, the high cost of telecasting requires most TV stations to be in metropolitan areas.<sup>11</sup> Yet the FCC felt it was important to provide TV service to sparsely populated areas. The rural communities themselves, though, devised the translators that filled the void.<sup>12</sup>

The FCC chronicled translator history: "In the early days of television, the [FCC's] rules made no provision for [translators]. This lack of a licensing procedure, however, did not prevent the establishment of such stations. In many areas plagued by poor reception, individuals provided low power service on an extra-legal basis."<sup>13</sup> According to the FCC, the first translator went on the air in 1948. Complaints followed, and the FCC sent out field inspectors to shut down unlicensed translators.<sup>14</sup>

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<sup>10</sup>Id.

<sup>11</sup>Eric D. Berkowitz, Comment, Low Power Television and the Doctrine of Localism: The Need to Reconcile a Medium With Its Message, 18 U.S.F. L. Rev. 505, 508 (1984).

<sup>12</sup>Id.

<sup>13</sup>Notice, supra note 6, at 50-51. One television engineer told me that many extra-legal translators exist, even today, on Indian reservations.

<sup>14</sup>Id. at 51.

Translators still continued to grow, and "the [FCC] became increasingly concerned about the potential for causing interference to other broadcast services. Without a licensing procedure, the [FCC] had no way of incorporating them into the overall pattern of assignments."<sup>15</sup> A translator licensing system was mandated, and the FCC created one in 1956.<sup>16</sup>

In the late fifties, about 1,000 unlicensed translators were still operating,<sup>17</sup> as well as 200 licensed translators.<sup>18</sup> In those days, translators served markets ranging from 150 receivers (a translator in California) to 40,000 or 50,000 receivers (a group of Pennsylvania translators).<sup>19</sup>

Originally, all translators were located on the ultrahigh frequency (UHF) band. Boosters or repeaters were similar to translators except that they were on the very high frequency (VHF) band.<sup>20</sup> The forerunners to VHF translators, about 1,000 boosters or repeaters were on the air in 1959--the exact number is unknown because none were authorized by the FCC.<sup>21</sup> That

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<sup>15</sup>Id.

<sup>16</sup>The Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, Report and Order 26 F.C.C. 403, 409 (1959) [hereinafter Report].

<sup>17</sup>Notice, supra note 6, at 51.

<sup>18</sup>Report, supra note 16, at 410.

<sup>19</sup>Notice, supra note 6, at 51.

<sup>20</sup>Report, supra note 16, at 411.

<sup>21</sup>Id.

changed one year later when the FCC authorized the licensing of VHF translators.<sup>22</sup>

### 1. Ownership

TV translators are generally owned by either the stations whose signals the translators carry, or community groups. Station-owned translators are usually maintained by the station's engineering crew.<sup>23</sup> Community groups often contract with local TV repairmen to maintain their translators.<sup>24</sup> Public appeals usually provide the funding for community group-owned translators.

Albuquerque CBS affiliate KRQE and its satellite station,<sup>25</sup> KBIM in Roswell, are officially carried<sup>26</sup> on sixty-nine translators in New Mexico, Arizona, and Colorado.<sup>27</sup> Eighteen of those are owned by KRQE and six are owned by KBIM.<sup>28</sup> The rest are owned by associations or private individuals.<sup>29</sup>

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<sup>22</sup>Notice, supra note 6, at 53.

<sup>23</sup>Tikkanen, supra note 9.

<sup>24</sup>Id.

<sup>25</sup>A satellite station is a full-power station that retransmits nearly all of the programming of another station.

<sup>26</sup>Albuquerque TV stations are also carried, unofficially, on extra-legal translators on Indian reservations. See supra note 13.

<sup>27</sup>New Mexico Broadcasting Co., Translators: KRQE and KBIM-TV (Feb. 23, 1993) (unpublished list, on file with KRQE).

<sup>28</sup>Id.

<sup>29</sup>Interview with Al Deme, Chief Engineer at KRQE, in Albuquerque, NM (Feb. 26, 1993).

