CHARTING THE DIGITAL BROADCASTING FUTURE

FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS

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Final Report
of the Advisory Committee on
Public Interest Obligations of Digital
Television Broadcasters

December 18, 1998
Washington, D.C.

The Benton Foundation—a nonprofit organization that works to promote the effective use of communications technologies for all Americans—will serve as a legatee for the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. Information and updates about the issues in this Report will be available at www.benton.org/PIAC.

December 18, 1998

The Vice President
The White House
Washington, DC 20500

Dear Mr. Vice President:

It is with pleasure that we submit to you the Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. The Advisory Committee's Report represents 15 months of intensive work and embodies the collective efforts of numerous individuals in the television industry, public interest community, and the general public.

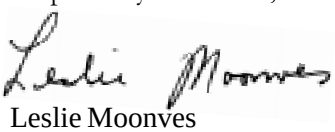
Digital broadcast television is now a reality. In many areas of the country, the first digital broadcast signals were transmitted just before the Advisory Committee completed its deliberations, and the promise of a new and exciting digital future is here. It is a timely moment, therefore, for you, as well as Congress, the Federal Communications Commission, the telecommunications industry, and the public to consider how the public interest will be best served as we experience the implementation of digital television.

The enclosed Report has several sections. It includes a history of our Advisory Committee, a history of public interest obligations and broadcasting, an account of the genesis of digital television, the Advisory Committee's recommendations and supporting material, and individual views of many of our members. The recommendations reflect a broad consensus of our Advisory Committee, cutting across all lines and including the overwhelming majority of our members.

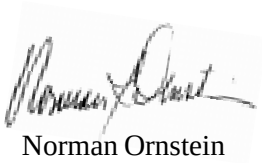
We are also pleased to report that the Benton Foundation has offered to serve as a home of the Advisory Committee legacy, acting as our institutional memory and tracking the debate on and progress of the Advisory Committee's report and recommendations.

On behalf of the entire Advisory Committee, we want to thank you and the President for the opportunity to serve the public through this Advisory Committee, and for the honor of transmitting to you the Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, pursuant to Section 2 of Executive Order No. 13038 of March 11, 1997.

Respectfully submitted,



Leslie Moonves
Co-Chair



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Acknowledgments

The work of the Advisory Committee on Public Interest Obligations spanned 15 months, covered a broad range of diverse and complicated issues, and required the assistance of many people. The Advisory Committee wishes to thank all the individuals and organizations across the country who participated in its work. Without all of you, the Advisory Committee could not have discharged its mandate so ably.

The Advisory Committee offers special thanks to the Department of Commerce's National Telecommunications and Information Administration (NTIA). Thanks to the generosity and efforts of Secretary of Commerce William M. Daley and Assistant Secretary for Communications and Information Larry Irving, NTIA provided the home, and logistical and staff support for the Advisory Committee, under the able and indefatigable leadership of Karen M. Edwards, and with the help of Anne Stauffer, Sandra Laousis, and Sheree Stalling. We would never have been able to discharge our responsibilities without their efforts, which were a model for public service. Likewise, we offer thanks to David Bollier, who assisted the Advisory Committee in drafting, under severe time pressures, some of the materials for our Final Report, and to Jonathan Cohen, who gave invaluable assistance in the early stages of our deliberations.

The Advisory Committee also thanks its members whose companies and organizations made staff members available to assist Advisory Committee members and provided financial resources to support the Advisory Committee's work. Several members were also instrumental in helping to plan and coordinate Advisory Committee meetings held in various parts of the country. Staff members who supported the members of the Advisory Committee are listed below.

Finally, the Advisory Committee is indebted to the people who testified during the fact-finding phase of its work. These broadcasters, educators, programmers, attorneys, and advocates—from the CEOs to the parents—provided much of the factual predicate on which the Advisory Committee's Final Report is based. The Advisory Committee also thanks all the individuals and organizations who followed its work closely and submitted thoughtful comments on how digital television broadcasters could serve the public interest.

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Executive Summary

As this Nation's 1,600 television stations begin to convert to a digital television format, it is appropriate to reexamine the long-standing social compact between broadcasters and the American people. The quality of governance, intelligence of political discourse, diversity of free expression, vitality of local communities, opportunities for education and instruction, and many other dimensions of American life will be affected profoundly by how digital television evolves.

This Advisory Committee's recommendations on how public interest obligations of television broadcasters ought to change in the new digital television era represent a new stage in the ongoing evolution of the public interest standard: a needed reassessment in light of dramatic changes in communications technology, market structures, and the needs of a democratic society.

Section I.
The Origins and Future Prospects of Digital Television

Digital television is a new technology for transmitting and receiving broadcast television signals. It delivers better pictures and sound, uses the broadcast spectrum more efficiently, and adds versatility to the range of applications. Often referred to as DTV, digital television also represents a new technological infrastructure for broadcast television, and thus a new economic and competitive paradigm.

Using an additional 6 megahertz (MHz) of broadcast spectrum temporarily granted by Congress and the Federal Communications Commission (FCC) for a period of no fewer than 9 years, broadcasters will be able to develop a diverse range of new digital television programming and services while continuing to transmit conventional analog television programming on their existing allotments of spectrum, as required by the Telecommunications Act of 1996.

One of the primary rationales for the Nation's transition to digital television is high-definition television, or HDTV. This transmission mode contains up to six times more data than con-

ventional television signals and at least twice the picture resolution. But DTV also enables a broadcast station to send as many as five digital "standard-definition television" (SDTV) signals, which are not as sharp as HDTV but still superior to existing television images. This new capacity, known as "multicasting" or "multiplexing," is expected to allow broadcasters to compete with other multichannel media such as cable and direct broadcast satellite systems.

Another DTV capability is the ability to provide new kinds of video and data services, such as subscription television programming, computer software distribution, data transmissions, teletext, interactive services, and audio signals, among others. Referred to as "ancillary and supplementary services" under the Telecommunications Act of 1996, these services include such potentially revenue-producing innovations as providing stock prices and sports scores, classified advertising, paging services, "zoned" news reports, advertising targeted to specific television sets, "time-shifted" video programming, and closed-circuit television services.

These choices—HDTV, SDTV, and innovative video/information services—are not mutually exclusive. Within a single programming day, a broadcaster will have the flexibility to shift back and forth among different DTV modes in different day parts. Although many existing programming genres and styles will surely continue, innovations in video programming and information services will arise, fueled in no small part by the anticipated convergence of personal computer and television technologies.

SECTION II.
THE PUBLIC INTEREST STANDARD IN TELEVISION BROADCASTING

Federal oversight of all broadcasting has had two general goals: to foster the commercial development of the industry and to ensure that broadcasting serves the educational and informational needs of the American people. In many respects, the two goals have been quite complementary, as seen in the development of network news operations and in the variety of cultural, educational, and public affairs programming aired over the years.

In other respects, however, Congress and the Federal Communications Commission have sometimes concluded that the broadcast marketplace by itself is not adequately serving public needs. Specific policies have sought to foster diversity of programming, ensure candidate access to the airwaves, provide diverse views on public issues, encourage news and public affairs programming, promote localism, generate more educational programming for children, and sustain a separate realm of noncommercial television programming services.

The fundamental legal framework that still governs the broadcast industry, based on the notion of "spectrum scarcity," sets it apart from other media. Congress has mandated that licensees serve as "public trustees" of the airwaves. Broadcasters have affirmative statutory and regulatory obligations to serve the public in specific ways. The U.S. Supreme Court has upheld the public trustee basis of broadcast regulation as constitutional.

SECTION III.
RECOMMENDATIONS OF THE ADVISORY COMMITTEE

The vast new range of choices inherent in digital television technology makes it impossible to transfer summarily existing public interest obligations to digital television broadcasting. A key mandate for the Committee, therefore, has been to suggest how traditional principles of public-interest performance should be applied in the digital era. A second mandate has been to consider what additional public interest obligations may be appropriate, given the enhanced opportunities and advantages that broadcasters may receive through digital broadcasting.

Mindful of the uncertainties in how digital television will evolve, the Advisory Committee has operated under several basic principles in formulating its recommendations. The first is that the public, as well as broadcasters, should benefit from the transition to digital television. Second, flexibility is critical to accommodate unforeseen economic and technological developments. Third, the Advisory Committee has favored, whenever possible, policy approaches that rely on information disclosures, voluntary self-regulation, and economic incentives, as opposed to regulation.

The Advisory Committee recommends:

- **Disclosure of Public Interest Activities by Broadcasters**

  Digital broadcasters should be required to make enhanced disclosures of their public interest programming and activities on a quarterly basis, using standardized checkoff forms that reduce administrative burdens and can be easily understood by the public.

- **Voluntary Standards of Conduct**

  The National Association of Broadcasters, acting as the representative of the broadcasting industry, should draft an updated voluntary Code of Conduct to highlight and reinforce the public interest commitments of broadcasters.

- **Minimum Public Interest Requirements**

  The FCC should adopt a set of minimum public interest requirements for digital television broadcasters in the areas of community outreach, accountability, public service announcements, public affairs programming, and closed captioning.

- **Improving Education Through Digital Broadcasting**

  Congress should create a trust fund to ensure enhanced and permanent funding for public broadcasting to help it fulfill its potential in the digital television environment and remove it from the vicissitudes of the political process.

  When spectrum now used for analog broadcasting is returned to the government, Congress should reserve the equivalent of 6 MHz of spectrum for each viewing community in order to establish channels devoted specifically to noncommercial educational programming. Congress should establish an orderly process for allocating the new channels as well as provide adequate funding from appropriate revenue sources.

Broadcasters that choose to implement datacasting should transmit information on behalf of local schools, libraries, community-based nonprofit organizations, governmental bodies, and public safety institutions. This activity should count toward fulfillment of a digital broadcaster's public interest obligations.

- **Multiplexing and the Public Interest**

  Digital television broadcasters who choose to multiplex, and in doing so reap enhanced economic benefits, should have the flexibility to choose between paying a fee, providing a multicasted channel for public interest purposes, or making an in-kind contribution. Given the uncertainties of this still-hypothetical market, broadcasters should have a 2-year moratorium on any fees or contributions to allow for experimentation and innovation. Small-market broadcasters should be given an opportunity to appeal to the FCC for additional time. The moratorium should begin after the market penetration for digital television reaches a stipulated threshold.

- **Improving the Quality of Political Discourse**

  If Congress undertakes comprehensive campaign finance reform, broadcasters should commit firmly to do their part to reform the role of television in campaigns. This could include repeal of the "lowest unit rate" requirement in exchange for free airtime, a broadcast bank to distribute money or vouchers for airtime, and shorter time periods of selling political airtime, among other changes.

  In addition, the television broadcasting industry should voluntarily provide 5 minutes each night for candidate-centered discourse in the 30 days before an election. Finally, blanket bans on the sale of airtime to all State and local political candidates should be prohibited.

- **Disaster Warnings in the Digital Age**

  Broadcasters should work with appropriate emergency communications specialists and manufacturers to determine the most effective means to transmit disaster warning information. The means chosen should be minimally intrusive on bandwidth and not result in undue additional burdens or costs on broadcasters. Appropriate regulatory authorities should also work with manufacturers of digital television sets to make sure that they are modified to handle these kinds of transmissions.

- **Disability Access to Digital Programming**

  Broadcasters should take full advantage of new digital closed captioning technologies to provide maximum choice and quality for Americans with disabilities, where doing so would not impose an undue burden on the broadcasters. These steps should include the gradual expansion of captioning on public service announcements, public affairs programming, and political programming; the allocation of sufficient audio bandwidth for the transmission and delivery of video description; disability access to ancillary and supplementary services; and collaboration between regulatory authorities and set manufacturers to ensure the most efficient, inexpensive, and innovative capabilities for disability access.

- **Diversity in Broadcasting**

  Diversity is an important value in broadcasting, whether it is in programming, political discourse, hiring, promotion, or business opportunities within the industry. The Advisory Committee recommends that broadcasters seize the opportunities inherent in digital television technology to substantially enhance the diversity available in the television marketplace. Serving diverse interests within a community is both good business and good public policy.

- **New Approaches to Public Interest Obligations in the New Television Environment**

  Although the Advisory Committee makes no consensus recommendation about entirely new models for fulfilling public interest obligations, it believes that the Administration, the Congress, and the FCC should explore alternative approaches that allow for greater flexibility and efficiency while affirmatively serving public needs and interests.

Finally, some members of the Advisory Committee have submitted separate statements that supplement, modify, or dissent from the Committee's recommendations. These statements are provided in Section IV of the Report.

Introduction

As this Nation's 1,600 television stations begin to convert to a digital television format, it is appropriate to reexamine the longstanding social compact between broadcasters and the American people. In the words of Vice President Al Gore, this coming transition represents "the greatest transformation in television's history...one that is truly bigger than the shift from black and white to color....It's like the difference between a one-man band and a symphony."[1]

The quality of governance, intelligence of political discourse, diversity of free expression, vitality of local communities, opportunities for education and instruction, and many other dimensions of American life will be affected profoundly by how digital television evolves. As a free and ubiquitous medium, over-the-air television has been and will continue to be a central, defining force in American society. Thus, the American people have a vital stake in the character of television in the new digital era.

Much remains unknown about the future of digital television, which is precisely why President Clinton established the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. It is important to help affirmatively *shape* the new digital television era, in concert with market forces and the technology itself, by recommending appropriate legal obligations and marketplace rules.

Acting on behalf of the American public, this is a role the Federal Government has played since the inception of broadcasting. As decreed by Congress, and affirmed by the Supreme Court, the airways are a public resource legally owned by the American people.[2] Broadcasters are licensed to use those airwaves, acting as fiduciaries for the public good, and the Congress and the Federal Communications Commission are authorized to ensure that broadcasters fulfill this function.

The framework for broadcasting was first articulated by Herbert Hoover when he was serving as Secretary of Commerce in the 1920s. "The ether is a public medium, and its use must be for a public benefit," Hoover said. "The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, country-wide in distribution."[3]

This principle is the golden thread that has run through more than seven decades of broadcasting. It was enshrined in the Radio Act of 1927 and the Communications Act of 1934 in the mandate that broadcasting serve the "public interest, convenience and necessity."[4] It has been elaborated on through numerous FCC regulations designed to enhance diversity of expression, political discourse, children's programming, and other important cultural functions. And it has been reaffirmed by Supreme Court rulings that balance the First Amendment rights of speakers and viewers/listeners in broadcasting.[5] The specific public interest obligations of television broadcasters have varied over time, but the principles of public interest service have been, and remain, central to the defining charter of broadcasting.

This Advisory Committee's recommendations on how public interest obligations of television broadcasters ought to change in the new digital television era—outlined in Section III below—represent a new stage in the ongoing evolution of the public interest standard: a needed reassessment in light of dramatic changes in communications technology, market structures, and the needs of a democratic society.

Before presenting those recommendations, this report reviews the historical events that have brought broadcasting to this point. Section I describes the evolution of digital television technology, while Section II describes the events that have affected the development of the public interest standard since 1927. These histories provide a useful context for understanding the Advisory Committee's recommendations and how they seek to preserve and extend many well-established principles in the new media environment. They also shed light on the special challenges of bringing commercial objectives and public needs into greater alignment in broadcast television, whose free and ubiquitous programming and tradition of public responsibilities make it a very special resource in American society.

ENDNOTES

1 Vice President Al Gore, Address at the inaugural meeting of the Advisory Committee on Public Interest Obligations (Oct. 22, 1997).

2 *See*, 47 U.S.C. § 301 (1997); *Federal Communications Comm'n* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1939).

3 *Proceedings of the Fourth National Radio Conference,* Washington, DC, Nov. 9-11, 1925 (Washington, DC: Government Printing Office, 1926), p. 7.

4 Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162, § 4 (1927). *See also* 47 U.S.C. §§ 307(a), 309(a), 310(d).

5 S*ee, e.g., Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 650 (1994), *vacated and remanded*, 910 F. Supp. 734 (1995), *aff'd*, 520 U.S. 180 (1997); *Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 117-18 (1973).

Section I.
The Origins and Future Prospects of Digital Television

Digital television is a superior television format that delivers better pictures and sound, uses the broadcast spectrum more efficiently, and adds versatility to the range of applications. Often referred to as DTV,[1] digital television also represents a new technological infrastructure for broadcast television and thus a new economic and competitive paradigm. This new transmission technology invites a broad reassessment of established programming practices, competitive strategies, and regulatory requirements, including the public interest obligations that have always been considered fundamental to broadcast television in this country.

To understand fully the new framework of legal and technical standards that will guide the development of digital television—and thus the likely business models and most appropriate public interest standards—it is important to understand the evolution of digital television over the past 11 years. This section recounts that history. It also explains the statutory and regulatory standards that will govern DTV, barriers that may impede implementation of the new technology, and unresolved policy issues that require action by the Federal Communications Commission (FCC) and Congress.

What is Digital Television?

Digital television is a new technology for transmitting and receiving broadcast television signals. Using an additional 6 megahertz (MHz) of broadcast spectrum temporarily granted by Congress and the FCC for a period of no fewer than 9 years, broadcasters will be able to develop a diverse range of new digital television programming and services while continuing to transmit conventional analog television programming on their existing allotments of spectrum, as required by the Telecommunications Act of 1996.[2]

A digital standard is superior to analog because of its greater accuracy, versatility, efficiency, and interoperability with other electronic media. Digital signals also have the advantage of generating no noise or "ghosting," and being more resistant to signal interference. Within the range of the signal, this results in a perfect signal.

One of the primary rationales for the Nation's transition to digital television is high-definition television, or HDTV. This transmission standard contains up to six times more data than conventional television signals and at least twice the picture resolution. HDTV images have a 16-to-9 aspect ratio (the ratio of width to height), providing a wider image than the 4-to-3 ratio that has characterized television since 1941. This higher resolution and different aspect ratio makes HDTV images substantially more vivid and engaging than the images produced by the existing television format, and that effect is enhanced by five discrete channels of CD-quality audio.

But DTV is not just about HDTV. As a digital (and not analog) signal, DTV enables broadcasters to offer a variety of innovations. Instead of sending an HDTV signal of 19.4 megabits per second, for example, a broadcast station can send as many as five digital "standard-definition television" (SDTV) signals, each of which might consist of 4 to 5 megabits per second. Although SDTV images are not as sharp as HDTV, they are superior to existing television images. This new capacity, known as "multicasting" or "multiplexing," is expected to allow broadcasters to compete with other multichannel media such as cable and direct broadcast satellite systems. Moreover, as new advances in compression technology occur in the years ahead, broadcast stations are expected to fit even more SDTV signals into the same spectrum allotment.

Another DTV capability is the ability to provide new kinds of video and data services, such as subscription television programming, computer software distribution, data transmissions, teletext, interactive services, and audio signals, among others. Referred to as "ancillary and supplementary services" under the Telecommunications Act of 1996, these services include such potentially revenue-producing innovations as stock prices, sports scores, classified advertising, paging services, "zoned" news reports, advertising targeted to specific television sets, "time-shifted" video programming, and closed-circuit television services.

These choices—HDTV, multicasting, and innovative video/information services—are not mutually exclusive. Within a single programming day, a broadcaster will have the flexibility to shift back and forth between different DTV modes in different day parts. During daytime, for example, a station might show four SDTV channels; during primetime, programming might switch to a single HDTV program such as a movie or wide-screen sporting event. Because different gradations of HDTV and SDTV picture resolution are possible—there are 18 different transmission formats—a station can mix and match video programming with data services, provided that the various signals fit within the 6 MHz bandwidth.