KOB-TV, Albuquerque's NBC affiliate, and its satellites KOBF in Farmington and KOBR in Roswell, are officially carried by eighty-three translators in the same states as KRQE and KBIM.<sup>30</sup> About one quarter of those translators are owned by Hubbard Broadcasting Co., owner of KOB-TV, KOBF, and KOBR. The rest are owned by associations, some of which may ask Hubbard Broadcasting for funding.<sup>31</sup> Sam Tikkanen said the associations occasionally use a time-honored fund-raising method: "Much to the chagrin of everybody . . . if [the community doesn't] pay [its] rightful dues, then they shut everything off."<sup>32</sup>

## 2. Market Impact

A communications law casebook calls advertising "the engine that drives the broadcasting industry."<sup>33</sup> Advertisers pay for the number of viewers in the audience--the rates are generally based on cost per thousand.<sup>34</sup> Translators provide fuel for the engine by delivering viewers.

Translators are particularly important in western markets, where population is sparse and mountains block receivers' line-of-sight to transmitters. The New Mexico market is second only to Utah in area, so translators are crucial to New Mexico TV

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<sup>30</sup>Hubbard Broadcasting Co., KOB Translators (Feb. 24, 1993) (unpublished list, on file with KOB-TV).

<sup>31</sup>Tikkanen, supra note 9.

<sup>32</sup>Id.

<sup>33</sup>Douglas H. Ginsburg et al., Regulation of the Electronic Media 8 (2d ed. 1991) [hereinafter Ginsburg].

<sup>34</sup>Id.

stations.<sup>35</sup> The locations of KOB-TV's translators illustrate where distance or terrain hamper KOB-TV's signal. Noting that his station may spend between \$25,000 and \$50,000 per translator, KOB-TV Vice-Chairman Jerry Danziger said, "We don't build translators just for fun."<sup>36</sup>

Where would KOB-TV be without translators? Tikkanen answered:

Anybody that's got a mountain between us, from here out 125 to [1]30 miles, would not receive us . . . . Parts of Santa Fe would [not] receive us. Silver City would be out, Clovis would be out, Portales would be out . . . . The whole . . . southeast . . . and perhaps the whole northeast [of New Mexico], Raton, all that would be gone.<sup>37</sup>

The number of viewers who receive translator signals is not known. Nielsen and Arbitron, the audience measurement services, provide breakdowns of the number of people who watch off the air versus by cable. Those services do not, however, break the numbers down further into translator versus transmitter.<sup>38</sup>

### **3. Competition With Cable**

Translator history has been marked by competition and feuding with the cable industry. It is not surprising that cable companies are parties in most of the reported cases involving

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<sup>35</sup>Deme, supra note 29.

<sup>36</sup>Interview with Jerry Danziger, Vice-Chairman of KOB-TV, KOBR, and KOBF, in Albuquerque, NM (Feb. 26, 1993).

<sup>37</sup>Tikkanen, supra note 9.

<sup>38</sup>Danziger, supra note 36.

translators.<sup>39</sup> Without translators, cable companies own monopolies on telecast signal delivery in markets that are not directly served by TV stations. Conversely, without cable, translators usually find it easier to raise operating funds.

KRQE Chief Engineer Al Deme said cable has hurt translator groups: "Years ago . . . [translator] viewers would donate \$10 . . . or . . . \$20 a year, whatever it may be for that particular translator for that particular community . . . . That's not happening anymore. People are spending those dollars on cable."<sup>40</sup>

Ironically, many cable systems depend on translators to receive the signals they deliver to their subscribers. "[The community translator] association is basically in a lose-lose situation,"<sup>41</sup> worried Deme. "They are not getting any funding from the donations [like] they used to, and they do not get any funding from the local cable operator."<sup>42</sup>

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<sup>39</sup>See, e.g., H & B Communications Corp. v. FCC, 420 F.2d 638 (D.C. Cir. 1969) (dispute over interference to cable reception caused by translators); Telemedia Corp. v. FCC, 697 F.2d 402 (D.C. Cir. 1983) (cable company sought to have translator construction permits denied).

<sup>40</sup>Deme, supra note 29.

<sup>41</sup>Id.

<sup>42</sup>Id.

## B. FM

FM translators were first authorized by the FCC in 1970.<sup>43</sup> Since then, translators have played a major role (perhaps even greater than the FCC anticipated) in radio market economics.

### 1. Purposes

Generally, FM translators serve two purposes: (1) to provide listeners with choices other than just local stations; and (2) to provide better reception.

Translators in Prescott, Arizona serve the first purpose. Four radio stations are licensed to Prescott, two FM and two AM.<sup>44</sup> Although 96 miles<sup>45</sup> and many mountains separate Prescott from Phoenix, translators deliver to Prescott many of the most popular Phoenix FM stations.<sup>46</sup>

The second purpose is exemplified by Albuquerque's KLSK.<sup>47</sup> The "classic rock" station's 100,000 watt transmitter, which operates on a frequency of 104.1, is located in the Jemez Mountains. The Sandia Mountains block the transmitter's signal

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<sup>43</sup>Stirring up over FM translators, Broadcasting, March 28, 1988, at 35 [hereinafter FM translators].

<sup>44</sup>Broadcasting & Cable Market Place A-19 (R.R. Bowker comp. 1992) [hereinafter Broadcasting & Cable].

<sup>45</sup>Rand McNally Road Atlas: United States, Canada, Mexico 8 (1988).

<sup>46</sup>Telephone Interview with Chuck Roberts, Talk Show Host, KNOT-AM, Prescott, AZ (Feb. 23, 1993).

<sup>47</sup>Although it is licensed to Santa Fe, KLSK's office and studios are in Albuquerque, as are most of its listeners and advertisers. Interview with Milt McConnell, Station Manager of KLSK, in Albuquerque, NM (Feb. 25, 1993).

to the suburb of Sandia Heights. A translator on Sandia Crest fills the gap by delivering KLSK to Sandia Heights on a frequency of 100.9.<sup>48</sup>

## 2. Market Impact

Local radio stations do not like FM translators. They do not like the competition, and they do not like what they perceive to be irresponsibility on the translator operators' part.

Local station operators may point to Flagstaff, Arizona as an example of how serious the competition can be. In 1982, Flagstaff had five commercial stations--three AM and two FM. That year, FM translators began operating in Flagstaff, carrying the signals of some of Phoenix's most popular stations.<sup>49</sup>

Six years later, KCLS, northern Arizona's oldest station,<sup>50</sup> went off the air for good.<sup>51</sup> Factors such as its residence on the AM band, and poor management by a new station owner, undoubtedly contributed to KCLS's demise. Still, some who worked at KCLS believe the translators' role in the fragmentation of the market was critical.<sup>52</sup>

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<sup>48</sup>Interview with Bill Pace, Engineer for KLSK, in Albuquerque, NM (Feb. 25, 1993).

<sup>49</sup>Telephone Interview with Carlos Ibarra, Operations Manager, KTAN & KFFN-FM, Sierra Vista, Arizona (formerly Program Director, KCLS) (March 4, 1993).

<sup>50</sup>KCLS went on the air in 1950.

<sup>51</sup>Ibarra, supra note 49.

<sup>52</sup>Id.

Yet it is not just the competition that scares local stations.<sup>53</sup> "Someone from an outside market, often a very small market," said Tucson, Arizona station operator Art Kern, "can come into another market, usually a larger market, and reap the benefits of that market without having to pay any of the public interest costs, such as being responsive to community needs."<sup>54</sup>

In Albuquerque, KLSK Station Manager Milt McConnell contends with such a situation. KBAC, licensed to Las Vegas, New Mexico,<sup>55</sup> and KIOT, licensed to Española, New Mexico,<sup>56</sup> compete in Albuquerque using translators.<sup>57</sup> McConnell, however, showed little concern, dismissing KBAC's and KIOT's advertising sales to Albuquerque merchants as insignificant:<sup>58</sup>

If they were starting to have an active sales force and taking food off my table, yeah, I think I'd probably have a problem with it . . . . But you know what? The only way that they're going to put a sales staff [in Albuquerque] is if they start having an audience [in Albuquerque] and marketing here and they don't have the wherewithal, money-wise, to be able to do that.<sup>59</sup>

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<sup>53</sup>FM translators, supra note 43, at 35.