All this suggests that over the next 10 to 15 years, DTV will usher in a sweeping transformation of broadcast television—its programming and services, its revenue sources, its ownership structures, and its outside partnerships. Although many existing programming genres and styles will surely continue, innovations in video programming and information services will arise, fueled in no small part by the anticipated convergence of personal computer and television technologies. In addition, broadcast television may develop new services in alliance

with other telecommunications media—a scenario made possible by digital code, which is increasingly becoming the common language for all electronic media.

It is difficult to predict which programming and revenue models broadcasters will choose to develop as they commence DTV transmission. The Telecommunications Act of 1996, which authorized the FCC to give an additional 6 MHz channel to existing broadcasters for digital transmissions, is deliberately flexible.[3] Much will depend on the competitive opportunities that broadcasters identify as promising, emerging market conditions, and the regulatory groundrules.

A Brief History of Digital Television Technology

For almost 60 years, television broadcasters have transmitted signals based on the "NTSC standard." This technical format, developed and recommended by the National Television Systems Committee, has remained largely unchanged since it was adopted by the FCC in 1941.[4] The most significant modifications have been the introduction of color television in 1953; "ghost canceling" provisions to enhance picture clarity; the use of a previously unused portion of the transmission signal called the "vertical blanking interval" to send closed captioning; and stereophonic sound.

Although television engineers had long envisioned ways to upgrade the existing NTSC standard, for many years the broadcast community, Congress, and the FCC showed little interest in undertaking such a large, complex challenge. This view changed in the mid-1980s as Japanese consumer electronics firms forged ahead with the development of HDTV technology, and as the MUSE analog format proposed by NHK, a Japanese company, was seen as a pacesetter that threatened to eclipse U.S. electronics companies. During this period, the FCC considered reassigning some vacant portions of the broadcast spectrum to so-called Land Mobile users—police departments, emergency services, delivery companies, and others. At that point, broadcasters declared their interest in reserving this portion of the spectrum for HDTV.[5]

To explore the issues posed by HDTV, the FCC issued its First Notice of Inquiry on Advanced Television Service in July 1987[6] and a few months later, appointed a 25-member advisory panel—the Advisory Committee on Advanced Television Service (ACATS). Chaired by former FCC Chairman Richard E. Wiley, ACATS was charged with reviewing the technical issues and recommending an ATV system to the FCC.

The first congressional hearing on HDTV was held in October 1987. This event helped galvanize the ACATS to announce an open competition for development of the best advanced television standard. Until June 1990, the Japanese MUSE standard—based on an analog system—was the front-runner among the more than 23 different technical concepts under consideration. Then, an American company, General Instrument, demonstrated the feasibility of a digital television signal. This breakthrough was of such significance that the FCC was

persuaded to delay its decision on an ATV standard until a digitally based standard could be developed.

In March 1990, when it became clear that a digital standard was feasible, the FCC made a number of critical decisions. First, the Commission declared that the new ATV standard must be more than an enhanced analog signal, but be able to provide a genuine HDTV signal with at least twice the resolution of existing television images.[7] Then, to ensure that viewers who did not wish to buy a new digital television set could continue to receive conventional television broadcasts, it dictated that the new ATV standard must be capable of being "simulcast" on different channels.[8]

The new ATV standard also allowed the new DTV signal to be based on entirely new design principles. Although incompatible with the existing NTSC standard, the new DTV standard would be able to incorporate many improvements, including:

Progressive scanning, as explained below, is a more demanding technical format than the current "interlaced scanning" that will allow for a smoother sequencing of video picture frames and interactivity between computers and television sets.

Square pixels, or the most basic element of video image data, facilitate the interoperability of the new video standard with other imaging and information systems, including computers. With 1,920 pixels per line displayed on 1,080 lines per frame, the resolution of HDTV images is much sharper than that of the current NTSC format.

Increased frame rates allow a smoother simulation of motion in television signals; the more frames per second, the more realistic the portrayal of motion. The ACATS proposal allowed three different frame rates—24, 30, and 60 frames per second.

Additional lines per frame allow video images to be sharper in resolution. The current NTSC format provides for 525 horizontal lines of picture data; the HDTV standards provide for either 720 or 1080 horizontal lines.

Different aspect ratios give viewers a wider field of view, so that the viewing experience is more encompassing, in the manner of a film. In the existing NTSC format, the aspect ratio, or relation of the width to the height of the screen, is 4-to-3. In HDTV, the aspect ratio is a wider, more rectangular 16 to 9 aspect ratio, which is the same dimensions as 35-millimeter film.

Sound is more vivid in digital television, too, because there are five discrete channels of CD-quality audio, along with a sub-woofer channel for deeper sounds.

Over time, DTV programming is likely to exploit these new capabilities.

Although these technical improvements would help make television programming more appealing, the overarching goal of the ATV standard, the FCC later stated, is to:

> promote the success of a *free*, local television service using digital technology. Broadcast television's universal availability, appeal and the programs it provides—for example, entertainment, sports, local and national news, election results, weather advisories, access for candidates and public interest programming such as educational television for children—have made broadcast television a vital service.[9]

By adopting a uniform technical standard rather than leaving the outcome to marketplace competition, the Commission sought to ensure stability and continuity in the broadcast market. Television set manufacturers in particular wanted assurance that any digital television set would work and thus could be sold in all regions of the country.

The Advisory Committee on Advanced Television Service, which was hosting the competition for the best digital standard, decided to collaborate with the Advanced Television Systems Committee (ATSC), an industry group, to recommend a series of technical specifications. By early 1993, after a rigorous technical review of four digital HDTV standards and one analog proposal, this subgroup affirmed the superiority of digital over analog. Still, the ATSC subgroup found that each of the four digital proposals was deficient in some way.

This finding prompted the remaining seven ATV competitors to form a coalition, called the Grand Alliance, to pool their expertise.[10] Working with ACATS, the former competitors agreed in May 1993 jointly to develop a new, multifaceted standard that would incorporate the best of each system. By November 1995, after extensive testing at three laboratories, the ACATS formally recommended a set of prototype DTV protocols—the Grand Alliance standards—to the FCC. Key technical criteria in selecting the final standards were video/audio quality, interoperability with other video delivery media, spectrum efficiency issues, and cost.

In May 1996, the FCC formally proposed adoption of the Grand Alliance standards for terrestrial broadcasting,[11] and in December of that year, it adopted them, with some modifications.[12] Neither cable nor direct broadcast satellite transmissions would be directly affected. The standards covered five major technical subsystems: scanning, video compression, audio compression, packetized data transport, and radio-frequency transmission. They included 18 distinct transmission formats, a compromise that satisfied the sometimes-conflicting interests of various industries (broadcasting, television set manufacturers, film studios, and computer and software makers) while ensuring great flexibility in how digital television could be used.

The final standard adopted by the FCC did not require a single standard for scanning formats, aspect ratios, or lines of resolution. This outcome resulted from a dispute between the consumer electronics industry (joined by some broadcasters) and the computer industry (joined by the film industry and some public interest groups) over which of the two scanning processes—interlaced or progressive—is superior. Interlaced scanning, which is used in televisions worldwide, scans even-numbered lines first, then odd-numbered ones. Progressive scanning, which is the format used in computers, scans lines in sequences, from top to bottom.

The computer industry argued that progressive scanning is superior because it does not "flicker" in the manner of interlaced scanning. It also argued that progressive scanning enables easier connections with the Internet, and is more cheaply converted to interlaced formats than vice versa. The film industry also supported progressive scanning because it offers a more efficient means of converting filmed programming into digital formats. For their part, the consumer electronics industry and broadcasters argued that interlaced scanning was the only technology that could transmit the highest quality pictures then (and currently) feasible, i.e., 1,080 lines per picture and 1,920 pixels per line. Broadcasters also favored interlaced scanning because their vast archive of interlaced programming is not readily compatible with a progressive format.

In the end, the FCC acknowledged but did not adopt any of the 18 recommended formats; broadcasters may choose the scanning format that best suits their needs. Of the 18 formats, 6 are HDTV formats—3 of which are based on progressive scanning and 3 on interlaced scanning. Of the remaining formats, 8 are SDTV (4 wide-screen formats with 16 to 9 aspect ratios, and four conventional 4 to 3 aspect ratios), and 4 are VGA (formats that are of lower quality than the current analog NTSC standard; VGA stands for Video Graphics Array Adaptor). A key rationale for adopting so many formats was to allow broadcasters to explore what works best for them in the marketplace. "We anticipate that stations may take a variety of paths," the FCC said in its April 1997 *Fifth Report and Order on ATV*.[13]

> [S]ome may transmit all or mostly high resolution television programming, others a smaller amount of high resolution television, and yet others may present no HDTV, only SDTV, or SDTV and other services. We do not know what consumers may demand and support. Since broadcasters have incentives to discover the preferences of consumers and adapt their service offerings accordingly, we believe it is prudent to leave the choice up to broadcasters so that they may respond to the demands of the marketplace. A requirement now could stifle innovation as it would rest on a priori assumptions as to what services viewers would prefer.[14]

In this same report, the Commission also established a tentative 8-year transition schedule for moving from the current NTSC standard to DTV.

How Digital Television Will Evolve: The Plan

From 1994 to 1995, while ACATS wrestled with technical challenges and interindustry disagreements, Congress debated legislation that, on February 8, 1996, became the Telecommunications Act of 1996. This law was enacted to spur competition in the telephone and cable industries and to foster the development of new electronic media.

Section 201 of the 1996 Act specifies the basic terms under which digital television will move forward. Existing broadcasters are assigned a new DTV license and an additional 6 MHz channel to facilitate the transition from analog to digital television. They retain their original 6

MHz channel for analog broadcasts until the expected completion of the transition, at which time the channels are returned to the FCC.[15]

DTV licensees are granted great flexibility in how they use their new spectrum, provided that uses do not interfere with the provision of over-the-air television programming. DTV licensees are still bound by the public interest standards that apply to broadcast television. Finally, DTV licensees are to pay the Federal Government a fee for ancillary and supplementary (subscription) DTV services. In requiring fees for these envisioned services, Congress sought to ensure that broadcasters would pay approximately what they might have paid had the spectrum been auctioned, for any subscription services (as opposed to free over-the-air programming).[16] This way, the public would receive some portion of the value of the spectrum assigned to broadcasters. On November 19, 1998, the FCC adopted rules that require broadcasters to pay a fee of 5 percent of gross revenues received form ancillary or supplementary uses of the digital television spectrum for which they charge subscription fees or other specified compensation.[17] On the same day, the FCC issued a Notice of Proposed Rulemaking inviting comment on whether noncommercial broadcasters should be able to use their excess digital capacity for revenue-enhancing ancillary or supplementary services, and if so, whether they should be exempt from the 5 percent fee.[18]

In moving to a digital format, the FCC, broadcasters, public-interest organizations, and others agreed that it is important to ensure that free, over-the-air television remains universally available to the American people. The grant of free transitional spectrum to broadcasters for DTV was seen as a way to ensure that over-the-air television would continue to be universally available in the future. It was also meant to ensure that commercial broadcasting would remain competitive and that public broadcasting would remain a vital noncommercial venue.

By giving broadcasters use of the airwaves until at least 2006, rather than auctioning the spectrum or charging a fee, the Federal Government hoped to ease the transition to digital television. Broadcasters would have time to make considerable investments in new digital equipment and make strategic and operational changes; television set manufacturers would have time to develop and improve new products and lower prices; and consumers would have time to buy new sets.

To help broadcasters meet the transition deadline of December 31, 2006, the FCC established an accelerated schedule for the introduction of DTV so that all Americans could have access to it by the year 2002.[19] Affiliates of the top four networks (ABC, CBS, NBC, and Fox) in the top-10 markets must have a digital signal on the air by May 1, 1999. The same network affiliates in markets 11 through 30 must be on the air by November 1, 1999. All other commercial stations must be on the air by May 1, 2002.

According to FCC Chairman William E. Kennard, at the beginning of November 1998, 42 stations were broadcasting digital television.[20] Thus, digital television signals will be available to more than one-third of television households in the United States by year's end, and the

National Association of Broadcasters expects this coverage to rise to 50 percent by the end of 1999. Total DTV coverage for commercial stations is intended to be available by 2002.

When Congress passed the Balanced Budget Act of 1997, it specified that broadcasters will be permitted to keep their analog television service beyond 2006 under two conditions:

1. If one or more of the largest television stations in a market do not begin DTV transmission by the 2006 deadline through no fault of their own; or

2. If fewer than 85 percent of the television households in a market are able to receive digital television signals (either off the air or through a cable-type service that includes DTV stations).[21]

CHALLENGES THAT REMAIN

The advent of digital television will bring remarkable, exciting changes to broadcasting. Consumers will have many more choices from broadcast television, from sharp high-definition television programming and multicasting of niche-audience channels to new information services and computer-interactivity. Broadcasters will have new opportunities to develop innovative programming and services, along with new revenue streams and market franchises. DTV will help broadcasting evolve and compete in the new media environment, while ensuring that public interest needs are still met through over-the-air broadcasting.

Still, resolving the issues that surround digital television will take time. The next section reviews some of the more significant issues that need to be addressed.

What Kinds of DTV Programming and Services to Offer?

Because of the inherent versatility of digital transmissions and the still-evolving terms of market competition, how broadcasters will use their digital signals is unclear. One of the first-threshold choices broadcasters must make is whether to transmit HDTV programming, multicast, datacast, or to employ some combination of the these.

A survey conducted by the Harris Corporation, a provider of broadcast and radio equipment, found that as recently as December 1997, 44 percent of broadcasters were not sure exactly what they would do with DTV programming.[22] Some 33 percent said they planned to offer multicasting; another 23 percent said they definitely would offer high-definition television. For those broadcasters who will use high-definition television, most plan to do so during primetime, but not during other times of the day.[23] Of the broadcasters who plan to multicast, 50 percent predicted they would offer news and regular network programming; 47 percent said they planned to transmit information services; and 26 percent planned to air local news and public affairs. Two of the more significant findings of the Harris survey were that broadcasters will move to local digital program origination *faster* than generally anticipated, and that they expect to offer more locally produced news with DTV.

Some observers caution that the ways in which DTV will interact with media markets will be highly unpredictable for many years. Although it is likely that multicasting will be economically feasible for some types of programs and dayparts, no clear models exist for attracting and keeping viewers tuned in regularly in a multicasting environment. Nor is it clear how interactive services will be treated under must-carry rules.

Questions remain on how much revenue the new channels—whether HDTV, SDTV, or data—can actually generate. Will broadcasters cannibalize their primary signals as they pursue new DTV opportunities, or will they expand their franchises?[24] Furthermore, anticipating the nature of DTV programming and services is made complex by the new competition among different media, especially cable, direct broadcast satellite, and the Internet. Digital television offerings may also be affected by new ownership patterns for television broadcasting, which in turn might blur the boundaries between once-distinct media. Some broadcasting experts speculate that information providers may see television stations as distribution vehicles for their data, which may encourage new corporate owners to acquire broadcast stations.[25]

Technical Issues

Only a few technical problems stand in the way of a full rollout of digital television. The broadcast and cable industries have agreed to channel numbering for virtual channels with multicasting.[26] A consensus standard for ensuring that DTV is technically compatible with cable television systems, through which 65 percent of Americans receive television programming, is still under construction.[27]

Investment Costs

The December 1997 Harris Corporation's survey of broadcasters suggested that the average cost to broadcasters of converting to digital would be in the vicinity of $5.7 million. This sum is "soft" in the sense that television stations that serve the larger urban markets will likely bear greater expenses than smaller stations. The timing of purchase of DTV equipment will make a significant difference as well. In addition, the kinds and amount of equipment that stations choose to buy for local origination of DTV programming can vary immensely. For all these reasons, previous estimates of DTV conversion costs of $6 million to $10 million per station are expected to decline rapidly, probably even faster than the 20 percent annual price decrease that now prevails.[28]

Consumer Demand for DTV

Another uncertain variable is how quickly consumers will see value in DTV programming and services, and choose to buy DTV sets. Perhaps the most significant factor here is the cost of DTV sets. Original projections by manufacturers indicate that the new television sets will cost between $1,000 to $1,500 more than conventional high-end projection sets, or about $4,000 to $5,000.[29]

The first high-definition television sets offered for sale in September 1998 were, however, priced at $8,000; about 100,000 are expected to be manufactured in 1998[30]—out of a universe of more than 24 million conventional sets expected to be sold in 1998. A Samsung Electronics Company official estimates that HDTV sets will sell for $3,000 by the year 2002, considerably higher than the $500 or less that most Americans now pay for new television sets.[31] But as new digital programming and services become more plentiful, it is expected that consumer demand for DTV sets will rise and set prices will decline.

Must-Carry Regulations

Before digital television becomes fully operational, several regulatory issues must be resolved. One of the most important is clarifying how the must-carry provisions of the Telecommunications Act will apply to digital television.[32] Historically, cable televisions systems have had to carry the signal of local broadcasters, as mandated by the 1992 Cable Act and affirmed in the 1997 Supreme Court ruling of *Turner Broadcasting System, Inc. v. FCC* (*"Turner II"*).[33] The arrival of digital television transmission raises questions about how must-carry precedents should apply in the new television environment. Should cable systems be obliged to carry both the analog and digital television signals during the transition period, or only the analog signal, as they have under the existing must-carry rules? When cable systems do carry the digital signal, should they be obliged to carry the same amount of *bandwidth* as they currently do, even though that same spectrum may be carrying several programming channels and perhaps subscriber-based services? Do analog and digital broadcasts constitute separate "broadcasting stations" for the purposes of retransmission consent and digital broadcast signal carriage?

Resolving must-carry and retransmission consent requirements will affect the kind of access that cable households will have to digital television signals, what stations and channels are available over cable systems, and the rates that subscribers will have to pay. There is also concern about how must-carry rules in the new DTV environment might affect noncommercial video sources such as the Public Broadcasting System, and public affairs and public access cable channels. To help it address the must-carry/retransmission consent issue, the FCC released a Notice of Proposed Rulemaking on July 10, 1998, which proposes seven alternatives for implementing the must-carry provisions of the Telecommunications Act.[34]

Siting and Construction of DTV Towers

Another pending Notice of Proposed Rulemaking invites comment on whether Federal law should allow the preemption of local zoning rules to facilitate the siting and construction of digital broadcast towers.[35] This proceeding was initiated in August 1997 in response to a petition by the National Association of Broadcasters, which expressed concern that the local approval process for new towers could take too long and delay the introduction of DTV.[36]

Public Interest Obligations

Finally, one of the largest unresolved issues is what public interest obligations should govern digital broadcasters in the new media marketplace. In the Telecommunications Act of 1996,

Congress specified that broadcasters would continue to serve as trustees of the public's airwaves and that public interest obligations should extend into the digital television environment:

> Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest.[37]

Although Congress' general intent is clear, the substantive meaning of public interest obligations in the new television environment is likely to change. To determine the precise contours of a DTV licensee's public interest obligations, the FCC plans to initiate a rulemaking in the near future. This process will be enhanced by understanding the historical development of the public interest standard in broadcasting, which is the focus of Section II of this Report. This is followed in Section III by the Advisory Committee's formal recommendations.

For all the challenges that remain, the opportunities to build a new, more robust broadcasting system have never been greater. The sheer technological capabilities of DTV offer sweeping possibilities for program creativity as well as for the increased competitiveness of broadcasting and public interest service. The most important task at hand is to devise the most appropriate structures to facilitate all these goals.

ENDNOTES

1 DTV is often referred to as "advanced television," or ATV. Because ATV embraces any enhancements to the existing television format (known as the NTSC standard, for National Television Systems Committee), ATV is a more inclusive term than "digital television" or "high-definition television." Once digital technology proved feasible and the most desirable technical standard for advanced television, the term DTV became virtually synonymous with ATV. S*ee, e.g., In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service,* Notice of Proposed Rule Making, 6 FCC Rcd 7024 n.1 (discussing the definition of "ATV"). *See also, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,* Fourth Report and Order, 11 FCC Rcd 17771, 17773 (1996)(discussing the introduction of the term "DTV") (*Fourth Report and Order*).