<sup>54</sup>Id.

<sup>55</sup>Broadcasting & Cable, supra note 44, at A-227.

<sup>56</sup>Id. at A-228.

<sup>57</sup>McConnell, supra note 47.

<sup>58</sup>Id.

<sup>59</sup>Id.

Fayetteville, Arkansas certified public accountant John S. La Tour would likely agree with McConnell.<sup>60</sup> La Tour, who owns more than forty FM translators in an area ranging from Georgia to Texas and Iowa to Louisiana, believes the impact of translators is inconsequential in the top fifty markets.<sup>61</sup>

### **III. REGULATION**

Translator regulation is necessary for the same reason that originating stations must be regulated: to bring them within the national broadcasting order as executed by the FCC.

#### **A. FCC Jurisdiction**

American broadcasting is an industry that has always participated in, and supported, regulation. The First Radio Conference, convened by then-Secretary of Commerce Herbert Hoover in 1922, saw broadcasters unanimously decide to recommend legislation granting government control over frequency allocation, assignment, and use.<sup>62</sup> After congressional study of those problems, Hoover surmised: "I think this is probably the only industry in the United States that is unanimously in favor of having itself regulated."<sup>63</sup>

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<sup>60</sup>See FM translators, supra note 43, at 35.

<sup>61</sup>Id.

<sup>62</sup>Douglas H. Ginsburg et al., Regulation of the Electronic Mass Media 20 (2d ed. 1991) [hereinafter Ginsburg].

<sup>63</sup>Id.

Although cable systems did not fall under the authority of the FCC until 1968,<sup>64</sup> translator regulation started in 1956.<sup>65</sup> The basis for regulation of translators is Title II of the Communications Act of 1934,<sup>66</sup> which pertains to "any apparatus for the transmission of energy or communications or signals by radio."<sup>67</sup> The Mass Media Bureau is the FCC's regulatory arm for AM, FM, and TV stations and related facilities.<sup>68</sup>

### **B. Key Regulations**

The most basic of translator regulations is: "The licensee of a . . . TV broadcast translator station shall not rebroadcast the programs of any other TV broadcast station . . . without obtaining prior consent of the station whose signals or programs are proposed to be retransmitted."<sup>69</sup> FM translator licensees are subject to a similar regulation.<sup>70</sup>

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<sup>64</sup>United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

<sup>65</sup>See supra § II(A).

<sup>66</sup>See 47 U.S.C.A. § 301 (1991).

<sup>67</sup>Id.

<sup>68</sup>Ginsburg, supra note 62, at 46.

<sup>69</sup>FCC Rebroadcast Rule, 47 C.F.R. § 74.784 (1992).

<sup>70</sup>See FCC Purpose and Permissible Service Rule, 47 C.F.R. § 74.1231(e) (1992).

Unlike stations that originate programming, translators need not be attended by a qualified operator.<sup>71</sup> There are many more regulations that define the limitations on translators.<sup>72</sup>

The past decade saw dramatic changes, however, in translator regulation. For example, the FCC established low-power TV through the deregulation of translators,<sup>73</sup> resulting in "the first new broadcast service . . . in twenty years."<sup>74</sup> Some of the most important translator regulations are discussed below.

### 1. Identification

Generally, the FCC requires broadcast stations to identify themselves, by call sign and location, once an hour. The identification (ID) can be by audio or visual means.<sup>75</sup> Because they simply rebroadcast the signal of another station, though, translators are subject to a different rule. In its 1980 reexamination of the role of translators, the FCC expressed its support for the established translator ID rules.<sup>76</sup>

There are two ways by which TV translators may identify themselves. The first way appears to be unusual: "transmitting

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<sup>71</sup>Notice, supra note 6, at 54 n.16.

<sup>72</sup>See FCC Low Power TV, TV Translator, and TV Booster Station Rules, 47 C.F.R. Subpart G (1992) [hereinafter Translator Rules]; FCC FM Broadcast Translator Station and FM Broadcast Booster Station Rules, 47 C.F.R. Subpart L (1992).

<sup>73</sup>See Berkowitz, supra note 11, at 507-09.

<sup>74</sup>Notice, supra note 6, at 80.

<sup>75</sup>FCC Station Identification Rules, 47 C.F.R. § 73.1201 (1992).

<sup>76</sup>Notice, supra note 6, at 74.

the call sign in International Morse Code at least once an hour .

. . . "77 The second way is:

[b]y arranging for the primary station, whose signal is being rebroadcast, to identify the translator station by transmitting an easily readable visual presentation or a clearly understandable aural presentation of the translator station's call letters and location. Two such identifications shall be made between 7 a.m. and 9 a.m. and 3 p.m. and 5 p.m. each broadcast day at approximately one hour intervals during each time period. Television stations which do not begin their broadcast day before 9 a.m. shall make these identifications in the hours closest to these time periods at specified intervals.<sup>78</sup>

The second way may be more common, but it also may be more obtrusive. "I was so mad one time when they showed all those translators during 'Final Jeopardy,'"<sup>79</sup> complained a KRQE viewer. "I couldn't read the question."<sup>80</sup> The complaint concerned KRQE's rolling of superimposed translator IDs during a telecast of the game show Jeopardy.<sup>81</sup>

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<sup>77</sup>FCC Low Power TV and TV Translator Station Identification Rules, 47 C.F.R. § 74.783(a)(1) (1992).

<sup>78</sup>FCC Low Power TV and TV Translator Station Identification Rules, 47 C.F.R. § 74.783(a)(2) (1992). FM translators are subject to similar ID rules. See FCC Station Identification Rules, 47 C.F.R. § 74.1283(c)(1) & (2) (1992).

<sup>79</sup>Interview with Rachelle L. Shaw, KRQE Viewer, in Albuquerque, NM (March 7, 1993).

<sup>80</sup>Id.

<sup>81</sup>Id.

## 2. Interference with Over-the-Air TV

The FCC gives translators "secondary status."<sup>82</sup> That means translators must operate "on a non-interfering basis, and . . . relinquish their frequency if a full service station wished to commence operations on the same channel."<sup>83</sup>

Secondary status, according to the FCC, provides for flexibility:

Secondary status . . . permits broadcasters to select the appropriate mix of technology that accords with local needs, up to the definitional limit of the service itself: namely, maximum transmitter output powers to 100 watts (VHF) or of 1,000 watts (UHF). The operator willing to assume the risks of secondary status [is] given wide latitude to design and engineer a system adapted to local needs.<sup>84</sup>

As there are far more translators in operation than new stations wishing to take the translators' frequencies, secondary status typically means this:<sup>85</sup> "[A] translator . . . creating harmful interference to a full service station must cease operation if it is unable to change its channel or take other steps to correct the interference."<sup>86</sup>

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<sup>82</sup>See Notice, supra note 6, at 49.

<sup>83</sup>Id.

<sup>84</sup>Id. at 54-55.

<sup>85</sup>See id.

<sup>86</sup>Id.

### 3. Interference with Cable Systems

Competition may be at the heart of the translator-cable feud (see Section II(A)(3) above), but interference has sometimes served as a pretext for litigation between operators of the two types of systems. H & B Communications v. FCC<sup>87</sup> provides a good example.

In H & B, a translator group serving some 5,000 households in Prescott, Arizona, applied to the FCC for a construction permit for a new translator. The new translator was to rebroadcast, on channel two, the signal of a Phoenix public TV station. The translator group already had four translators in operation, all rebroadcasting Phoenix stations. H & B operated a cable system in Prescott with about 2,000 subscribers.<sup>88</sup> H & B argued that the FCC should deny the construction permit as the new translator would "create interference to the [cable] subscriber's [sic] reception on cable channel 2, previously the only channel free from any interference . . . ." <sup>89</sup> The D.C. Circuit refrained from deciding the case, remanding it for a hearing on the extent to which the interference could be eliminated.<sup>90</sup>

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<sup>87</sup>420 F.2d 638 (D.C. Cir. 1969).