2 Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. 151 et. seq.) (Feb. 8, 1996). This Act amended the Communications Act of 1934. *See* 47 U.S.C. §§ 336, 309(j) (1998).

3 47 U.S.C. §336 (allowing the FCC to determine, with only general guidance, whether to issue additional licenses for advanced television services).

4 *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Notice of Inquiry, 2 FCC Rcd 5125, 5126 (1987) *(Notice of Inquiry on ATV)*

(discussing the evolution of the NTSC standard and noting that "the NTSC transmission standard has proven to be remarkably durable and adaptable to changes over the years").

5 *In the Matter of Further Sharing of the UHF Television Band by Private Land Mobile Radio Services*, Notice of Proposed Rule Making, 101 FCC 2d 852 (1985). *See also* JOEL BRINKLEY, DEFINING VISION: THE BATTLE FOR THE FUTURE OF TELEVISION (1997).

6 *Notice of Inquiry on ATV*, *supra* note 4.

7 *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, First Report and Order, 5 FCC Rcd 5627, 5628 (1990).

8 *Id.*

9 *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12820 (1997) (*Fifth Report and Order*).

10 The seven members of the Grand Alliance were AT&T (now Lucent Technologies), General Instrument Corporation, Massachusetts Institute of Technology, Philips Electronics North American Corporation, Thomson Consumer Electronics, The David Sarnoff Research Center, and Zenith Electronics Corporation. *See Fourth Report and Order, supra* note 1, at 17774, n.10.

11 *In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Fifth Further Notice of Proposed Rule Making, 11 FCC Rcd 6235 (1996).

12 *Fourth Report and Order, supra* note 1.

13 *Fifth Report and Order*, supra note 9, 12 FCC Rcd at 12826.

14 *Id.* at 12826-27.

15 The Balanced Budget Act of 1997 Act directs the FCC to auction the so-called analog spectrum in 2002. The spectrum may be returned to the FCC and reassigned as early as 2006. 47 U.S.C. § 309(j)(14)(A)-(C) (1998).

16 47 U.S.C. 336(e)(2)(B).

17 *Fees for Ancillary or Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996,* Report and Order, MM Docket No. 97-247. Adopted Nov. 19, 1998; Released Nov. 19, 1998.

18 *Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees,* Notice of Proposed Rulemaking, MM Docket No. 98-203 (Nov. 19, 1998).

19 *Fifth Report and Order*, *supra* note 9, at 12840-41.

20 Remarks of William E. Kennard, Chairman, Federal Communications Commission to the "Dawn of Digital Television" Summit Meeting, Washington, D.C. (Nov. 16, 1998)(visited Nov. 18, 1998) <http://www.fcc.gov/Speeches/Kennard/spwek834.html>.

21 Balanced Budget Act of 1997, Pub. L. No. 105-33 § 3003, 111 Stat. 251, 267 (1997). Some industry observers question whether the full transition to DTV and the return of analog spectrum will be consummated by 2006, as intended by the Balanced Budget Act of 1997. This view stems from doubts about consumer enthusiasm for DTV if sets are too expen-

sive and, in turn, a likely triggering of the two contingency clauses adopted by Congress in 1997.

Based on existing projections of the market penetration of DTV over the next 8 years, many analysts believe it is unlikely that 85 percent of households will be equipped to receive DTV by 2006. Josh Bernoff, a principal analyst with Forrester Research, an independent market research firm based in Cambridge, Massachusetts, estimates that only 23 percent of U.S. households (nearly 20 million) will have DTV sets by 2004 and only 48 percent (42 million) by the year 2007. *See* Statement by Josh Bernoff, Forrester Research, Transcript of Meeting of the Advisory Committee on the Public Interest Obligations of Broadcasters, at 33-34 (Jan.16, 1998) (on file with the Advisory Committee Secretariat).

[22] Statement by Bruce Allan, Vice President and General Manager of the Harris Corporation's Broadcasting Division, Transcript of Meeting of the Advisory Committee on the Public Interest Obligations of Broadcasters, at 16 (Jan. 16, 1998) (on file with the Advisory Committee Secretariat).

[23] *Id.* The survey interviewed 401 television executives who represent approximately 480 stations. *Id.* at 12.

[24] Statement by Josh Bernoff, to Advisory Committee on the Public Interest Obligations of Digital Broadcasters, *supra* note 22 at 79 (Jan. 16, 1998)("If you look at the fragmentation [of the existing TV marketplace], it's possible to imagine a world in which there's all of this wonderful programming. But if you look at the fragmentation that's happened so far with things like cable, a lot of what is available is reruns of prime time fare....Maybe we'll have the ability to see *Three's Company* at seven different times during the day, but I'm not sure that there's the capability to produce all of this original programming, given that the audience for the lepidoptery channel is not likely to be that large.").

[25] Statements by Josh Bernoff, Forrester Research, and Robert W. Decherd, Chairman of A.H. Belo Corporation, to Advisory Committee on the Public Interest Obligations of Digital Broadcasters, *Id.* at 53, 82-84. If new permutations of ownership and blurring of media technologies do occur, some observers envision a rivalry between the personal computer and television, or perhaps a novel blending of the two media. Already, Intel and Zenith are collaborating on a digital TV decoder card for PCs, an innovation that could open up the PC market to digital television. *Id.* at 23. On the other hand, there are reasons to believe that PCs and TV will remain distinct media. The experience of interacting with a PC from a distance of 12 to 18 inches is quite different from relaxing in front of a TV screen, which is best viewed from 6 to 10 feet away (and even further for big-screen HDTV). And adding interactive features to TV programming would entail great expense, competition among several different technical protocols, and the absence of an established audience.

[26] *Id.* at 20. *Advanced Television Systems and their Impact upon the Existing Television Broadcast Service,* Order on Reconsideration, MM. Docket No. 87-268 (Feb. 17, 1998) (affirming DTV channel assignments).

[27] Letter from William E. Kennard, Chairman, Federal Communications Commission, to Decker Anstrom, President and CEO, National Cable Television Association and Gary

Shapiro, President, Consumer Electronics Manufacturers Association (Aug. 13, 1998)(visited Dec. 7, 1998) <http://www.fcc.gov/Speeches/Kennard/Statements/stwek862.html> (urging that the cable industry, electronics manufacturers coordinate efforts to resolve compatibility problems between first-generation digital television sets and cable systems). *See also* Joel Brinkley, "*FCC Wants HDTV Glitch Solved Soon*," THE NEW YORK TIMES, Aug. 24, 1998, at D4.

[28] Gary Arlen, *Making the Transition: A New Kind of Television, A White Paper* 19 (April 1998) (on file with the author) (predicting that new digital equipment may cost barely 20 percent more than today's comparable analog facilities, which suggests that the most cost-efficient way to proceed is scaled purchases of DTV equipment that parallel development of the market).

[29] Joel Brinkley, "*HDTV: High in Definition, High in Price*," THE NEW YORK TIMES, (Aug. 20, 1998), at G1.

[30] *Id.*

[31] *Id.*

[32] 47 U.S.C. § 534(b)(4)(B)(1998). *See also In the Matter of Carriage of the Transmissions of Digital Television Broadcast Stations*, *Amendments to Part 76 of the Commission's Rules,* Notice of Proposed Rule Making, 13 FCC Rcd 15092 (1998) (*Carriage of the Transmissions of Digital Television*).

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

[34] *Carriage of the Transmissions of Digital Television, supra* note 32.

[35] *In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities,* Notice of Proposed Rule Making, 12 FCC Rcd 12504 (1997).

[36] *Id.* at 12504, n.1.

[37] 47 U.S.C. § 336(d)(1998).

Section II.
The Public Interest Standard in Television Broadcasting

Federal oversight of all broadcasting has had two general goals: to foster the commercial development of the industry and to ensure that broadcasting serves the educational and informational needs of the American people. In many respects, the two goals have been quite complementary, as seen in the development of network news operations and in the variety of cultural, educational, and public affairs programming aired over the years.

In other respects, however, Congress and the Federal Communications Commission (FCC) have sometimes concluded that the broadcast marketplace by itself is not adequately serving public needs. Accordingly, numerous efforts have been undertaken over the past 70 years to encourage or require programming or airtime to enhance the electoral process, governance, political discourse, local community affairs, and education. Some initiatives have sought to help underserved audience-constituencies such as children, minorities, and individuals with disabilities.

In essence, the public interest standard in broadcasting has attempted to invigorate the political life and democratic culture of this Nation. Commercial broadcasting has often performed this task superbly. But when it has fallen short, Congress and the FCC have developed new policy tools aimed at achieving those goals. Specific policies try to foster diversity of programming, ensure candidate access to the airwaves, provide diverse views on public issues, encourage news and public affairs programming, promote localism, develop quality programming for children, and sustain a separate realm of high-quality, noncommercial television programming.

It has been an ambitious enterprise, imperfectly realized. Part of the challenge has been to use public policy, with all its strengths and limitations, to integrate vital public goals into a commercial milieu. This challenge has been complicated in recent years by rapid and far-reaching changes in technology and market structures, not to mention evolving public needs. As competition in the telecommunications marketplace becomes more acute and as the competitive dynamics of TV broadcasting change, the capacities of the free marketplace to serve public ends are being tested as never before.

Before presenting the Advisory Committee's recommendations for how the public interest standard in broadcast television should evolve in the digital era, it is important to understand the historical forces that have shaped the public interest standard. This section of the Report begins with a discussion of the origins and development of the public interest standard, with special attention to the role of spectrum scarcity and Government licensing in creating the "public trustee" model of broadcast regulation. It concludes with an examination of six primary realms of public interest concern in broadcast television: diversity of programming, political discourse, localism, children's educational programming, access for persons with disabilities, and equal employment opportunity.

The Origins of the Public Interest Standard

Spectrum Scarcity and the Public Trustee Model

A recurring challenge for Congress and the FCC has been how to reconcile the competitive commercial pressures of broadcasting with the needs of a democracy when the two seem to be in conflict. This struggle was at the heart of the controversy that led to enactment of the Radio Act of 1927 and the Communications Act of 1934.[1]

Under the antiquated Radio Act of 1912, the Secretary of Commerce and Labor was authorized to issue radio licenses to citizens on request.[2] Because broadcast spectrum was so plentiful relative to demand, it was not considered necessary to empower the Secretary to deny radio licenses. By the 1920s, however, unregulated broadcasting was causing a cacophony of signal interference, which Commerce Secretary Herbert Hoover was powerless to address. The lack of a legal framework for regulating broadcasting not only prevented reliable communication with mass audiences but also thwarted the commercial development of broadcasting.

Thus began an extended debate over how to allocate a limited number of broadcast frequencies in a responsible manner. A prime consideration was how to ensure the free speech rights of the diverse constituencies vying for licensure. Some groups—especially politicians, educators, labor activists, and religious groups—feared that, under a system of broadcast licensing, their free speech interests might be crowded out by inhospitable licensees, particularly commercial interests. They therefore sought (among other policy remedies) a regime of common carriage. A common carrier system would have ensured nondiscriminatory access by requiring broadcasters to allow anyone to buy airtime.

For their part, existing broadcasters sought to maintain editorial control and to develop the commercial potential of forging individual stations into national networks. They wanted Congress to grant them full free speech rights in the broadcast medium and did *not* want to be treated as common carriers.

This basic conflict was resolved provisionally with passage of the Radio Act of 1927, and 7 years later, by the Communications Act of 1934. The 1934 Act, which continues to be the charter for broadcast television, ratified a fundamental compromise by adopting two related provisions: a ban on "common carrier" regulation (sought by broadcasters) and a general

requirement that broadcast licensees operate in the "public interest, convenience and necessity" (supported by Congress and various civic, educational, and religious groups).[3] The phrase was given no particular definition; some considered it necessary for the Federal Government's licensing powers to be considered constitutional.[4]

By prohibiting a common carriage regime, Congress essentially prohibited non-licensees from having free speech rights in the broadcast medium except as authorized by "public interest" requirements. Only Government-sanctioned licensees would, as a rule, have free speech rights in broadcasting. Although the limited number of licensees was in one respect dictated by the physics of the electromagnetic spectrum (only so many stations could operate without chaos resulting), the "scarcity" was also dictated by the Government licensing scheme, which banned a regime of common carriage and made arbitrary divisions of spectrum space for particular reserved uses. The scarcity of access to the airwaves is, in this sense, a creature of Government licensure.

The Government's exclusionary licensing arrangement was justified by requiring that broadcasters act as public fiduciaries. Their primary duty would be to serve the "public interest, convenience and necessity," as expressed in both the 1927 and 1934 Acts.[5] Created by the 1927 Act, the Federal Radio Commission described the "public trustee" model in this manner:

> [Despite the fact that] the conscience and judgment of a station's management are necessarily personal....the station itself must be operated as if owned by the public....It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: "Manage this station in our interest." The standing of every station is determined by that conception.[6]

To give substance to the public interest standard, Congress has from time to time enacted its own requirements for what constitutes the public interest in broadcasting. But Congress also gave the FCC broad discretion to formulate and revise the meaning of broadcasters' public interest obligations as circumstances changed.[7]

The FCC's authority, while extensive, is constrained by traditional First Amendment principles. The Federal Government may not censor broadcasters, for example, nor may it regulate content except in the most general fashion, including favoring broad categories of programming such as public affairs and local programming.[8] The FCC can intervene to correct perceived inadequacies in overall industry performance, but it cannot trample on the broad editorial discretion of licensees.

As the foregoing history suggests, the fundamental legal framework that governs the broadcast industry sets it apart from other media. In broadcasting, the Federal Government grants exclusive free speech rights to licensees, while denying such freedom to others. To justify this privileged treatment, Congress and the courts have mandated that licensees serve as "public trustees" of the airwaves.

The public trustee model has given rise to a distinct genre of First Amendment jurisprudence. Unlike newspapers and magazines, broadcasters have affirmative statutory and regulatory

obligations to serve the public in specific ways. Despite the philosophical complications and political tensions that this arrangement entails, the U.S. Supreme Court has repeatedly upheld the public trustee basis of broadcast regulation as constitutional.[9] The reason that broadcasters have substantial, but not complete, First Amendment protection, said the Court, is the scarcity of broadcasting frequencies and the Government licensing that is necessary:

> When there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish....A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.[10]

Therefore, the Government may require a licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[11]

Although many commentators have challenged the reasoning of the *Red Lion* case, it stands as the operative ruling in this area.[12] Much of the criticism focuses on how the "scarcity rationale" has been invalidated by the proliferation of new media outlets. Many broadcasters and others also argue that scarcity is a basic economic fact of life affecting all media, so why should it justify broadcast regulation?[13] Defenders of *Red Lion* assert that there are still more applicants for broadcast licenses than available licenses—a basic definition of scarcity—and that Government selection of one licensee over another justifies the continuing application of the public interest standard.

Broadcast Television and Democratic Deliberation

The licensing arrangements that gave rise to public interest obligations were an attempt to reconcile the prerogatives of commercial interests on the one hand with the needs of the democratic system on the other. Yet they also introduced tensions in First Amendment jurisprudence and gave rise to different visions of free speech.

One vision, often associated with Justice Oliver Wendell Holmes, sees the First Amendment as a guarantor of the "free marketplace of ideas" against Government encroachment.[14] Under this familiar metaphor, a "free trade in ideas" in a pluralistic society will yield the most freedom, the closest approximations to truth, and the greatest common good.

An overlapping perspective with a different emphasis is associated with James Madison, the great champion of free speech during the framing of the Constitution and Bill of Rights. For Madison, the First Amendment was important as a way to ensure political equality, especially in the face of economic inequalities, and to foster free and open political deliberation.[15] This conception of the First Amendment sees free speech as servicing the civic needs of a democracy. Free speech, in Madison's view, expresses the sovereignty of the people. Justice Louis

Brandeis, also associated with this vision of the First Amendment, emphasized the vital role of citizens in coming together as political equals to engage in rational political discussion. [16] In Brandeis's view, free speech is not just an end unto itself, or simply a freedom from Government meddling; it is also a necessary means for democratic self-governance. [17]

The philosophical distinction between the free marketplace of ideas metaphor and the Madisonian notion of a deliberative democracy is not academic. It lies at the heart of the public interest standard in broadcasting. From the beginning, broadcast regulation in the public interest has sought to meet certain basic needs of American politics and culture, over and above what the marketplace may or may not provide. It has sought to cultivate a more informed citizenry, greater democratic dialogue, diversity of expression, a more educated population, and more robust, culturally inclusive communities.

The Madisonian concept of free speech helps clarify, then, why public interest obligations have been seen as vital to broadcast television—and why a marketplace conception of free speech may meet many, but not all, needs of American democracy. As constitutional scholars have noted, the famous "marketplace of ideas" metaphor associated with Justice Holmes presumes that diverse ideas have the ability to compete for public acceptance.[18]

Some scholars say the marketplace metaphor obscures the extent to which political outcomes require active deliberation and debate.[19] This requires public fora that can give serious, sustained attention to different perspectives. These public fora must be open and accessible to divergent viewpoints, and they must be able to facilitate citizen participation in matters of democratic concern.[20] The marketplace may or may not serve these needs well. When Congress and the FCC have determined that public policy is needed to fulfill conditions that Madison saw as primary to the First Amendment, they have developed new applications of the public interest standard.

Another view of the First Amendment, propounded by many broadcasters and others, is that the marketplace alone is the best guarantor of diversity of expression. According to this perspective, Government's role is likely to be intrusive and inimical to diverse expression; only a robust, free marketplace can duly honor the free speech rights of speaker and listener. As one commentator from this perspective writes:

> The question of whether or not an unregulated marketplace produces "enough" valuable speech, or conversely, "too much" worthless or harmful speech, assumes an ability to determine the optimal amount separate from the voluntary choices of speakers and listeners. It presumes that the "public interest" should outweigh traditional First Amendment concepts of speaker and listener autonomy.[21]

By this view, any Government policy that presumes to affect the content of broadcasting (such as limitations on advertising, guidelines for public affairs programming, or requirements for children's educational programming) represents an abridgement of broadcasters' First Amendment rights.

The philosophical disagreements between the marketplace and Madisonian interpretations of the First Amendment have ebbed and flowed over time. But in general, when Congress or the FCC have applied the public interest standard, they have cited the need to help American democracy function more effectively and to help civic culture thrive. While some applications of the public interest standard have been highly controversial, others have gained wider acceptance and proven quite durable.

The public interest standard has most often been applied to six major arenas: diversity of programming, political discourse, localism, children's educational programming, access to persons with disabilities, and equal employment opportunity.

The Primary Applications of the Public Interest Standard

Encouraging Diversity of Programming

If broadcasters are meant to act as trustees for the public interest, then a corollary is that they must affirmatively present a wide diversity of perspectives. This is clearly a central role of the First Amendment and the reason why the Federal Government from the beginning of broadcasting has sought to encourage programming diversity.

The first major initiative in this regard was a set of guidelines known as *Great Lakes Broadcasting Co.*, issued by the Federal Radio Commission (FRC) in 1929. To assess the performance of licensees under the public interest standard, the FRC declared that a station should meet the

> tastes, needs and desires of all substantial groups among the listening public...in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family, find a place.[22]

The FRC held that programming along these lines would be considered part of a station's public interest obligation at the time of license renewal. Apart from pushing "propaganda stations" off the air, the FCC did not flex its muscle significantly to affect programming during the 1930s and 1940s.[23]

In 1943, the Supreme Court affirmed the FCC's broad powers over the broadcasting industry in its landmark ruling, *National Broadcasting Co. v. United States*.[24] This decision held that the public interest standard is the touchstone of FCC authority; that the standard is not unconstitutionally vague; that the scarcity rationale justifies the public interest standard; and that FCC license revocations and nonrenewals do not violate the First Amendment rights of broadcasters.

Despite the FCC's reticence toward content regulation in the 1930s, the changing economies of network radio and proliferation of entertainment programming prompted the Commission to issue another general policy statement about programming in 1946.[25] The *Blue Book* specified the means the FCC would employ to assess the public interest performance of licensees at

renewal time. It required four basic components: live local programs, public affairs programming, limits on excessive advertising, and "sustaining" programs. (Sustaining programs were unsponsored network shows that were deliberately created to showcase high-quality programming having experimental formats or appealing to niche audiences.)

Although it had symbolic importance, the *Blue Book* had no legal force. The FCC never ratified or rejected *Blue Book* guidelines. Many considered the Commission's goals in developing the guidelines laudable, even to public trustees of the airwaves, the idea of Government mandating specific programming was viewed as contrary to the First Amendment. Nonetheless, the National Association of Broadcasters, which had a voluntary code of programming standards, used this occasion to issue a new and stronger code in 1948.[26]

The challenge for the FCC, then and on other occasions since, has been to give substance to the broad public interest standard without becoming too prescriptive or intrusive. This task is inherently difficult because the first duty—to ensure licensee compliance with public trustee responsibilities—quickly threatens to run athwart the First Amendment. During the late 1950s, scandals involving rigged quiz shows and radio "payola"—paying of bribes for radio airplay of certain songs—shook public confidence in broadcasting.[27] The FCC decided that it was an appropriate moment to clarify the meaning of the public interest standard once again and to articulate guidelines for programming.

The result was 19 days of hearings and testimony from more than 90 witnesses, culminating in the FCC's 1960 report, *Report and Statement of Policy re: Commission en banc Programming Inquiry*.[28] Widely known as the *1960 Programming Policy Statement*, the report listed 14 "major elements usually necessary to the public interest":[29]

1. Opportunity for local self-expression.
2. The development and use of local talent.
3. Programs for children.
4. Religious programs.
5. Educational programs.
6. Public affairs programs.
7. Editorialization by licensees.
8. Political broadcasts.
9. Agricultural programs.
10. News programs.
11. Weather and market services.
12. Sports programs.
13. Service to minority groups.
14. Entertainment programming.

The FCC noted that the categories were not intended as "a rigid mold or fixed formula for station operations," but rather were "indicia of the types and areas of service which, on the basis of experience, have usually been accepted by broadcasters as more or less included in the practical definition of community needs and interests."[30]

This general approach to defining the public interest standard prevailed for the next two decades. In the years following the *1960 Programming Policy Statement*, the FCC adopted guidelines for minimum amounts of news, public affairs, and other non-entertainment programming,[31] and primetime access rules (to encourage non-network and local programming).[32]

Without specifying actual program content, the FCC's goal was to mandate certain market parameters as an indirect means of stimulating programming of civic importance.

During the 1980s, the FCC's vision of the public interest standard—and how to achieve diverse programming—underwent a significant change. As new media industries arose and a new set of FCC Commissioners took office, the FCC made a major policy shift by adopting a marketplace approach to public interest goals.[33] In essence, the FCC held that competition would adequately serve public needs and that federally mandated obligations were both too vague to be enforced properly and too much of a threat to broadcasters' First Amendment rights.[34] Many citizen groups argued that the new policy was tantamount to abandoning the public interest mandate entirely.

Pursuant to its marketplace approach, the FCC embarked on a sweeping program of deregulation, eliminating a number of long-standing rules designed to promote program diversity, localism, and compliance with public interest standards. These rules included requirements to maintain program logs, limit advertising time, air minimum amounts of public affairs programming, and formally ascertain community needs.[35] The license renewal process—historically, the time at which a station's public interest performance is formally evaluated—was shortened and made virtually automatic through a so-called "postcard renewal" process.[36] The FCC also abolished most elements of the Fairness Doctrine, which had long functioned as the centerpiece of the public interest standard.[37]

In 1996, Congress expanded the deregulatory approach of the 1980s with its enactment of the Telecommunications Act.[38] Among other things, the Act extended the length of television broadcast licenses from 5 years to 8 years[39] and instituted new license renewal procedures that made it more difficult for competitors to compete for an existing broadcast license.[40] The Telecommunications Act also lifted limits on the number of stations that a single company could own, a rule that historically was intended to promote greater diversity in programming.[41]

The range of programming has expanded as the number of broadcasting stations and other media has proliferated over the past 20 years. Yet market forces have not necessarily generated the kinds of quality, noncommercial programming that Congress, the FCC, and others envisioned. Hence, Congress and the FCC have retained rules regarding children's educational programming and candidate access, among other things.

Broadcasting as a Forum for Political Discourse

Candidate Access to the Airwaves. Although Congress gave broadcasters broad editorial control of the airwaves under the Communications Act, it retained two common-carrier-like provisions to ensure access for legally qualified candidates for Federal office. The "equal opportunities" provision of the Act—often referred to as "equal time," or Section 315—gives candidates the legal right to airtime if their opponents are given or buy airtime.[42] In addition, in the early 1970s Congress determined that it was in the public interest to expand Federal candidates' rights to obtain "reasonable access" to airtime. It enacted Section 312(a)(7) of the

Communications Act, the practical effect of which is to give candidates the right to buy at least some airtime and to specify the format and placement of their ads.[43]

Until 1959, the "equal opportunities" rules were enforced without complication. That year, Lar Daly, a political opponent of Chicago Mayor Richard Daley, demanded free airtime from a TV station after Mayor Daley was shown at a ceremonial event on the evening news. This unexpected use of Section 315 prompted Congress to amend it, exempting four categories of news programs from equal-opportunity requirements. Another complication arose in 1960 when Congress decided to suspend the rules to allow the Kennedy-Nixon debates to proceed without networks having to grant airtime to minor candidates. This exception for candidate debates was formalized and broadened in 1975, when the FCC ruled that candidate debates are "bona fide news events" and therefore covered by Section 315 exemptions.[44]

The FCC has issued other rules governing candidate access to the airwaves. For instance, the *Zapple* rule requires that if a broadcaster gives or sells airtime to supporters of one candidate, it must give or sell similar airtime to supporters of opposing candidates.[45] In the same vein, the FCC has mandated that candidates have a right of reply to political editorials and candidate endorsements and attacks made by licensees.[46] If a broadcast licensee airs an editorial that either endorses or opposes a legally qualified candidate, the licensee must notify all other candidates for that particular office within 24 hours, provide them with a script or tape, and offer them a "reasonable opportunity to respond through the use of the licensee's broadcast facilities."[47]

Congress also guaranteed that if a broadcaster offers to sell time to political candidates (including State and local candidates), the broadcaster must charge them the "lowest unit charge of the station" for the "same class and amount of time for the same period," during the 45 days preceding a primary election and the 60 days preceding a general or special election.[48]

Although candidates for Federal office have access to the airwaves under prescribed conditions, political editorial advertising that is not bought by candidates or that addresses issues without a plea to vote for a particular candidate does not enjoy such protection. The 1973 Supreme Court ruling in *CBS v. Democratic National Committee* held that broadcasters have total discretion over whether to accept or reject editorial advertisements.[49] Essentially, the Court held that broadcasters, as licensees, enjoy broad editorial control to serve the public interest and need not function as common carriers open to any paying customer. But this editorial control was justified in part, the Court noted, because the Fairness Doctrine (discussed below) and broadcast news otherwise ensure that the public can hear diverse perspectives on controversial issues.

Citizen Access to the Airwaves. For many years, the chief legal vehicle for citizens to gain direct access to the airwaves—or hear diverse viewpoints on controversial public issues—was the Fairness Doctrine. The principles behind the Fairness Doctrine were first expressed in 1929 in guidelines issued by the FRC, with regard to *Great Lakes Broadcasting Co.*[50] That Com-

mission statement affirmed the need for broadcasters to serve a diverse public with well-rounded programming.

In an effort to be even-handed, the FCC held in the *Mayflower* ruling in 1941 that a broadcast station could *never* editorialize because it would flout the public interest mandate that all sides of a controversial issue be fairly presented. Licensees, the FCC said, must present "all sides of important public questions fairly, objectively and without bias."[51]

By 1949, in its *Report on Editorializing by Broadcast Licensees*, the Commission reversed its *Mayflower* ruling that editorializing was inconsistent with the public interest.[52] But the FCC reaffirmed its holding that licensees must not use their stations "for the private interest, whims or caprices [of licensees], but in a manner which will serve the community generally."[53] To achieve this goal, the FCC promulgated the "Fairness Doctrine" to ensure that "all sides of important public questions [are presented] fairly."[54]

For decades, the Fairness Doctrine was seen as a primary feature of the public interest standard. It had two prongs. One required that broadcasters devote a reasonable amount of time to cover controversial issues of public importance.[55] The other required that they provide a reasonable opportunity for presentation of contrasting viewpoints.[56] Compliance with the Fairness Doctrine was considered a major performance criterion at license renewal time.

In the 1960s, procedures for enforcing the Fairness Doctrine were fortified.[57] Complaints about one-sided coverage were adjudicated, not just at license renewal time as part of a station's overall performance, but also on a case-by-case basis.[58] This change increased the gravity of complaints and encouraged greater FCC involvement with broadcast content.

In addition, existing principles of the Fairness Doctrine were enforced more aggressively, particularly with respect to commercial advertising, news coverage, and personal attacks. In 1963, the FCC formally articulated the principle that the presentation of only one side of an issue during a sponsored program (such as an attack on the proposed Nuclear Test Ban Treaty) required free airtime for opposing views—a rule known as the *Cullman Doctrine*.[59] Cigarette advertising, and later, controversial advertising in general, also became subject to the Fairness Doctrine.[60] In 1967 the Commission formalized its "personal attack rule" and political editorial policies in specific and specialized rules.[61]

Broadcasters, objecting to the "chilling effects" of the Fairness Doctrine on their free speech, eventually challenged its constitutionality.[62] The case that came before the U.S. Supreme Court involved Red Lion Broadcasting of Red Lion, Pennsylvania, which had refused to give writer Fred J. Cook an opportunity to reply to a personal attack on him during a paid program. Cook sued, citing the Fairness Doctrine, and prevailed in the Supreme Court.[63]

The landmark *Red Lion Broadcasting v. FCC* decision in 1969 upheld the constitutionality of the public interest standard in general and the Fairness Doctrine in particular.[64] One of the oft-quoted principles of the Supreme Court's decision echoes Herbert Hoover and the Federal Radio Commission: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[65]

Over the decades, the legal contours of the Fairness Doctrine changed—its applicability to advertising had been rescinded, for example.[66] To address these changes, the FCC in 1974 issued *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standard of the Communications Act, Fairness Report* to guide broadcasters and the public.[67] The Fairness Doctrine was in its heyday and citizen groups and others periodically complained about one-sided coverage and negotiated airtime to respond. For their part, broadcasters complained that the rule had a "chilling effect" on their free speech by discouraging them from airing programming on controversial issues.

In 1985, the FCC agreed and determined that the Fairness Doctrine was incompatible with the public interest.[68] Because of legal contention over whether the doctrine was a statutory or regulatory creation—and thus over who had the authority to revoke it—the FCC invited either Congress or the courts to make a determination. The U.S. Court of Appeals for the D.C. Circuit obliged by declaring that the FCC had the authority to rescind the Fairness Doctrine.[69] Although Congress attempted to codify the doctrine through legislation, a presidential veto quashed their effort and, in 1987, the FCC rescinded the Fairness Doctrine pursuant to the Circuit Court ruling.[70]

Broadcasting as a Force for Localism

Another long-standing tradition in broadcast regulation has been the affirmative need of stations to serve their local communities. The principle was adopted by the FRC and the FCC has cited it periodically as an important component of programming and the license renewal process.[71]

Two of the four programming requirements cited by the *Blue Book* in 1946 were "local live programs" and "programming devoted to discussion of local public issues."[72] The *1960 Program Policy Statement* gave a similar emphasis, citing "opportunity for local self-expression" and "the development and use of local talent" as the first 2 of 14 programming priorities.[73] This statement also held that the "principal ingredient" of the public interest standard "consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area. If he has accomplished this, he has met this public responsibility."[74]

The concept of seeking out the needs of the local audience, known as "ascertainment," is a procedure that many broadcasters follow as a simple matter of good business practice. But others have been less conscientious. Deficiencies in local engagement and broadcasters' desire for certainty as to what was expected of them prompted the FCC to issue a formal *Ascertainment Primer* in 1971 to "aid broadcasters in being more responsive to the problems of their communities" and to "add more certainty to their efforts in meeting Commission standards."[75] The primer advises broadcasters to consult with community leaders and members of the general public in developing suitable local programming and public service announcements.

Although some television stations criticized ascertainment procedures as empty and costly formalisms, many community leaders saw the procedures as a useful requirement that can lead

to responsive local programming. In any case, the FCC removed formal ascertainment requirements from its books in 1984 as part of its new deregulatory approach.[76] The FCC now relies on broadcasters and the marketplace to meet their general obligation to serve their local communities.

Localism was one reason why Congress enacted the 1962 "all-channel" law—a law that required that all television receivers be capable of receiving both VHF and UHF signals. The idea, according to a House committee report, was to "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression."[77] With varying degrees of success, the FCC has also sought to promote locally originated programming through the Prime Time Access Rule (a rule that once limited networks to 3 hours of programming during primetime, but has since been repealed) and through policy statements that mention local news and public affairs programming as inherent to the public interest standard.[78]

The bond between broadcasters and their local communities was given a new and stronger dimension in the 1960s as a result of *United Church of Christ v. FCC*.[79] In 1964, after the station owner of WLBT in Jackson, Mississippi, aired a program urging racial segregation but refused to air the views of civil rights activists or even to meet with them, the United Church of Christ and others petitioned for legal standing to challenge the renewal of WLBT's broadcast license. A Circuit Court ruling in 1966 held that citizens have the right to participate in the FCC license renewal process.[80] This ruling opened the door to active citizen participation with local broadcasting and the FCC, a major development that gave greater substance to the principle that broadcast licensees must serve their local communities.

Localism has been such a central feature of broadcast television that Congress in 1992 declared: "A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."[81] Pursuant to this and other goals, Congress enacted Sections 4 through 6 of the Cable Television Consumer Protection and Competitive Act of 1992 to ensure that local broadcast programming would be available to the millions of Americans who cannot afford cable TV or do not have access to free local programming.[82] The so-called "must-carry" rules that resulted require cable operators to distribute broadcast television programming over their systems.[83] Although the cable industry challenged the constitutionality of must-carry rules, the Supreme Court in *Turner Broadcasting v. FCC* recognized Congress's rationale and upheld the must-carry rules as consistent with the First Amendment.[84]

As must-carry and other regulations illustrate, policymakers view broadcast television primarily as a local service. Community programming and service are public interest responsibilities that distinguish broadcasting from most other electronic media.

The Public Interest in Children's Educational Programming

Until 1960, when the FCC's *Program Policy Statement* cited children's programming as one of the 14 components "usually necessary to meet the public interest, needs and desires of the

community," the public interest standard did not explicitly mention the needs of children.[85] Fulfillment of that commitment has been uneven, because of commercial pressures on broadcasters to expand the number of advertising minutes per hour. Moreover, it is difficult to define "quality" programming in an enforceable way.

The debate over children's television has revolved mainly around specific ways in which children's programming could or could not be exempted from the customary workings of the marketplace to produce "better" programming. The earliest, most ambitious attempt to develop extra-market standards for children's television was initiated by Action for Children's Television. The group sought 14 hours of children's programming per week per station; age-appropriate programming for different groups of children; bans on performers promoting products during programs; and the clustering of commercials at the beginning and end of programs.[86] (In the meantime, on a separate front, a new genre of noncommercial children's programming, exemplified by *Sesame Street*, arose, largely insulated from customary commercial pressures.)

The FCC initiated a rulemaking on children's television in 1971,[87] and what ultimately resulted, in 1973, were a number of voluntary changes to the National Association of Broadcasters' code. The NAB agreed to separate commercials from programming and ban host selling; to forbid ads for vitamins and drugs during children's shows; and to reduce the number of ads per hour from 16 minutes to 12 minutes during weekdays and to 9 minutes during the weekend.[88]

After the NAB amended its voluntary industry code, the FCC chose not to exercise its authority and issue new requirements for children's programming. The Commission did, however, issue a *1974 Policy Statement* in which it stated, "broadcasters have a special obligation to serve children."[89] The statement had no specific mandates, opting instead for a general, ad hoc approach to the problems documented. Still, the authority of the FCC to require programming to meet the needs of children was later upheld by the D.C. Circuit Court in *ACT v. FCC*, which wrote: "It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligations under the Communications Act to operate in the 'public interest.'"[90]

In 1975, reporting rules for children's programming were tightened.[91] Guidelines were reaffirmed in the *1979 Children's Television Report*, which determined that self-regulation was not working.[92] The 1979 report showed continued shortcomings[93] and proposed somewhat more prescriptive rules.[94]

This initiative never came to fruition, however, as a new set of commissioners took office in the early 1980s and a new chairman, Mark Fowler, decided in 1984 that the marketplace could sufficiently meet children's needs and serve the public interest.[95] On this basis, the FCC repealed the *1974 Policy Statement* that stations should air educational and informational programming for children.[96] Critics charged that the amount of children's programming dramatically declined as a result and that the toy merchandising tie-ins to programming increased.[97] Meanwhile, during the Reagan Administration, the Department of Justice success-

fully challenged a provision in the NAB's voluntary code that limited certain advertising practices as a violation of antitrust law.[98] After this action in 1982, the NAB decided to eliminate the remainder of its code, including its limits on children's advertising practices.

Disturbed by the failure of a deregulated marketplace to generate adequate educational programming for children and to curb over-commercialization, Congress in 1990 enacted the Children's Television Act of 1990.[99] The Act mandated that advertising on children's programming be limited to 12 minutes per hour during weekdays and 10.5 minutes during weekends.[100] The Act also declared that the "educational and informational needs of children" would be a criterion for assessing a broadcaster's public interest performance at license renewal time.[101]

Under Chairman Hundt, the FCC developed processing guidelines that ensured automatic license renewals for stations that aired 3 hours of children's educational programming but full Commission review for those stations that did not.[102] It also issued more specific definitions of what constitutes educational and informational programming for children.[103]

The public interest in affirmatively serving children has had a number of other expressions. The Telecommunications Act of 1996 encouraged the television industry to develop a voluntary ratings system that allows parents to assess the suitability of programming for their children. This measure is designed for use in conjunction with the so-called V-chip in television sets, which will enable parents to block objectionable programming.

Access by Persons with Disabilities

Just as Congress has expanded choices for children and parents through Federal mandates, it has sought to expand television access for individuals with disabilities. These efforts have primarily focused on the expansion of closed captioning and the use of video descriptions.

Since 1976, the FCC has reserved Line 21 of the vertical blanking interval of analog television signals for the transmission of closed captioning. The captions, which parallel the audio content of television programming, are decoded and generated into visual characters which are displayed on TV screens. Captioning services first began in the early 1980's, through the voluntary efforts of the Public Broadcasting System and the major commercial broadcasting networks. Since that time, the number of programs broadcast with captions has grown dramatically, and captioning has become widely used among the 28 million Americans who are deaf and hard of hearing, among individuals learning English as a second language, and among individuals seeking to attain literacy.