<sup>88</sup>Id. at 639-40.

<sup>89</sup>Id. at 640.

<sup>90</sup>Id. at 643.

After H & B, the FCC adopted a "first in time, first in right" interference policy for translators conflicting with cable systems.<sup>91</sup> As the FCC's Rules state:

When a . . . TV translator station causes interference to a [cable] system by radiations within its assigned channel at the cable headend or on the output channel of any system converter located at the receiver, the earlier user, whether cable system or . . . translator station, will be given priority on the channel, and the later user will be responsible for correction of the interference.<sup>92</sup>

The area of interference with cable systems is not one in which translators are relegated to secondary status.

#### **4. FM Translator Ownership**

Translators would appear to be an obvious way of expanding an FM station's coverage area, and thereby increasing its audience. A station cannot, however, simply poke its way out of the effulgence of its transmitter by owning translators.<sup>93</sup> Station-owned translators may be used for one purpose only: to improve reception in areas already within "the protected contour of the commercial primary station [the station from which it receives its signal]."<sup>94</sup>

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<sup>91</sup>FCC Fact Sheet on LPTV 7 (Aug. 1991) [hereinafter Fact Sheet].

<sup>92</sup>FCC Interference Rule, 47 C.F.R. § 74.703(d) (1992).

<sup>93</sup>FCC Translator Eligibility and Licensing Requirements, 47 C.F.R. § 74.1232(d) (1992).

<sup>94</sup>Id.

KLSK owns its Sandia Heights translator.<sup>95</sup> (See Section II(B)(1) above.) Yet none of the Phoenix stations carried by translators in Flagstaff and Prescott own those translators.<sup>96</sup> KLSK Engineer Bill Pace agreed with the rule: "I think it makes sense . . . . When you come into a market that has [too many] radio stations in it [as Albuquerque does], translators kind of muddy up the water. I don't know that they do a lot of good. I don't know that they really serve the public interest."<sup>97</sup> KLSK Station Manager Milt McConnell added that translators add no unique formats from which Albuquerque listeners may choose.<sup>98</sup>

Although FM stations cannot expand their coverage areas through the use of translators, FM stations can have their coverage areas expanded for them via translators. A translator that broadcasts beyond the coverage area of the primary station may not receive support, except for technical assistance, from the primary station. Such a translator must be owned and operated independently of the primary station.<sup>99</sup>

### **C. Key Changes in Regulations**

The language in a 1969 translator-versus-cable case was typical of much communications litigation: "If the . . . issue

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<sup>95</sup>Pace, supra note 48.

<sup>96</sup>See FCC Translator Eligibility and Licensing Requirements, 47 C.F.R. § 74.1232(e) (1992) [hereinafter Translator Eligibility].

<sup>97</sup>Pace, supra note 48.

<sup>98</sup>McConnell, supra note 47.

<sup>99</sup>Translator Eligibility, supra note 96.

is material to the ultimate issue of the public interest, convenience, and necessity, a hearing accordingly would be required."<sup>100</sup> The FCC now views the public interest, convenience, and necessity differently than it did in those days. Some changes in translator regulation resulted from the difference.

### 1. FCC Policy Change

For many broadcasters, the words "public interest, convenience, [and] necessity"<sup>101</sup> evoked images of Big Brother.<sup>102</sup> Because the words guided the FCC in the license-issuance and renewal process, broadcasters tried to do their best to comply.<sup>103</sup> For many years, the public interest, convenience, and necessity meant:

(1) what has come to be known as the FCC's "local service" objective--the establishment of stations in as many localities as possible;

(2) achievement of an acceptable level of diversity in program content;

(3) fulfillment of broadcasting's role as public servant; and

(4) the maintenance of an acceptable level of competition.<sup>104</sup>

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<sup>100</sup>H & B Communications Corp. v. FCC, 420 F.2d 638, 640 (D.C. Cir. 1969).

<sup>101</sup>FCC General Provisions for Licenses, 47 U.S.C. § 307(a) (1988) [hereinafter General Provisions].