Congress has recognized the public interest in expanding captioning access through two key legislative acts. The Television Decoder Circuitry Act (TDCA), passed in 1990, requires all television sets with screens 13 inches or larger manufactured or imported into the United States after July 1, 1993, to display closed captions through a "decoder chip" built into the sets.[104] Prior to the TDCA, individuals were required to purchase expensive and cumbersome external decoder equipment to receive captions. The TDCA—originally patterned after the All Channel Receiver Act of 1962 which mandated the inclusion of UHF tuners in all televi-

sion sets[105]—was intended to expand the caption viewing audience, and thereby create the necessary economic incentives for networks to caption more of their programs. Anticipating the advent of digital television technologies, Congress also included a section in the TDCA requiring the FCC to ensure that, as these technologies are deployed, closed captions will continue to be available to viewers without the need for separate decoders.

Although the TDCA had been designed to provide sufficient market incentive for the continued expansion of captioned programming, the early 1990's did not see a significant increase in captioning on certain types of programming, including daytime and cable programming. In order to address this situation, Congress enacted Section 305 of the Telecommunications Act of 1996,[106] which sets forth extensive requirements for the provision of closed captions on television. An FCC rulemaking implementing this section[107] requires 100 percent of all non-exempt "new" programming, defined as programming first published or exhibited after January 1, 1998, to be captioned over a period of 8 years. Seventy-five percent of older or "pre-rule" non-exempt programming, first published or exhibited prior to January 1, 1998, must be captioned over a 10-year period, by 2008. The FCC's rules exempt, *inter alia,* advertisements under 5 minutes, interstitial and promotional programming, limited late-night programming, and programming by new networks during their first 4 years of existence. An additional exemption exists for small programming providers with annual gross revenues of under $3 million,[108] and all programming providers are permitted to limit their expenditures on captioning to 2 percent of their annual gross revenues.[109]

In Section 305 of the Telecommunications Act, Congress also recognized the need to expand television access to blind and visually disabled persons. That section directed the FCC to conduct a study on the feasibility of requiring video descriptions on television programming. Video Descriptions consist of verbal descriptions of key visual elements in a video program, and offer, for example, information about settings, gestures, costumes, and actions. In the resulting Video Accessibility Report[110] to Congress, the FCC concluded that the record was insufficient to assess appropriate methods and schedules for phasing in video description. The FCC continues to monitor this issue through its annual report on competition in video markets.

Equal Employment Opportunity

Ensuring that equal employment opportunities exist at the workplaces of broadcast licensees is another important component of the public interest standard. Equal employment opportunity (EEO) is a well-established national policy. Mandated first by Section VII of the Civil Rights Act of 1964, this policy is currently overseen by the Equal Employment Opportunities Commission and the Department of Justice.[111] Broadcast licensees must provide equal employment opportunities to meet the public interest standard. Authority to ensure compliance with EEO requirements is within the FCC's expansive powers to ensure that licensees serve the "public interest, convenience and necessity," as specified in the Communications Act.[112] The FCC is obliged to ensure that licensees act as responsible public trustees, which requires an attentiveness to the concerns of members of minority groups and women in a number of areas.[113]

For example, the character qualifications of broadcast licensees is one factor that the FCC must consider in granting licenses, a principle that may entail practices that affect members of minority groups and women.[114] Serious questions about the character of a licensee would be raised if a broadcaster consistently discriminated in its employment practices. Similarly, the FCC, in implementing the public interest standard, has long sought to ensure that diverse viewpoints, including those of minorities, are expressed in programming and included in programming decisions.[115] The FCC has determined that one important way of fulfilling this mandate is through the recruitment and employment of a reasonable number of members of minority groups, and women.[116]

Historically, the public interest standard has required that licensees ascertain community needs as part of their public trustee function, in order to help make programming more responsive to local communities. A licensee who discriminates in employment policies or practices is not likely to fulfill the ascertainment function well. As the FCC noted in 1968, the existence of discriminatory employment practices "immediately raises the question of whether [the licensee] is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts."[117]

As these examples suggest, although FCC policymaking in equal employment opportunities supports a general national policy, it is based on the distinctive character of broadcasting as a unique mass medium and by the specific statutory mandate of the Communications Act and its administrative implementation.

The FCC first issued EEO rules in 1969 when it prohibited discrimination among licensees and required that they review their employment policies and practices to identify any barriers to equal opportunities.[118] The FCC's policies and enforcement have evolved over the years to take account of other, more specific needs. Broadly speaking, FCC rules prohibit broadcasters from overt discrimination on the basis of race, color, national origin, religion, and gender.[119] They have also required broadcasters to show that they have made systematic efforts to recruit, hire, and promote members of minority groups and women.[120]

In addition, the rules require annual reporting of data showing the results of those efforts.[121] Since 1973, the Commission's assessment reviewing this employment data has become a regular part of the assessment of broadcasters' license renewal applications. The FCC requires that broadcasters whose results fall below certain benchmarks demonstrate that they have sought to recruit members of minority groups and women.[122] Since the FCC adopted its EEO rules, broadcast industry employment at all levels, including management, has improved more rapidly than in the rest of the American workforce.[123]

Specific regulatory approaches for promoting equal employment opportunity in broadcasting have changed over time and are likely to continue to evolve. The FCC's basic commitment to promoting equal employment opportunity in broadcasting and diversity of programming and viewpoints remains unchanged.[124]

The FCC's EEO policy was modified in 1998 when the U.S. Court of Appeals for the D.C. Circuit declared its minority recruitment rules unconstitutional.[125] It is unclear to some parties whether the ruling affects only the FCC's processing guidelines, or if it also undermines the FCC's broader authority even to issue EEO recruitment rules. On November 19, 1998, in response to the Court of Appeals's ruling, the FCC proposed new equal employment opportunity rules that would require broadcast licensees to inform women and members of minority groups of job vacancies.[126] (Unlike the previous EEO rules, the new rules would not require licensees to assess how the composition of their employment profiles compares with the composition of the local labor force, nor would the FCC use such comparisons—sometimes referred to as "processing guidelines"—when assessing a licensee's EEO program.)[127] In its Notice of Proposed Rulemaking, the FCC invited comment on its belief that the FCC has ample statutory authority to retain the anti-discrimination provisions of the broadcast EEO rules.[128]

Over time, shifts in the regulatory implementation of EEO goals are inevitable. But the FCC's authority to advance equal employment opportunities remains intact and is an important component of the public interest standard.

CONCLUSION

Although some of its specific applications have been controversial, the public interest standard is widely accepted as integral to broadcasting. The standard provides the legal basis for promoting greater diversity in programming, more robust political discussion, candidate access to the airwaves, programming that serves local communities, children's educational programming, access to programming for Americans with disabilities, and equal employment opportunities within broadcasting.

As the new era of digital television arrives, the times demand a thoughtful re-engagement with the meaning of the public interest standard. Many existing principles of public interest performance will likely need new interpretations in light of the new technology, market conditions, and cultural needs. In this spirit, the Advisory Committee turns now to some imaginative, flexible, and effective strategies that it believes will help ensure that the traditional public purposes of broadcast television will continue to be met in the digital era.

ENDNOTES

1 Communications Act of 1934, ch. 652, 48 Stat.1064 (codified in 47 U.S.C. §§ 151-611 (1994); Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

2 Radio Act of 1912, ch. 287, § 1, 37 Stat. 302.

3 *See, generally,* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin ed. 1989). See the legislative history of the Communications Act recounted in *CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973); *see also* Tracy Westen, *Government-Created Scarcity: Thinking About Broadcast Regulation and the First Amendment*, *in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST 47 (Charles M. Firestone & Amy Korzick Garmer, eds. 1998).

[4] *See* Robert W. McChesney, Telecommunications, Mass Media and Democracy: The Battle for Control of U.S. Broadcasting 1928-1935 at 18 and n. 27 (citing. Louis G. Caldwell, *The Standard of Public Interest, Convenience or Necessity, as Used in the Radio Act of 1927*, 1 Air L.R. 295 (1930) and William D. Rowland, Jr., *The Meaning of The Public Interest in Communications Policy—Part I: Its Origins in State and Federal Regulation*, Presentation Before the International Communications Association (Annual Meeting, 1989)).

[5] Although the Communications Act does not expressly obligate broadcasters to serve the public interest, it authorizes the Commission to perform certain regulatory functions "from time to time, as the public convenience, interest, or necessity requires." Communications Act of 1934, ch. 652, § 303 (codified in 47 U.S.C. § 303 (1994)). It specifies that Commission may issue, modify, or renew a broadcast license if it determines that the "public interest, convenience, or necessity would be served" thereby. *Id.* § 309(a), 47 U.S.C. § 309(a) (1994). It also provides that broadcast licenses may not be transferred "unless the Commission shall, after securing full information, decide that said transfer is in the public interest." *Id.* § 310(b), 47 U.S.C. § 310(b) (1994). *See also* Radio Act of 1927, ch. 169, §§ 4, 11, 12, 44 Stat. 1163, 1167 (setting forth similar provisions).

[6] *Schaeffer Radio Co.* (FRC 1930) (quoted in John W. Willis, *The Federal Radio Commission and the Public Service Responsibility of Broadcast Licensees*, 11 Fed. Com. B.J. 5, 14 (1950)).

[7] *See e.g., Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 380 (1969) (citing *Nat'l. Broad. Co. v. U.S.,* 319 U.S. 190, 219 (1943) and noting that the "mandate to the FCC to assure that broadcasters operate in the public interest is a broad one…")

[8] *See* 47 U.S.C. §326 (1994) ("Nothing…shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station"); *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 650 (1994) ("the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations").

[9] *Red Lion Broad. Co. supra* note 7.

[10] *Id.* at 388-89.

[11] *Id.* at 389.

[12] The Supreme Court has either relied on *Red Lion* or cited it approvingly in *CBS Inc.* 412 U.S. 94, 123 (1973); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 798-800 (1978); *CBS Inc. v. FCC*, 453 U.S. 367, 395-96 (1981); *FCC v. League of Women Voters* 468 U.S. 364, 377-78 (1984); and *Turner Broad. Sys, Inc.. v. FCC*, 512 U.S. 622, 637-638 (1994). Some constitutional law scholars, however, cite language in many of these cases to suggest that the Court might be willing to reconsider *Red Lion* under appropriate circumstances.

[13] Expressions of these viewpoints include Thomas G. Krattenmaker & Lucas A. Powe, Jr. Regulating Broadcast Programming 204-19 (1994) and Laurence H. Winer, *Public Interest Obligations and First Principles* at 4-5, Issues in Broadcasting and the Public Interest, Paper No. 1 (The Media Institute, 1998).

[14] *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test

of truth is the power of the thought to get itself accepted in the competition of the market").

15 CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvii (The Free Press 1995) (1993).

16 A key statement of Brandeis' understanding of the First Amendment can be seen in *Whitney v. California*, 274 U.S. 357, 372 (1927), in which Brandeis writes that "the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

17 An illuminating review of Brandeis' views of free speech can be found in Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988), and in John Rawls, POLITICAL LIBERALISM 351-56 (1993).

18 *See* SUNSTEIN *supra note 15*.

19 *Id.* at 249.

20 *Id.* at 101-103.

21 Robert Corn-Revere, "Self-Regulation and the Public Interest," *in* DIGITAL BROADCASTING AND THE PUBLIC INTEREST 63 (Charles M. Firestone & Amy Korzick Garmer, eds. 1998). For similar perspectives, see Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) and Laurence H. Winer, *Deficiencies of the "Aspen Matrix"* at 12-13, *Issues in Broadcasting and the Public Interest,* Paper No. 3 (The Media Institute 1998).

22 *Great Lakes Broad. Co.*, 3 FRC Ann. Rep. 32, 34 (1929) (quoted in J. Roger Wollenberg, *The FCC as Arbiter of "The Public Interest, Convenience, and Necessity,"* in Paglin, *supra* note 3, at 61.)

23 One such propaganda station, for example, featured an evangelist stridently attacking other religions; another featured a "goat-gland doctor" hawking his own dubious medicines. *See* Erwin Krasnow, *The "Public Interest" Standard: The Elusive Search for the Holy Grail*, 50 FED. COM. L.J. 605, 613 (1998).

24 319 U.S. 190 (1943).

25 Formally entitled, *Public Service Responsiblity of Licensees,* this document became known as the *Blue Book* because of its blue cover.

26 *See generally,* KRATTENMAKER, *supra* note 13; JOHN R. BITTNER, LAW AND REGULATION OF ELECTRONIC MEDIA, (2nd ed. Prentice Hall 1994) (recounting history of the regulation of broadcast programming).

27 *Id.*

28 *En banc Programming Inquiry,* 44 FCC 2303 (1960).

29 *Id.* at 2314.

30 *Id.* at 2313.

31 FCC guidelines on non-entertainment programming, contained in delegations of authority to FCC staff, provided standards of at least 5 percent local programming, 5 percent informational programming (defined as news and public affairs), and 10 percent total non-

entertainment programming. In general, any renewal or assignment application that fell short of the guidelines had to be sent to the full Commission for action. These guidelines were adopted in 1976 and repealed by the FCC in 1984. *Amendments to Delegations of Authority*, 59 FCC 2d 491, 493 (1976).

[32] The Prime Time Access Rule generally limited the television networks from offering more than 3 hours of primetime entertainment programming per day. The rationale for the rule was to allow non-network production houses to produce programming for the vacated time periods. *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Report and Order, 23 FCC 2d 382, 385-87 (1970), *aff'd sub nom. Mt. Mansfield Television Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971). The Commission modified the Prime Time Access Rule in 1974. *Consideration of the Operation of, and Possible Changes in, the "Prime Time Access Rule" in Section 73.658(k) of the Commission's Rules*, 44 FCC 2d 1081 (1974), *aff'd sub nom. National Ass'n of Indep. Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). The FCC repealed the rules in 1995. *Review of the Prime Time Access Rule,* 11 FCC Rcd 546 (1995) (repealing the Prime Time Access rule effective Aug. 30, 1996).

[33] The Commission commenced its radio deregulation in 1979 under Chairman Charles Ferris, a Carter appointee. President Reagan's choice for Commission Chairman, Mark S. Fowler, aggressively pursued television deregulation.

[34] A leading statement of this approach to FCC regulation of broadcasters is set forth in a law review article by the then FCC Chairman and his legal assistant. Mark Fowler and Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEXAS L. REV. 2087 (1982).

[35] These rules were all repealed in the same order, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984) *recon. denied*, 104 FCC 2d 358 (1986), *affd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). The major litigation on deregulation and repeal of program guidelines concerned the repeal of radio rules in 1981, and was over before television deregulation was adopted in 1984. *Deregulation of Radio*, 84 FCC 2d 968, *recon. denied,* 87 FCC 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communications of the United Church of Christ v. FCC*, 709 F.2d 1413 (D.C. Cir. 1983).

[36] Postcard renewal was adopted in *Revision of Applications for Renewals of License of Commercial and Non-Commercial AM, FM and Television Licensees*, 49 RR 2d 740, *recon. denied*, 87 FCC 2d 1127 (1981), *aff'd. sub nom. Black Citizens for A Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

[37] The legal history of the Fairness Doctrine is complicated, but stated simply, the FCC stopped enforcing most applications of the Fairness Doctrine in *Syracuse Peace Council,* 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd. sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1019 (1990). In 1992, the Commission announced it would no longer apply the doctrine to ballot issues. *Arkansas AFL-CIO,* 7 FCC Rcd 541 (1992), *aff'd. on other grounds sub nom. Arkansas AFL-CIO v. FCC*,

11 F.3d 1430 (8th Circ. 1993)(*en banc*). Still, the Commission continues to enforce several aspects of the Fairness Doctrine, including the political editorial and personal attack rules. The decision to continue enforcing these rules has been challenged.

[38] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. 151 et. Seq.) (Feb. 8, 1996).

[39] *Id.* at § 203 (codified at 47 U.S.C. 307(c)).

[40] *Id.* at § 204 (codified at 47 U.S.C. 309(k)).

[41] *Id.* at § 202.

[42] Communications Act of 1934 (as amended), 47 U.S.C. § 315(a).

[43] 47 U.S.C. § 312(a)(7).

[44] *See Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 9 FCC Rcd 551, 651-52 (1994).

[45] *Letter to Nicholas Zapple*, 23 FCC 2d 707 (1970).

[46] 47 C.F.R. § 73.1930.

[47] *Id.*

[48] The lowest unit rate requirement, codified as 47 U.S.C. §, 315(b), was adopted in 1972, in Pub. L. 92-225, and somewhat modified in 1974, in Pub. L. 93-442.

[49] *Columbia Broad. Sys., Democratic National Committee* 412 U.S. 94, 130-31 (1973).

[50] *Great Lakes Broad. Co.,* 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds,* 37 F.2d 993 (D.C. Cir.), c*ert. denied,* 281 U.S. 706 (1930).

[51] *Mayflower Broad. Corp. supra,* note 46, at 340.

[52] *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, 1258 (1949).

[53] *Id.* at 1248-49.

[54] *See* 47 C.F.R. §73.1910.

[55] *See Red Lion Broad., supra* note 7, at 377-78.

[56] *Id.*

[57] *See Letter to Oren Harris*, 40 FCC 582 (1963).

[58] *Id.* at 583 ("[W]e believe that under the public interest standard itself we must, as far as practicable, determine fairness questions at the time of the complaint rather than awaiting renewal.")

[59] The *Cullman Doctrine* was set forth in a letter decision in 1963. *Cullman Broad. Co., Inc.,* 40 FCC 576 (1963).

[60] This history is complicated, but one landmark case was *Banzhaf v. FCC,* 405 F.2d 1082 (D.C. Cir. 1968), *cert denied,* 396 U.S. 842 (1969), in which the Court of Appeals held that cigarette ads were subject to the Fairness Doctrine. The Commission later held that there was no longer any controversy about the "general [point]… that cigarette smoking is hazardous to public health," so anti-smoking public service announcements did not have to

be balanced with pro-smoking messages. *Formulation of Appropriate Further Regulatory Policies Concerning Cigarette Advertising and AntiSmoking Presentations*, Report and Order, 27 FCC 2d 453 (1970), *aff'd. sub nom. Larus & Brother, Inc. v. FCC*, 477 F.2d 876 (4th Cir. 1971).

[61] The personal attack rule requires licensees to give reply time to persons or groups whose honesty is challenged during discussion of controversial issues. 47 C.F.R. § 73.1920. The political editorial rule permits candidates to reply to licensees' editorial endorsements. 47 C.F.R. § 73.1930. Like *Cullman*, the personal attack and political editorial concepts were integral to the Fairness Doctrine from the outset. Indeed, the *Red Lion* case was itself a personal attack case that predated the 1967 adoption of the specific rules. *Red Lion*, *supra* note 7. In response to criticism that the application of the Fairness Doctrine in those circumstances was too vague, the FCC adopted specific rules. *Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates*, Memorandum and Order, 8 FCC 2d 721 (1967). The two rules were also upheld in the companion case that was consolidated into *Red Lion* by the Supreme Court. *Red Lion*, *supra* note 7 at 371-71.

The personal attack and political editorial rules (subsets of the Fairness Doctrine) and the so-called "quasi-equal opportunities" policy (the Zapple rule) have at all times been subject to continued enforcement, even with rescission of the Fairness Doctrine. Letter from Dennis R. Patrick, Chaiman, *Federal Communications Commission* to U.S. Representative John D. Dingell, Chairman, *Committee on Energy and Commerce* (Sept. 22, 1987). In the summer of 1998, however, the FCC declared by a split vote of two-to-two (with Chairman Kennard recused) that it had no majority to repeal the personal attack and political editorial rules. Public Notice, Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, 12 Communications Reg. (P & F) 497 (1998). This decision is being challenged in court. *Id.*

[62] *See, Red Lion, supra* note 7.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 390.

[66] In *Friends of Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971), *remanded sub nom. Complaint by Friends of the Earth Concerning Fairness Doctrine re Station WNBC-TV, New York, N.Y.*, 39 FCC 2d 564 (1973) the Court of Appeals extended *Banzhaf* to gasoline ads. The Commission responded by changing its policy to repeal application of the Fairness Doctrine to all ads. *Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards ofthe Communications Act*, 48 FCC 2d 1, 24-26 (1974), *aff'd. sub. nom. NCCB v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 926 (1978) (*1974 Fairness Report*).

[67] *See 1974 Fairness Report supra.*

[68] *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees,* 102 FCC 2d 145 (1985), *petition for review docketed sub nom. Radio-Television News Directors Ass'n v. FCC,* No. 85-1691 (D.C. Cir. 1985).

[69] *TRAC v. FCC,* 801 F.2d 501, 517 (D.C. Cir.) *pet. for reh'g. en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). *See also, Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993)(*en banc*).

[70] *Syracuse Peace Council,* 2 FCC Rcd 5043, 5054-55 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd. sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1019 (1990).

[71] *See Public Service Reponsibilities of Broadcast Licensees,* 12 (1946) (*Blue Book*) (quoting *Great Lakes Broad. Co.,* 3 F.R.C.Ann. Rep. Docket No. 4900 (1928)). *See also* Communications Act of 1934 (as amended), supra note 1 at § 307(b)).

[72] *Blue Book*, *supra* at 12, 36-40.

[73] Commission Policy on Programming, 20 Rad. Reg. (P &F) 1901, at 1913 (July. 29, 1960) (*1960 Program Policy Statement*).

[74] *Id.* at 1912.

[75] *Primer on Ascertainment of Community Problems by Broadcast Applicants, Part I, Sections IV-A and IV-B of FCC Forms*, Report and Order, 27 FCC 2d 650, 651 (1971), amended by 76 FCC 2d 401, 414(1980). This Primer was overruled in 1984 by *Revision of Programming and Commercialization Policies, Ascertaiment Requirements, and Program Log Requirements for Commercial Television Stations,* Report and Order, 98 FCC 2d 1076, 1116 (1984) (*Revision of Ascertaiment Requirements*).

[76] *See Revision of Ascertaiment Requirements, supra.*

[77] *See* BARRY COLE & MAL OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE 174 (1978).

[78] The Prime Time Access Rule was adopted in 1970 and repealed in 1995. *See Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules*, Report and Order, 11 FCC Rcd 546, 550-53,608 (1995).

[79] *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir., 1966).

[80] *Id.* at 1009.

[81] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, 1461 (1992).

[82] *Id.* at 1461-63.

[83] *Id.* at 1471-81.

[84] *Turner, supra* note 8.

[85] *1960 Program Policy Statement, supra* note 73 at 1913.

[86] *Petition of Action for Children's Television for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs,* Notice of Inquiry and Notice of Proposed Rule Making, 28 FCC 2d 368 (1971).

[87] *Id.*

[88] *Petition of Action for Children's Television for Rulemaking*, Children's Television Report and Policy Statement, 50 FCC 2d 1, 5 (1974) *aff'd*, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977)*(1974 Policy Statement). Children's Television Report and Policy Statement, supra* at 12 (1974), *aff'd sub nom. Action for Children's Television supra.*

[89] *See 1974 Policy Statement supra* at 5.

[90] *Action for Children's Television supra* note 88, at 465.

[91] *Petition of Action for Children's Television for Rulemaking*, Memorandum and Opinion and Order, 58 FCC 2d 1169 (1975).

[92] *Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Broadcast Stations*, 11 FCC Rcd 10660, 10668 (1996)(citing *Television Programming for Children, A Report of the Children's Task Force*, (1979)) (*1979 Children's Television Report*).

[93] *See id.* (citing *1979 Childrens Television Report, Vol. 1,* at 3).

[94] *Children's Television Programming and Advertising Practices,* Notice of Proposed Rulemaking, 75 FCC 2d 138 (1979).

[95] *Children's Television Programming and Advertising Practices,* Report and Order, 96 FCC 2d 634 (1984), *aff'd sub nom. ACT v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

[96] *Id.* at 635, 648, 656.

[97] Newton N. Minow & Craig L. LaMay, Abandoned in the Wasteland: Children, Television and the First Amendment (1997).

[98] *United States v. Nat'l Ass'n of Broad.*, 553 F. Supp. 621 (D. D.C. 1982).

[99] Children's Television Act of 1990, Pub. L. 101-437, 104 Stat. 996 (1990).

[100] *Id.* at § 102(b).

[101] *Id.* at § 103(a)(2).

[102] *Policies and Rules Concerning Children's Television Programming, supra* note 92 at 10715-727. *See also* 47 C.F.R. § 73.671.

[103] *Policy and Rules Concerning Children's Television Programming, supra* note 92.

[104] Television Decoder Circuitry Act of 1990, Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §303 (a), 330(b)) The FCC has promulgated extensive rules to govern the display of closed captions. Report and Order, Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990 Gen. Dkt. 91-1, FCC 91-119 (April 12, 1991). Among other things, these stan-

dards cover caption size, the use of color characters, upper and lower case characters, italics, scrolling, and compatibility with cable scrambling technology.

[105] 47 U.S.C. §303(s).

[106] 47 U.S.C. §713.

[107] *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility,* Report and Order, 13 FCC Rcd 3272 (1997) and Order on Reconsideration, MM Dkt. No. 95-176 (Sept. 17, 1998).

[108] 47 C.F.R. §79.1(d)(12).

[109] 47 C.F.R. §79.1(d)(11).

[110] *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1997, Video Programming Accessibility,* Report. FCC 96-318, MM Dkt. No. 95-176 (July 29, 1996).

[111] 42 U.S.C. § 2000e *et. seq.* (mandated first by Section VII of the Civil Rights Act of 1964.)

[112] *See generally National Broad. Co. v. U.S.,* 319 U.S. 190, 219 (1943)("the Act gave the Commission...expansive powers").

[113] *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees,* Report and Order, 60 FCC 2d 226, 229-30 (1976).

[114] *See, e.g., National Organization for Women v. FCC,* 555 F.2d 1002 (D.C. Cir. 1977).

[115] This authority was upheld by the Supreme Court in *NAACP v. FPC*, 425 U.S. 662, 666-669 (1976).

[116] *See* 47 C.F.C. § 73.2080 (b), (c).

[117] *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 FCC 2d at 770 (1968).

[118] *Nondiscrimination in Broadcast Employment,* 18 FCC 2d 240 (1969).

[119] 47 CFR § 73.2080(a).

[120] *Id.*

[121] 47 C.F.R. § 73.3612.

[122] *See, Review of Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Notice of Proposed Rule Making, (*EEO NPRM)* ¶ 9, MM Docket Nos. 98-204, 96-16, (Released Nov. 20, 1998).

[123] *See, e.g., Implementation of the Commission's Equal Opportunity Rules,* 9 FCC Rcd 2047, 2049-50 (1994).

[124] *See, e.g.*, *EEO NPRM*, *supra* note 122.

[125] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487 (D.C. Cir. 1998).

[126] *EEO NPRM*, *supra* note 122.

[127] *Id.* ¶¶ 52, 58.

[128] *Id.* ¶¶ 59-60.

Section III. Recommendations of the Advisory Committee

As the preceding sections suggest, there are great complexities in applying the principles of public trusteeship to the new realities of digital television. The challenges are at once technological, legal, social, political, and economic in nature, and are so intertwined as to create difficult questions for policymakers and broadcasters alike. The Advisory Committee has sought to face these challenges squarely, recognizing that, while the digital television age may introduce new uncertainties, it also holds great opportunities.

The Advisory Committee's inquiry has been necessary because the seemingly simple transition from analog to digital television broadcasting actually entails many complications. Analog broadcasters send one signal, usually 24 hours a day. Digital broadcasters may send one or multiple signals, at many different time periods throughout the day. Some of these signals may be programs; others may involve data transmissions or other broadband and telecommunications services. The vast new range of choices inherent in digital television technology makes it impossible to transfer summarily existing public interest obligations to digital television broadcasting. A key mandate for the Advisory Committee, therefore, has been to suggest how traditional principles of public-interest performance should be applied in the digital era.

A second mandate has been to consider what additional public interest obligations may be appropriate, given the enhanced opportunities and advantages that broadcasters may receive through digital broadcasting. The grant by Congress of the use of digital spectrum to broadcasters is valuable. We are in no position to assess that value in monetary terms. No one knows whether digital television will maintain, much less increase, broadcasters' revenues. If the digital portion of the public airwaves does provide enhanced economic benefits to broadcasters, however, it is reasonable to recommend ways for the public to receive some benefit in return.

Whether or not digital broadcasting results in greater revenues for licensees, it promises to open up exciting new opportunities for meeting important goals for our society. Channels of communication will be more plentiful. The clarity of images will be sharpened and sound quality enhanced. The varieties of television signals that can be transmitted—and the imaginative new programming and information formats—will expand.

The television medium, in short, will become more versatile, flexible, and abundant. The sheer capacity of digital television will also allow specialized interests and needs to be met more effectively. New openings for improving political discourse and invigorating democratic deliberation will be possible. New ways to meet the educational needs of Americans can be developed. The work of schools, libraries, training centers, and distance education can be enhanced. One can imagine new communications venues for diverse groups in each community. Digital broadcast technology also can help improve early warning of impending natural disasters, and enhance the opportunities for individuals with hearing and vision disabilities to receive programming and communications.

Some of these goals, such as disaster notifications and expanded closed captioning, can be achieved at modest additional expense. Others, such as enhancing education, will clearly cost more. In its recommendations, the Advisory Committee explores ways of achieving these goals without placing undue or unreasonable burdens on broadcasters.

Formulating recommendations that could command a broad consensus yet speak with clarity has been a special challenge for this Advisory Committee. The 22 members of this panel represent a diverse range of interests and perspectives. Formulating recommendations is difficult, too, because no one really knows how digital broadcasting will develop. It is unclear when receiver costs will become low enough to attract significant audiences; when digital broadcasting will actually supplant analog broadcasting; and which transmission formats digital broadcasters will choose to offer—single-signal high-definition programming, multiple-channel multiplexing, or any number of data/information services.

The answers to these issues are likely to vary from one region of the country to another, and in major metropolitan areas as opposed to rural communities. Significant technical questions also remain, such as what technical formats will dominate, how advances in screen technologies may enhance viewing, and how improvements in compression technologies may expand channel capacity.

Mindful of these uncertainties, the Advisory Committee has operated under several basic principles in formulating its recommendations. The first is that the public, as well as broadcasters, should benefit from the transition to digital television. Second, flexibility is critical to accommodate unforeseen economic and technological developments.

Third, the Advisory Committee has favored, whenever possible, policy approaches that rely on information disclosures, voluntary self-regulation, and economic incentives, as opposed to regulation. Traditional regulation tends to be inflexible and can generate counterproductive incentives for broadcasters. On the other hand, marketplace forces do not always deliver important social benefits, such as sufficient educational programming for children or adequate attention to public affairs. In such circumstances, government can appropriately play a role.

The Committee's preference for minimal regulation does not mean total deregulation or the elimination of broadcasters' public interest obligations.[1] Broadcasters have a long tradition of commitment to the public interest and have formally affirmed their commitment to serve as

guardians of the public trust in their use of the public airwaves. Congress, the Executive Branch, and the courts have consistently held that public interest obligations for broadcasters are appropriate and required as a condition of using valuable portions of the public airwaves. Those obligations do not disappear in a digital era. With these recommendations, the Advisory Committee hopes public interest service in broadcasting will be continued and enhanced.

The recommendations that follow address ten key areas of concern:

1. Disclosure of Public Interest Activities by Broadcasters
2. Voluntary Standards of Conduct
3. Minimum Public Interest Requirements
4. Improving Education Through Digital Broadcasting
5. Multiplexing and the Public Interest
6. Improving the Quality of Political Discourse
7. Disaster Warnings in the Digital Age
8. Disability Access to Digital Programming
9. Diversity in Broadcasting
10. New Approaches to Public Interest Obligations in the New Television Environment

CORE RECOMMENDATIONS OF THE ADVISORY COMMITTEE

Disclosure of Public Interest Activities by Broadcasters

1. Digital broadcasters should be required to make enhanced disclosures of their public interest programming and activities on a quarterly basis, using standardized check-off forms that reduce administrative burdens and can be easily understood by the public.

Effective self-regulation by the broadcast industry in the public interest requires the availability to the public of adequate information about what a local broadcaster is doing. Some valuable information is currently made available. For example, all television broadcasters must prepare and place in their public file separate quarterly reports on their non-entertainment programming responsive to ascertained community needs and on their children's programming.[2] The Advisory Committee recommends that the Federal Communications Commission require that these reports be augmented by the addition of more information on stations' public interest programs and activities. That information should include but not be limited to contributions to political discourse, public service announcements, children's and educational programming, local programming, programming that meets the needs of underserved communities, and community-specific activities. The Advisory Committee does not intend that such efforts

should be onerous to broadcasters, but they should make readily available the most important information for community groups and other members of the public to assess. Information reporting requirements established for implementing the Children's Television Act (CTA) are a useful model. Under the CTA, broadcasters must identify and describe the programming, when it was aired, and how it meets the broadcaster's obligation to serve the public. They are encouraged to submit electronic reports of this programming via the Internet. A possible form using a checkoff approach is included in Appendix A.

At the same time, digital television broadcasters should take steps to distribute such public interest information more widely, perhaps through cooperation with local newspapers and/or local program guides so that viewers can more readily identify and evaluate the efforts local broadcasters are making to address their interests. Similarly, many local television stations now maintain Internet websites where they could post on a regular basis this kind of information.

Greater availability of relevant information will increase awareness and promote continuing dialogue between digital television broadcasters and their communities and provide an important self-audit to the broadcasters.

Voluntary Standards of Conduct

2. The National Association of Broadcasters, acting as the representative of the broadcasting industry, should draft an updated voluntary Code of Conduct to highlight and reinforce the public interest commitments of broadcasters.

The Advisory Committee believes that most broadcasters feel a strong commitment to the public interest and their responsibilities as public trustees, and behave accordingly. To reinforce public service interests and standards, the National Association of Broadcasters adopted a "Code of Conduct" that set out appropriate principles and standards, and recognized those stations that adhered to the Code. The Code was abandoned in 1982 after the Department of Justice objected to certain aspects of the Code's advertising provisions. (See Section II and Appendix B for more on this history.)

A new industry statement of principles updating the 1952 Code would have many virtues. The most significant one is that it would enable the broadcasting industry to identify the high standards of public service that most stations follow and that represent the ideals and historic traditions of the industry. A new set of standards can help counteract short-term pressures that have been exacerbated by the incredibly competitive landscape broadcasters now face, particularly when compared to the first 30-some years of the television era. Those competitive pressures can lead to less attention to public issues and community concerns. A renewed statement of principles can make salient and keep fresh general aspirations that can easily be lost in the hectic atmosphere and pressures of day-to-day operations.

To ensure that broadcasters fulfill their obligations as public trustees, we endorse self-regulation by knowledgeable industry people. This could serve as an effective tool to minimize government regulation. To that end, we recommend that the National Association of Broadcasters, acting as the representative of the broadcasting industry, draft a new set of principles or statement of standards. The Advisory Committee hopes that the NAB will develop and recommend self-regulatory standards to and for the industry. The standards should be drafted and implemented by the NAB and the industry, preferably with input from community and public interest leaders, without pressure, interference, or direct or indirect enforcement by the government. The public, the marketplace, and the court of public opinion can then judge their efficacy.

What might a set of Standards of Conduct look like in the digital age? We include in Appendix B a model draft, done by an Advisory Committee working group under the leadership of Professor Cass Sunstein of the University of Chicago Law School. Another model we have included is the Statement of Principles adopted by the NAB Board of Directors to replace the old Code, which can be found in Appendix C.

Minimum Public Interest Requirements

3. The FCC should adopt a set of minimum public interest requirements for digital television broadcasters.

The Advisory Committee believes that having the broadcast industry adopt a strong set of voluntary standards of conduct, created and administered by the National Association of Broadcasters, would be a highly desirable step toward creating a digital world meeting the needs and interests of the American public. The Advisory Committee nevertheless recognizes an additional reality: not all broadcasters will subscribe to voluntary guidelines. Importantly, a large number of broadcast stations—perhaps as many as 400—are not members of the NAB and thus would not be affected by an industry-drafted and administered code.

Therefore, despite the Committee's stated preferences for voluntary self-regulation and maximum broadcaster flexibility, the Advisory Committee recommends that the FCC adopt a set of mandatory minimum public interest requirements for digital broadcasters. These minimum standards should be drafted in a way that would not impose an undue burden on digital broadcast stations, and should apply to areas generally accepted as important universal responsibilities for broadcasters—as well as for cable and satellite providers. Any set of minimum standards should be drafted by the FCC in close conjunction with broadcasters and representatives of the public, and phased in over several years beginning with stations' transmission of digital signals.

We have a broad consensus on the Advisory Committee that there should be minimum standards. However, our Advisory Committee is not unanimous in its recommendation about

what those standards should be, or what form they should take. Some of the disagreements in this regard, including whether areas like free political time should be included in minimum standards, are expressed in the individual views of Advisory Committee members found in Section IV in this report. More generally, we have sharply different views about the specificity of minimum standards. Many of our committee members endorse the idea of detailed standards with defined numerical guidelines of performance, believing that the only way to make standards work and to evaluate whether stations meet them is to make the standards specific. However, others, including many broadcasters on the panel who endorse the concept of minimum standards, object vociferously to that idea, believing that detailed standards with numerical quotas reflect an outdated model of regulation, and simply do not fit the diverse character of digital television stations around the country.

After much discussion, and having reviewed the product of a working group of the Advisory Committee led by James. F. Goodmon of Capitol Broadcasting, the Committee recommends the following categories for minimum standards for digital broadcasters:[3]

1. **Community Outreach.** Digital stations should be required to develop a method for determining or "ascertaining" a community's needs and interests. This process of reaching out and involving the community should serve as the station's road map for addressing these needs through news, public affairs, children's and other local programming, and public service announcements. Further public input should be invited on a regular basis through regular postal and electronic mail services. The call for requests for public input should be closed captioned. The stations should regularly report during the year to the public on their efforts.

2. **Accountability.** Whatever the mandatory minimums, stations should report quarterly to the public on their public interest efforts, as outlined in recommendation 1, above.

3. **Public Service Announcements.** A minimum commitment to public service announcements should be required of digital television broadcasters, with at least equal emphasis placed on locally produced PSAs addressing a community's local needs. PSAs should run in all day parts including in primetime and at other times of peak viewing.

4. **Public Affairs Programming.** A minimum commitment to public affairs programming should be required of digital television broadcasters, again with some emphasis on local issues and needs. Such programming should air in visible time periods during the day and evening. Public affairs programming can occur within or outside regularly scheduled newscasts, but is not defined as coverage of news itself.

5. **Closed Captioning.** A digital broadcast station should provide closed captioning of PSAs, public affairs programming, and political programming. Captioning in these areas should be phased in over the first 4 years of a station's digital broadcasts**,** where doing so would not impose an undue burden**,** but should be completed no later than the FCC-imposed deadline of 2006 for captioning most programming.