<sup>102</sup>Big Brother was the omnipresent power figure in George Orwell's Nineteen Eighty-Four (1949).

<sup>103</sup>See General Provisions, supra note 101.

<sup>104</sup>Roger G. Noll et al., Economic Aspects of Television Regulation 99 (1973) quoted in Ginsburg, supra note 33, at 158.

Local service, diversity of content, and broadcasting's role as public servant seem to have been swallowed by maintenance of competition. Laissez faire now colors the FCC's interpretation of public interest, convenience, and necessity. As KOB-TV Chief Engineer Sam Tikkanen put it: "The FCC could care less. As long as you don't interfere with somebody else's channel, [the FCC really doesn't care about] the politics of it."<sup>105</sup>

Concerning translators, the FCC expressed the change in policy this way: "We believe that the time has come to establish a parity of free and open opportunities for translators . . . to compete not only with cable television systems, but with other distribution technologies as well."<sup>106</sup>

The change is evidenced by the FCC's licensing of FM translators that encroach on local stations' markets. (See Section II(B)(2) above.)

## 2. Low-Power TV

"For many years . . . [TV] translators . . . operated with significant legal restrictions,"<sup>107</sup> stated a communications law casebook. Mainly, translators were restricted from originating their own programming.<sup>108</sup> In 1982, the FCC established low-power

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<sup>105</sup>Tikkanen, supra note 9.

<sup>106</sup>Notice, supra note 6, at 58.

<sup>107</sup>Donald M. Gillmor et al., Mass Communication Law 702 (5th ed. 1990) [hereinafter Gillmor].

<sup>108</sup>Id.

TV service (LPTV),<sup>109</sup> which grew "out of, and [was] a natural extension of, translator service."<sup>110</sup> Some believe the establishment of LPTV dramatically changed the regulation of TV translators.<sup>111</sup> For example, LPTV stations can originate programming,<sup>112</sup> and the same set of FCC rules governs TV translators and LPTV.<sup>113</sup> Still, translator regulation remains distinct within that set of rules.<sup>114</sup>

"We propose to build upon the existing translator service, affording new opportunities to low power television,"<sup>115</sup> explained the FCC in 1980. The FCC granted considerable freedom to those who risked putting an LPTV station on the air. LPTV stations could broadcast programming from any source: local originations, twenty-four hour satellite programming services, even scrambled, subscription (STV) services.<sup>116</sup>

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<sup>109</sup>Fact Sheet, supra note 91, at 1.

<sup>110</sup>Neighborhood TV Co. v. FCC, 742 F.2d 629, 639 (D.C. Cir. 1984).

<sup>111</sup>See Gillmor, supra note 107, at 702-03.

<sup>112</sup>Id. at 703.

<sup>113</sup>FCC Rules for Low Power TV, TV Translator, and TV Booster Stations, 47 C.F.R. Subpart G (1992).

<sup>114</sup>See id.

<sup>115</sup>Notice, supra note 6, at 48.

<sup>116</sup>Gillmor, supra note 107, at 703. As of 1990, no STV stations were operating. Ginsburg, supra note 33, at 13.

LPTV operators tackled the opportunity enthusiastically.<sup>117</sup> The man who received the first LPTV license put his station on the air in 1981. Several months later, he told a trade publication that his station was booming.<sup>118</sup> Whatever boom LPTV enjoyed did not last.<sup>119</sup> The number of LPTV stations is small and the service is struggling.<sup>120</sup>

### 3. Application Windows

Probably the most controversial translator regulation is this: "New . . . television translator construction permit applications, and those for major changes in facilities, may be submitted only during a specific time period, or 'window.'"<sup>121</sup> Windows have occurred about once a year since 1988 and typically last for five days.<sup>122</sup>

"It's an unfair disadvantage for the . . . owner of that translator,"<sup>123</sup> claimed KRQE Chief Engineer Al Deme. "We cannot improve our systems because of the regulation. A cable company could [immediately] improve or increase their coverage area . . .

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<sup>117</sup>See LPTV pioneers: homesteading television's newest frontier, *Broadcasting*, May 17, 1982, at 65.

<sup>118</sup>Id.