MUST CARRY

Our recommendation for mandatory minimum standards stands alone. But it also expresses a recognition that in the digital era it is in the public interest for television broadcasting, which meets significant public interest obligations, to reach all American homes as soon as possible. To "preserv[e] the benefits of free, over-the-air broadcast television"[4] in a digital world, the Advisory Committee recommends that appropriate governmental authorities adopt ways, including digital "must carry" by cable operators, to expedite the widespread availability of digital broadcast television to the public. Congress has required cable operators to carry broadcasters' digital signals. In addition, the intent of the Telecommunications Act of 1996 was to expedite the advance of digital broadcasting.[5] If it is in the public interest to have digital television broadcasting available as soon as possible to the largest number of Americans, policies that encourage that availability should themselves be encouraged, in a manner that does not disadvantage smaller broadcasters as compared to larger broadcasters, and that recognizes the important role of public broadcasting. The Advisory Committee recognizes that implementation of digital "must carry" poses many difficult questions, including technological ones, which the FCC is exploring in an ongoing rulemaking.

Improving Education Through Digital Broadcasting

4a. Congress should create a trust fund to ensure enhanced and permanent funding for public broadcasting to help it fulfill its potential in the digital television environment and remove it from the vicissitudes of the political process.

4b. When spectrum now used for analog broadcasting is returned to the government, Congress should reserve the equivalent of 6 MHz of spectrum for each viewing community in order to establish channels devoted specifically to noncommercial educational programming. Congress should establish an orderly process for allocating the new channels as well as provide adequate funding from appropriate revenue sources.

4c. Broadcasters that choose to implement datacasting should transmit information on behalf of local schools, libraries, community-based nonprofit organizations, governmental bodies, and public safety institutions. This activity should count toward fulfillment of a digital broadcaster's public interest obligations.

The digital age will open up major new avenues for broadcasting information and entertainment to Americans, creating many new lanes on the information superhighway. In theory, the expansion in information resources and avenues should result in the marketplace driving a vast augmentation of programming in all areas, including those that serve the public interest. For

the most part, it works well, as witnessed by the substantial amount of quality programming aired by commercial analog broadcasters.

But the Advisory Committee recognizes that the market alone may not provide programming that can adequately serve children, the governing process, special community needs, and the diverse voices in the country. To be sure, cable television's multiple channels have served commendably some of these needs, such as through Nickelodeon for children or C-SPAN for government and politics. But cable channels like these are not available to a large share of the populace, either because they are not carried on many cable systems or because cable itself is neither universally available nor free. Moreover, many of these channels are commercial.

4a. Public Broadcasting

Free, over-the-air broadcasting has the virtue of being readily available to virtually all the people in America, but the marketplace dictates of commercial broadcasters do not automatically accommodate the public interest programming needs of our diverse population. That is why public broadcasting was created and why it has served the country so well. The role that public broadcasting has played in the analog era does not disappear in a digital age. To the contrary, we believe that public broadcasting will continue to be a vital link for many Americans who want access to high quality cultural, public affairs, children's, and educational programs—indeed, that the exciting capabilities of the digital spectrum in terms of high-definition pictures, multiple signals, data transmission and interactivity should serve to enhance dramatically the value of public broadcasting to the country.

But there is a major challenge ahead for public broadcasting to fulfill its potential in the digital age. The startup costs of converting to digital signals are high, and just as significantly, the costs of producing digital programming are 10 to 20 percent higher than those of comparable analog programming. (See Section I.) We believe that public broadcasting will need the funding necessary to produce quality digital programming and to promote it so that viewers know what is available to them. Thus, we urge Congress to consider ways to provide enhanced funding for public broadcasting in the digital era, and to create a trust fund to make such funding assured and permanent, and to move public broadcasting out of the whipsaw of the political arena. By "public broadcasting," we mean the public broadcasting system, along with independent noncommercial programmers. If Congress does create a public broadcasting trust fund with a base ample enough to fund public broadcasting in the digital age, we join Representatives Billy Tauzin, Edward Markey, and others in urging that public broadcasting reduce or eliminate the practice of "enhanced underwriting" that closely resembles full commercial advertising.[6]

4b. The Creation of New Noncommercial, Educational Channels

Even if the steps described above are taken, we believe that there is more that can be done to exploit the move on the spectrum from analog to digital broadcasting to meet public interest needs. In particular, we recommend carving out space on the spectrum for channels devoted

specifically to noncommercial educational programming and services, and funding them in ways that will vastly expand the educational opportunities for all Americans, and particularly for those now underserved by information resources.

The opportunity for digital television to improve student achievement has extraordinarily high stakes for our Nation. The acquisition and use of knowledge is a major resource for our society in the coming century and is pivotal for our quality of life, our economic development, our democracy, and indeed our security. The Nation's success depends upon how effectively all members of our society are prepared to use information technologies, which in turn means that the proficiency of our citizens depends upon the quality of our educational offerings and the capacity of students to utilize information technologies for educational ends. We put our children at a competitive disadvantage in the global economy if we do not invest wisely in educational resources.

The capacity of digital television to expand the flow of information and communication to and within our school systems, and to the population as a whole will require new and imaginative decisions on the dedication of entire channels or sub-channels, and the interaction between programming and datacasting in the digital form.

Under current law, when digital channels are up and running and reaching substantial numbers of people, the existing analog channels are to be turned back to the government, repacked and auctioned off.[7] We recommend that when this process occurs, the equivalent of one 6 megahertz channel in each viewing area be reserved instead for noncommercial educational purposes—defined as preschool, elementary, secondary, and postsecondary education, lifelong learning, distance learning, literacy, vocational education, children's educational, public affairs, multicultural, arts and civic education, and other programming directed to the educational needs of underserved communities.

We recommend the creation of an orderly process to allocate these channels in a way that will serve each viewing community. A very high priority should be given to ensuring that these educational channels serve underprivileged and minority communities that typically have less access to the educational opportunities present in the information age. One option would be to give the first opportunity to claim and run each educational channel to the local public television station or stations. Partners could include universities, libraries, minority organizations, other noncommercial broadcasters, and other groups. However, the license to operate the channels should be neither automatic nor eternal. The applicants would first have to draft and submit a plan to the FCC indicating how they would involve the local community, including schools, universities, libraries, and diverse and underrepresented groups, what kinds of noncommercial educational programming they might produce and air, and how the new channel devoted to education would be different from their existing public television stations.

The FCC would either accept or reject the plans; if rejected, the educational channel space would be open for application by others, including schools, universities, libraries, minority organizations, other broadcasters or other groups, under clear FCC guidelines made publicly available prior to the application process. The licenses issued would be for finite periods; the

record of each station in these areas would be reviewed and considered at license renewal time.

We make this recommendation with one important condition. We believe that spectrum space alone, despite its enormous intrinsic value, will be unable to reach its potential if there are not adequate resources to provide appropriate and engaging programming. New channels devoted to education can be of enormous benefit to the country if they have adequate financial backing. We recommend that Congress provide such funding, using as sources revenues from the auction of other spectrum, including the remainder of the analog spectrum; some of the fees from ancillary and supplementary services by digital broadcasters required by current law; and a portion of the fees we recommend implementing for the use of multiple commercial-driven broadcast channels by digital broadcasters.

The Advisory Committee is very much aware that revenues from auction of the analog spectrum and fees from ancillary and supplementary services are already "scored" under the Balanced Budget Act of 1997 and the 1996 Telecommunications Act, and are destined for the General Treasury. We urge Congress and the President to reconsider the destination for these funds–and indeed, urge Congress to adopt the general principle that revenues from auctions of broadcast spectrum and from any fees from broadcasters be used to protect and enhance the public interest in broadcasting. But if Congress and the President decide not to alter the path of these revenues, we urge them to find other sources of revenue for a trust fund for public broadcasting and for the dedicated education channels, whether from industry sources or general revenues. We also urge that any funding mechanism include a provision for matching funds from local communities.

We have two other recommendations in this area. First, the U.S. Department of Education should be encouraged to work with educational programmers to suggest programming and datacasting ideas, once again with a particular sensitivity to the educational needs of minorities and other underserved communities. Second, some portion of the fees collected for these educational purposes, no more than 20 percent, should be set aside for bids by all broadcasters, including commercial ones and minority ones, to produce and air educational programming that would otherwise not be commercially feasible. That revenue should be specifically targeted to support the creation and promotion of programming from diverse and independent producers to air on noncommercial channels, with a particular emphasis on addressing the interests and needs of minorities and other underserved populations. This portion of the fees should be administered by a foundation, perhaps based on the model of the Children's Television Endowment mandated by the Children's Television Act of 1990.

4c. Datacasting

One of the more exciting new capabilities made possible by digital television technology is datacasting, a transmission mode that allows broadcasters to deliver vast amounts of information in a variety of formats to digital television sets and computers. Broadcasters that choose to datacast will be able to send information either alone or in conjunction with audio or video

transmissions. The information transmitted could be stock quotations, sports statistics, government information, weather updates, information to accompany video programming, and educational materials to be used with instructional programming, among other possibilities.

Datacasting is also notable for making interactive television feasible. Viewers can engage with programming that is "pushed" at them in the traditional fashion, but also with information content that they can "pull" out of the digital transmission. In this way, important aspects of television broadcasting and the Internet can be combined in innovative ways.

The potential applications of datacasting for education are also significant. Datacasting could transmit course-related materials, such as lesson plans and teacher and student guides, as part of instructional video programming. Schools, libraries, and other educational institutions could use datacasting as a large "digital pipe" to deliver computer-based educational materials during off-peak hours. Public television stations are already developing innovative applications of datacasting for use in conjunction with their video programming as well as in entirely new instructional applications.

Datacasting can also serve a variety of government and public interest needs. Some local government agencies have large amounts of information that could be delivered via datacasting. During weather-related crises, the service could be programmed to track storms house-by-house, and provide viewers with information about when a storm is likely to hit their area.

With datacasting's vast potential to serve, the Advisory Committee recommends that broadcasters develop their plans to implement datacasting with the public interest in mind. Broadcasters should work with local educational and public safety institutions to provide community broadcasting services. The types of information that might be transmitted include:

- Educational programming from preschool through higher education;
- Schedule and logistical information for voting, public hearings, and other governmental activities;
- Public school information;
- Public safety and health announcements;
- Snow emergency information;
- Public text bulletin boards (volunteer opportunities, nonprofit meetings, etc.);
- Community "radio" programming in multiple languages;
- Public access video programming;
- Local library information; and
- Open publication of citizen "letters to the editor."

It is unlikely that datacasting of public interest information would impose an undue burden on broadcasters. Such information consumes little bandwidth, generally less than 1 percent of

the total 6 MHz spectrum provided to each digital broadcaster. Digital television broadcasters should be encouraged to offer data broadcasting services on a not-for-profit basis to appropriate community organizations, and have this activity count as a public interest activity.

Multiplexing and the Public Interest

5. Digital television broadcasters who choose to multiplex, and in doing so reap enhanced economic benefits, should have the flexibility to choose between paying a fee, providing a multicasted channel for public interest purposes, or making an in-kind contribution. Given the uncertainties of this still-hypothetical market, broadcasters should have a 2-year moratorium on any fees or contributions to allow for experimentation and innovation. Small-market broadcasters should be given an opportunity to appeal to the FCC for additional time. The moratorium should begin after the market penetration for digital television reaches a stipulated threshold.

Nobody knows what the digital future holds for broadcasters, their viewers, their advertisers, or their competitors. It is true that broadcasters were granted use of an extremely valuable piece of the electromagnetic spectrum to transition to the digital age. It is also true that to do so, broadcasters will have to make large capital outlays to purchase equipment, erect towers or antennas and convert programming to digital formats—with no clear picture of what will happen to their revenue. Congress and the FCC originally envisioned this grant of spectrum as a one-for-one exchange, with broadcasters using it primarily for a single high-definition television (HDTV) signal. Under this scenario, the rationale for greatly increased public interest obligations or a massive new payment would be diminished. However, if broadcasters decide to use their digital real estate for multiple commercial channels (whether or not they are high definition), each generating its own revenue stream, then it is appropriate to consider whether the public interest requires a different formula. This is especially true since, as compression technology evolves, the number of channels possible may increase substantially, to six, eight or more.

The Telecommunications Act provided for the FCC to assess fees from digital broadcasters who get paid for ancillary or supplementary services—subscription channels, paging services, pay-per-view and the like.[8] It does not prohibit broadcasters from using multiple signals—multicasting several over-the-air channels that get revenue from commercials. There is good reason to let the marketplace settle whether a single high-definition broadcast signal, multiple standard definition channels, datacasting, or various combinations of them, will work best. Innovation and testing the markets in this area should not be unreasonably stifled, particularly since multichannel broadcasting could provide long sought new competition to cable and other multichannel program distributors.

Additionally, it is conceivable that broadcasters who apply multiplexing will simply cannibalize their single signal, achieving no additional revenues or perhaps merely stabilizing current

market share. We recognize these facts. We also accept the principle that there should be some additional benefit to the public if its grant to broadcasters of the valuable digital television spectrum results in enhanced economic benefits for broadcasters.

We recommend the following: Once digital television reaches a significant level of penetration as stipulated by the FCC, begin a 2-year moratorium during which digital broadcasters can experiment and explore multiplexing options in the marketplace without any undue hindrance. Small-market broadcasters should be given an opportunity to appeal to the FCC for additional time if they lack the resources for experimentation with multiple channels. Thereafter, if a broadcaster elects to multicast, and in doing so reaps the benefits noted above, Congress or the FCC should apply a menu of options to that multicaster. The menu would start with a fee payment, either contingent upon the extra channels reaching a particular revenue goal or on some other formula judged fair and appropriate by the FCC.

In lieu of the fee, broadcasters could turn to alternatives. They could dedicate one of their multicasted channels to noncommercial public interest purposes, which would have to include a commitment to provide robust programming and access for local voices, or lease one such channel at below market rates to an unaffiliated programmer who is local and has no financial or other interest in a broadcast station. They could provide in-kind contributions, such as free commercial time to political parties, or studio time and technical assistance to community groups producing PSAs or public interest programming, equal in market value to the assessed fee. Whatever requirements are assessed must be attentive to the risk that they might have unintended harmful consequences, such as discouraging multiplexing at all. And such requirements should be sensitive to the opportunities multiplexing can offer for underserved constituencies to speak in their own voices, and for enhanced minority participation in broadcasting, including opportunities in management and ownership. The FCC should make clear that if a broadcaster uses its extra capacity for public interest purposes like an all-news channel or children's educational channel, it would not incur extra obligations.

If a multiplexing broadcaster chooses either to (1) pay a fee in lieu of its additional public interest obligations; (2) dedicate a multicast channel for noncommercial public interest purposes; or (3) lease a multicast channel to an unaffiliated local programmer who has no financial or other interest in a broadcast station, it would not have to apply other nonstatutory public interest obligations to multiplexed signals other than its "primary" channel (unless the broadcaster could demonstrate to the FCC the public interest benefit of proportionally spreading specific obligations around the multicast channels. For example, it may prove advantageous to give a broadcaster flexibility to place political messages on whatever channels attract the right demographic audience to achieve maximum benefit, in ways that will accommodate the rights of candidates under the law.) We further recommend that, like the fees to be collected for ancillary and supplemental services, the fees collected for multiplexing be used to enhance the public interest in broadcasting, by applying them to educational or children's programming, using them as part of campaign finance reform for political airtime, or in some other fashion. In any event, these fees should not simply be used for deficit reduction or placed in the Treasury's general revenue accounts.

Improving the Quality of Political Discourse

6a. If Congress undertakes comprehensive campaign finance reform, broadcasters should commit firmly to do their part to reform the role of television in campaigns. This could include repeal of the "lowest unit rate" requirement in exchange for free air time, a broadcast bank to distribute money or vouchers for airtime, and shorter time periods for selling political air time, among other changes.

6b. The television broadcasting industry should voluntarily provide 5 minutes each night for candidate-centered discourse in the thirty days before an election.

6c. Blanket bans on the sale of air time to all state and local political candidates should be prohibited.

That there are serious problems with American political campaigns and the system of campaign finance is indisputable. The "barriers to entry" for candidates to run, especially to challenge incumbents, are high and growing. A major reason is the burgeoning costs of getting messages across in a cacophonous society that consists of large and diverse districts and states. The quality of political discourse is declining. The problems in the campaign finance system are rooted in existing laws, the changing nature of communications in our society, and many other complicated factors. One of them is the growing role of television in campaigns, and its emergence as the single largest category of spending in elections. Television advertising expenditures increased 800 percent between 1970 and 1996, more than any other category in campaign finance.[9]

Candidates have turned to television advertising, especially on broadcast television, because in many areas, it is the best medium to reach voters. They will continue to do so. At the same time, broadcast television remains the medium of choice for voters to learn about the campaigns and the candidates. Thus, any significant change in the campaign finance system will have to address the issue of the role of television. But no reasonable campaign finance reform can focus on television alone, or put the central burden for improving our political system on the backs of broadcasters. Reform must look at all the elements of the campaign system, recognizing broadcasting as one of them, albeit a vital one.

With some exceptions, broadcasters have played a major role in providing coverage, airtime and resources to enhance campaigns and provide voters with information about candidates and campaigns. The public interest is clearly served by a substantial role for broadcasters in this area. The digital age provides an opportunity to find enhanced ways for broadcasters to serve this interest. We believe that a better balance can be struck which can serve broadcasters, the political system and the public interest as well.

Broadcasters have frequently shown a commitment to providing a voice for candidates so that voters can evaluate their alternatives and so that campaigns can have an appropriate level of real debate and give-and-take to enhance the electoral and governing processes. Innovations by the major networks and station groups like Belo, Hubbard, and Post-Newsweek have been models for other broadcasters. These efforts should be replicated and expanded upon. The industry should redouble its efforts to enhance campaign discourse.

In a democracy that aspires to be deliberative, television can do a great deal if it deals with political issues in a serious way. Engagement with serious issues can be educative; it can increase citizen involvement in political issues; it can make citizens better able to choose. Efforts in this regard should be designed not just to reduce some of the problems faced by candidates with limited resources, but also as a method to ensure that the broadcasting system, private as well as public, helps to promote democratic ideals. To these ends, we recommend three steps in the area of political discourse:

6a. A Broadcast Industry Challenge to Congress on Campaign Finance Reform

First, we call on broadcasters to issue a public, collective challenge to Congress: If Congress passes comprehensive campaign finance reform, broadcasters will commit firmly and clearly to do their part to reform the role of television in campaigns. As we note above, television is only one part of a campaign system filled with serious problems. It is not reasonable to expect broadcasters alone to provide all the answers, or to make as the central component of reform Federal mandates upon broadcasters. But it is equally unreasonable to expect any comprehensive approach to campaign finance reform to ignore television and the role of broadcasters. Therefore, if Congress tackles comprehensive reform, which means including areas like the role of soft money, issue advocacy, the role of parties, contribution limits, the costs, length and tone of campaigns, broadcasters will pledge to work with Congress and other groups to develop proposals to include broadcaster commitments to improve political discourse and provide opportunities for candidates to get their messages across, and will support such reforms as part of the congressional reform package.

The Advisory Committee recommends the following options to consider:

1. Repeal the "lowest unit rate" requirement in return for some free time. One option would be an exchange: the repeal of lowest unit rate in return for a commitment by broadcasters to provide some free time (one suggestion is 1 minute of comparable free time for each 2 minutes of time sold) in return for paid time at market rates. The so-called lowest unit rate, the mandated discount advertising rate for candidates[10], is a complex and cumbersome system that clearly does not work very well. It does not work for candidates, who are confused by the system, and whose time-buying practices often make the lowest unit rate meaningless or superfluous. It can be a bureaucratic nightmare for broadcasters, with extensive reporting requirements and frequent lawsuits from candidates convinced they are being cheated. In the digital age, lowest unit rate becomes even more cumbersome and costly.