<sup>119</sup>See Gillmor, supra note 107, at 703.

<sup>120</sup>Id.

<sup>121</sup>Low Power Television and Television Translator Service, Report and Order, 2 F.C.C. Rcd. 1278 (1987).

<sup>122</sup>Fact Sheet, supra note 91, at 2, 14.

<sup>123</sup>Deme, supra note 29.

by extending their cable, but we can't [without waiting for a window]."<sup>124</sup>

To correct the problem, the Association of Maximum Service Telecasters called upon the FCC in 1986 to "act promptly to redesignate television translators as a separate class of service with priority for processing purposes."<sup>125</sup> The FCC has taken no such action.<sup>126</sup>

#### **D. The Future of Regulation and the Market**

FCC regulation has caught its share of criticism concerning regulation's effect on the market. One commentator argued in 1984:

The FCC botched its most important function-- allocation of spectrum for broadcasting. It prevented superior FM service for years, and in the case of TV, unwisely mixed UHF and VHF frequencies. When this resulted in killing off UHF, the Commission did not move all TV to UHF, as it knew it should in 1953. Instead, it diddled for years, then in 1962 chose an all-channel TV law, and even today is still playing with "drop-ins" and other ways to fix an allocation plan with an obvious and fatal flaw.<sup>127</sup>

Many broadcasters believe some of the parity problems caused by the FCC's "botched" spectrum allocation could be corrected through "must-carry" rules. Must-carry rules once required cable

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<sup>124</sup>Id.

<sup>125</sup>Changes in application procedures draw comment at FCC; Low-Power television and translators, Broadcasting, Sept. 8, 1986, at 100.

<sup>126</sup>See Translator Rules, supra note 72.

<sup>127</sup>Henry Geller, Communications Law--A Half Century Later, 37 Fed. Com. L.J. 73-74 (1984).

systems to carry certain signals, including many translators. Those must-carry rules succumbed, however, to the polestar of communications law, the First Amendment,<sup>128</sup> in Century Communications Corp. v. FCC.<sup>129</sup> New must-carry rules, however, appear to be coming soon.<sup>130</sup>

Sam Tikkanen believes the future of translators is dependent upon FCC policy. "There might be trouble as far as translators are concerned,"<sup>131</sup> worried Tikkanen. "I'm not sure that we're going to be able to sustain the host, the [network] affiliate . . . which feeds all of these things out there. Because when [competition results in] the pie get[ing] cut so thin . . . [revenues are reduced]."<sup>132</sup>

#### IV. CONCLUSION

TV translators have metamorphosed from extra-legal status into the role of importance they now play in the national television service. Throughout their history, TV translators have competed with cable systems, and translator operators have feuded with cable system operators. FM translators provide listeners with more choices or better reception. Yet, they have

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<sup>128</sup>U.S. Const. amend. I.

<sup>129</sup>835 F.2d 292 (D.C. Cir. 1987), clarified in 837 F.2d 517 (D.C. Cir. 1988), cert. denied, 486 U.S. 1032 (1988).

<sup>130</sup>'Historic and Long Awaited'; MUST-CARRY/RETRANSMISSION CONSENT RULES BEGIN TAKING EFFECT IN 2 MONTHS, Communications Daily, March 12, 1993, at 1.

<sup>131</sup>Tikkanen, supra note 9.

<sup>132</sup>Id.

been criticized for being nonresponsive to their communities and unfair competition for local stations.

Regulation of translators has not changed as much as the FCC believes. Although the two services are distinct, the FCC lumps TV translators together with LPTV, and translator regulation reflects such a notion. Translator regulations provide for, among other things: identification by International Morse Code, aurally, or, more commonly for TV, visually; approval for unattended operation; the requirement that translator operators obtain permission from primary station operators; rules to settle interference conflicts; and, for FM translators, ownership rules that may afford local stations some protection.

The future of translators intertwines with that of local broadcasting. The FCC's new, laissez faire interpretation of the "public interest, convenience, and necessity" apparently will factor strongly in determining that future. If FCC policy permits local broadcasting to decline, translators are likely to decline, too.