With the uncertainty and fluidity that will characterize commercial time and time-buying in the digital era, it makes sense to let the market dictate the costs of campaign commercial time. But a simple repeal of lowest unit rate would exacerbate the costs of campaigns, not make it easier to create more opportunities for discourse. The best approach would be to exchange the repeal of lowest unit rate for a simple and better approach on political time—one in which those broadcasters who would be able to air political advertisements at market rates would provide some free time for the paid political time they sell at market rates. Congress could legislate the details of this system, or could delegate the duty to the FCC as the expert agency.

To be sure, this simple exchange would not solve the money chase or reduce overall the costs of campaigns. In the context of an overall campaign finance reform that addressed such issues as soft money and overall contribution limits, this change could be a significant component to making the system work better.

2. Create a broadcast bank, providing money or vouchers for time for candidates and parties. A second option would be the creation of a broadcast bank, money or vouchers that could be distributed to parties and candidates for the purchase of radio and television time. The broadcast bank could be funded in many ways. Some resources could come from the fees paid by broadcasters for multiplexing or for ancillary and supplementary services. One component could be from a provision of time by broadcasters as their contribution to overall campaign reform.

How would the time be distributed? One model would have half the time going to the political parties to distribute to candidates as they see fit, and half the time going to candidates who raise sums from small individual donors, as matching grants. Those details, of course, would have to be legislated by Congress or delegated by Congress to the FCC as the expert agency.

3. Change requirements governing sale and use of discounted broadcast time to shorten the time period of its availability and expand the length of the candidate's appearance on the air. There are other options involving broadcasting that could improve the campaign process, perhaps in conjunction with the ones above. One would be for Congress to shorten the period of time during which broadcasters must sell time to candidates. Another is to require that candidates appear in the commercials they air. Many feel that a candidate stating his or her own case, rather than through the kinds of slickly produced, almost anonymous ads that so predominate today, would greatly reduce the negative tone of current campaigns.

There are undoubtedly other ideas for broadcasters to fulfill their part of this bargain if their challenge succeeds. But the challenge obviously requires a clear, unambiguous, and meaningful statement by the NAB and/or a representative coalition of important individual broadcasters and broadcast groups for this recommendation for voluntary action to succeed. The acceptance of this recommendation by the broadcasters on the Advisory Committee, who represent many facets of the industry, is a heartening sign that the industry will indeed respond by organizing such a challenge, thus avoiding the criticism that the promise of voluntary action is a hollow one.

6b. Airtime for Candidate-Centered Discourse

Our second recommendation for improving political discourse is for a critical mass of the television broadcasting industry to provide 5 minutes each night for candidate-centered discourse in the 30 days before an election. There are creative ways to improve political discourse, provide opportunities for candidates to get messages across to voters and to enhance voter understanding without heavy monetary costs to broadcasters, regulation of the content of programming, or without it being a kind of programming that will cause viewers to turn away. A broadcaster would make a commitment of 5 minutes for 30 nights (between 5 p.m. and 11:35 p.m., or the appropriate equivalents in Central and Mountain time zones.) We recommend a process with maximum flexibility for broadcasters in this area. Stations would choose the candidates and races, Federal, State and local, in the election that deserved more attention.

We recommend that Congress give the FCC the authority to waive the "equal opportunities" requirements of Section 315(a) of the Communications Act where it is necessary to allow the broadcasters to give time only to major candidates in a race, or to give time only to one candidate if one or more opponents decline the offer of time.[11] Stations would choose the format(s), with experimentation encouraged. Formats might include giving candidates one minute of airtime to get a message across; conducting "mini-debates;" or doing brief interviews with the candidates. The 5 minutes need not be in a contiguous block, but we hope the 5 minutes will not be subdivided into such short segments that serious discourse is precluded. This candidate-centered discourse could occur within station newscasts, but would not have to do so. If broadcasters chose to make the time available within newscasts, they could provide the 5 minutes each night without giving up a single minute of commercial time.

We do not intend for this recommendation to supersede the fine efforts of many broadcasters to improve political discourse in their own communities; we hope the proverbial thousand flowers bloom. But we see many advantages in the widespread adoption of this plan. For a modest commitment of time during a brief period each election cycle, broadcasters could provide an immense contribution to the political process and campaign discourse. If every station made this commitment during the period when voters pay the most attention to elections, it would send a powerful signal that elections matter. Not all stations would choose the same races and candidates to cover, but no doubt there would be considerable overlap. In this way, many candidates who otherwise would have no opportunity at all to address a larger audience would be given that chance, probably on several occasions at different times, and via different formats; likewise, many important races that are ignored in campaign season would have a chance to be covered.

We further urge that this commitment, of five minutes a night for thirty nights, be adopted by cable, satellite, radio and other video and audio programmers. And we recommend that this effort not be delayed until the full implementation of digital broadcasting; efforts in this regard should begin in 2000, allowing experimentation with formats and lengths to go on before the digital era.

6c. Blanket Bans of the Sale of Air Time to All State and Local Candidates

The third recommendation is that the FCC should prohibit broadcasters from adopting blanket bans on the sale of time to all State and local political candidates. In doing so, we are not recommending that broadcasters be required to sell time to candidates for every State and local office, or to any particular State or local candidate. We are recommending that broadcasters be prohibited from refusing to sell *any* time to *any* candidate for State and local office. We recognize that broadcasters in election periods can have difficulty finding enough commercial time in their inventories to satisfy their regular commercial customers and Federal candidates who have a right to reasonable access, especially in major metropolitan markets where broadcast service areas may include portions of several States. We also recognize that the application of the equal opportunities and lowest unit rate provisions of the Communications Act greatly complicate the practical ability of a station to hold itself out as being willing and able to sell advertising time to all candidates in the multitude of elections held simultaneously in the service area of many broadcast markets.

But the need to balance the demands from applicants for commercial time should not be used to justify a blanket ban on all advertising for State and local offices. Broad blanket policies of this sort make it difficult for local citizens to be informed about the political races that may have the greatest impact on their lives.

Disaster Warnings in the Digital Age

7. Broadcasters should work with appropriate emergency communications specialists and manufacturers to determine the most effective means to transmit disaster warning information. The means chosen should be minimally intrusive on bandwidth and not result in undue additional burdens or costs on broadcasters. Appropriate regulatory authorities should also work with manufacturers of digital television sets to make sure that they are modified to handle these kinds of transmissions.

Broadcasters have always taken seriously their fundamental public interest responsibility to warn viewers about impending natural disasters and to keep them informed about disaster-related events. Digital technology will provide many new and innovative ways to transmit warnings to people at risk, including ways to warn individuals who have hearing and vision disabilities, and even to pinpoint specific households or neighborhoods at risk. According to the U. S. Geological Survey's Working Group on Natural Disaster Information Systems,[12] most of these innovations will require minimal use of the 6 megahertz bandwidth available to digital broadcasters. Broadcasters should work with appropriate emergency communications specialists and manufacturers to determine the most effective means to transmit important

information that will be minimally intrusive on bandwidth and not result in undue additional burdens or costs on broadcasters.

The Advisory Committee also recommends that the appropriate regulatory authorities work with manufacturers of digital television sets to make sure that they are modified appropriately to handle these kinds of transmissions, to avoid the excess costs of retrofitting.

Disability Access to Digital Programming

8. Broadcasters should take full advantage of new digital closed captioning technologies to provide maximum choice and quality for Americans with disabilities, where doing so would not impose an undue burden on the broadcasters. These steps should include the gradual expansion of captioning on PSAs, public affairs programming, and political programming; the allocation of sufficient audio bandwidth for the transmission and delivery of video description; disability access to ancillary and supplementary services; and collaboration between regulatory authorities and set manufacturers to ensure the most efficient, inexpensive, and innovative capabilities for disability access.

The Telecommunications Act of 1996 mandated that broadcast and cable programming be fully accessible through the provision of closed captioning.[13] Recently, the FCC promulgated regulations to implement Section 305 of the Act, requiring 100 percent of new television programming to be captioned over an 8-year period, and 75 percent of "pre-rule" programming to be captioned over a 10-year period.[14] The obligation to provide captioning access will, of course, continue into the digital era. The 1990 Television Decoder Circuitry Act requires that new television technologies, such as digital technologies, be capable of transmitting closed captions.[15] Passage of this legislation and Section 305 reflect Congress' intent to ensure that our Nation's 28 million Americans who are deaf or hard of hearing continue to receive access to televised news, information, education, and entertainment in the digital age.

Digital technology will open new avenues to enhance and expand captioning access. For example, the ability to alter the size of captions will enable viewers to see both captions and other text appearing on a television screen. The Advisory Committee recommends that broadcasters take full advantage of new digital closed captioning technologies to provide maximum choice and quality for caption viewers, and to work to make captioning in the digital age functionally equivalent to audio transmissions.

The FCC's rules on captioning currently exempt certain categories of programming, including advertisements under 5 minutes, certain late-night programming, and certain local non-repeat programming.[16] Thus, benefits derived from recommendations made elsewhere in this

Report—for example, recommendations made with respect to PSAs, public affairs programming, and political discourse—will not reach deaf and hard-of-hearing viewers under existing FCC rules. It is for this reason that we have included within our minimum public interest requirements a requirement for the gradual expansion of captioning on PSAs, public affairs programming, and political programming, where doing so would not impose an undue burden on a digital television broadcaster.

Section 305 of the Telecommunications Act also directed the FCC to conduct an inquiry into the provision of video description on video programming.[17] Video description provides a narration for blind and visually disabled viewers that consists of verbal descriptions of key visual elements in a television program, which are inserted into natural pauses in the program's dialogue. Utilization of video description as a form of providing access has been hindered by the analog standard, which only permits delivery of descriptions via the secondary audio program channel. In contrast, digital technology offers multiple audio channels, with significantly greater bandwidth, that can more easily accommodate video descriptions. We recommend that broadcasters allocate sufficient audio bandwidth for the transmission and delivery of video description in the digital age to make expanded use of this access technology technically feasible.

The Telecommunications Act of 1996 allows broadcasters to provide ancillary and supplementary services using a portion of the digital spectrum.[18] The Advisory Committee recommends that broadcasters ensure that the provision of ancillary and supplementary services not impinge upon the 9600 baud bandwidth currently set aside for captioning of digital programs. At the same time, we recommend that as broadcasters explore new digital technologies, they vigorously explore ways to expand access to these ancillary and supplementary services by individuals with disabilities. The provision of these services, which as noted, may include new kinds of video services, computer software distribution, interactive services, and data transmissions, can open a world of opportunities for individuals with disabilities who are seeking full participation in our society. The resulting greater access in employment, education, recreation, and other areas can provide significant benefits to individuals with disabilities and to society as a whole. Drawing upon the flexibility and capacity of digital technology, broadcasters should provide such disability access to their ancillary and supplementary services, where doing so would not impose an undue burden. Among other things, this would entail offering a text option for material that is presented orally and an audio option for material otherwise presented visually.

Finally, just as with emergency notifications, we recommend that the FCC and other regulatory authorities work with set manufacturers to ensure that modifications in audio channels, decoders, and other technical areas be built to ensure the most efficient, inexpensive, and innovative capabilities for disability access.

Diversity in Broadcasting

9. Diversity is an important value in broadcasting, whether it is in programming, political discourse, hiring, promotion, or business opportunities within the industry. The Advisory Committee recommends that broadcasters seize the opportunities inherent in digital television technology to substantially enhance the diversity available in the television marketplace. Serving diverse interests within a community is both good business and good public policy.

Much attention has been paid historically to the concept of "diversity" in broadcast programming. It is undeniably a good thing for the broadcast industry as a whole to present a wide range of information, opinion and entertainment programming, including programming that responds to the needs and interests of minorities and other underserved communities in our society. Some argue that the marketplace can be relied upon to generate this diversity. Others say that government-imposed station ownership limits, and policies encouraging station ownership by minorities are necessary, at least as adjuncts to marketplace forces. The Advisory Committee recognizes the value of program and viewpoint diversity and recommends that broadcasters take the opportunity presented by the innate flexibility of digital television to enhance substantially the diversity available in the television marketplace.

Much of the discussion and many of the recommendations contained elsewhere in this report bear on the diversity issue. For example, we have recommended that innovation in the use of digital channels for multiplexed, multichannel programming not be discouraged by government policy. A multichannel digital broadcasting model could, of course, include program streams that are "narrowcasts" aimed at distinct audiences, including minority groups and other underserved communities. Multiplexing could also create new opportunities for minority entrepreneurship through channel-leasing agreements, partnerships, and other creative business arrangements.

We have also recommended that, at the end of the transition, one new 6 MHz broadcast channel should be reserved in each market for noncommercial, educational purposes, including the provision of educational programming directed at minority groups and other underserved communities. We have recommended that the flexibility of digital technology be exploited by the use of newly available audio channels to help serve the needs of individuals with disabilities. The Advisory Committee wants to emphasize that this enhanced audio capability will also facilitate increased use of foreign language audio tracks to expand the usefulness and entertainment value of broadcast programming for minority communities, and we recommend that broadcasters take advantage of this capability. Finally, our recommendations on ways that political discourse can be made more effective in the context of digital television will have a direct impact on the diversity of viewpoints that will be available on television in the future.

Independent production is often a prime opportunity for the non-mainstream to be heard, including persons of color and cultural minorities, thereby adding to the plurality of voices represented in our mass communications. Therefore, our recommendations on diversity should serve to aid independent producers both in providing funding for programming and providing incentives for giving these voices access to the airwaves. Our recommendations should result in providing revenues to support the creation and promotion of programming from diverse and independent producers to air on noncommercial channels.

The Advisory Committee also believes that hiring and promotion policies that result in significant representation of minorities and women in decision-making positions in broadcast management could tend to increase programming diversity. While this effect may be difficult to prove or quantify, we believe that such policies (as well as policies facilitating station ownership by minorities and women) are important in their own right, apart from any direct impact on programming diversity. Digital television will gradually create new programming and business opportunities. The Advisory Committee recommends that broadcasters voluntarily redouble their individual and collective efforts during the digital transition to encourage effective participation by minorities and women at all levels of the industry.

Serving diverse interests within a community is both good business and good public policy. Broadcasters should aggressively seek out ways to employ digital technology in creative ways to accomplish this goal, including but not limited to those described above.

New Approaches to Public Interest Obligations in the New Television Environment

10. Although the Advisory Committee makes no consensus recommendation about entirely new models for fulfilling public interest obligations, it believes that the Administration, the Congress, and the FCC should explore alternative approaches that allow for greater flexibility and efficiency while affirmatively serving public needs and interests.

The broadcast world will soon change from one with some stability and certainty—one analog signal for each broadcast station, operating usually 24 hours a day—to one with unpredictability, uncertainty and fluidity. Some broadcasters will operate one signal, as before, only in digital instead of analog. Some may operate multiple signals, perhaps two, perhaps many more, throughout the day and night. Others will shift between one high-definition channel and multiple channels. Others will add datacasting to the mix. Applying existing public interest obligations to this variegated universe will not be easy, and will certainly not entail a simple one-for-one exchange.

Looking ahead to the digital era, where the flexibility to fit the different patterns that will develop and that will change over time will be increasingly important, many members of the

Advisory Committee believe that the Administration, the Congress and the FCC should consider developing a whole new model of public interest obligations.

There are many models to consider. For many of us, a very promising approach would be to move to a kind of "pay-or-play" model. Under this model, broadcasters would be given the choice of maintaining the existing regime of public interest obligations, or of paying a share of revenues to bypass those obligations, while receiving in return an expedited license renewal process. Another option is embodied in a proposal made several years ago by Henry Geller, a telecommunications scholar and former FCC general counsel. Geller would implement a mandatory "pay" system whereby all broadcasters would be relieved of their public interest obligations in exchange for 2 percent of their gross revenues and 1 percent of the revenues from license transfers. The money collected under the Geller plan would be used for an endowment for public broadcasters, other noncommercial telecommunications entities and noncommercial programming, including programming for children, and for free time for political candidates. These options, and others that have been suggested to the Advisory Committee, are described in Appendix D.

The revenues received could then be used to enhance the public interest, by funding noncommercial public interest programming and services, especially locally originated and oriented programming and services. All broadcasters, of course, would still have to adhere to all statutory requirements and provide closed captioning, emergency reports, and reasonable access to political candidates. But allowing some stations, including religious and shopping channels, to pay in lieu of other public interest obligations would not only be less cumbersome, it would free up resources that could be used to enhance the public interest. A "pay-or-play" type model would replace the traditional regulatory approach with a marketplace model analogous to the trading of "pollution rights" in environmental regulation.

Advocates of pay-or-play on the Advisory Committee include broadcasters and non-broadcasters alike, attracted to the freedom of choice it provides to broadcasters, its simplicity, and the opportunity under the model to more efficiently allocate resources in the public interest.

But several Advisory Committee members objected vigorously to the very idea of pay-or-play, arguing that it would damage or destroy the ethos of public trusteeship on which broadcasting had been built. Some broadcasters likened pay-or-play to the Civil War era policy allowing wealthy individuals to buy their way out of military service. Others had practical objections, wondering how it would be possible to set up an equitable fee structure for the "pay" option, and how to allocate the revenues achieved to enhance the public interest.

Some critics worried that pay-or-play would result in broadcasters dropping all public interest-oriented programming, leaving public interest programming segregated on public broadcasting outlets, resulting in less exposure by citizens to important information on public affairs or programming for children or others.

It was clear from our spirited discussions that the Advisory Committee would come to no consensus on any specific alternative model of public interest obligations. It was worthy of

note that the divisions in viewpoint represented in the Advisory Committee were not predictable, based on affiliation or general perspectives. Even though we make no consensus recommendation in this area, we do believe that regulatory authorities, industry groups and public interest groups should explore carefully the range of alternative approaches to public interest obligations by broadcasters in the digital age, looking towards eventual adoption of a model that builds in more flexibility and efficiency while serving public needs and interests.

ENDNOTES

1 Of course, no imaginable system really involves total 'deregulation' in the sense of no government involvement. Any system of broadcasting must and will depend on a positive role for government. Genuine *laissez-faire* is not an option in light of the need, at minimum, for government to manage the spectrum and minimize interference.

2 *See* 47 C. F. R. §3526 (a)(8)(i), (iii) and 47 C.F.R. §3527 (a)(7).

3 In addition to the following categories, the Advisory Committee assumes that the Children's Television Act will apply to digital broadcasting as it does to analog.

4 *Turner Broad. Sys. Inc. v. FCC*, 117 S. Ct. 1174, 1186 (1997).

5 *See e.g.,* 47 U. S. C. §336(a)(1) (limiting "the initial eligibility for [advanced television service] licenses to persons that . . . are licensed to operate a television broadcast station or hold a permit to construct such a station").

6 Public Broadcasting Reform Act of 1998, H.R. 4067, 105th Cong. (1998).

7 *See* 47 U. S. C. §336(c); *see also* Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, adding new section 309(j)(14)(A), (B), and (C) to the Communications Act.

8 47 U. S. C. § 336(e).

9 NORMAN J. ORNSTEIN, CAMPAIGN FINANCE: AN ILLUSTRATED GUIDE 15-16 (1997).

10 47 U. S. C. §315(b)(1), (2).

11 With certain exceptions, the Communications Act of 1934 requires that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U. S. C. §315 (a).

12 The Working Group is an interagency body that evaluates and fosters ways to integrate public and private resources and infrastructure as it relates to natural disasters. It attempts to ensure that accurate and timely technical information about natural disasters is available instantly to everyone who can take action to save lives, reduce damage, and enhance response and recovery. Pursuant to FCC rules, the Federal Emergency Alert System

(EAS) is designed to disseminate local, regional, and Federal information using radio, television and cable channels. 47 C.F.R. Part 11.

13 Section 305, Telecommunications Act of 1996, Pub. L. 104-114, 110 Stat. 56 (1996).

14 The FCC exempted certain programming from its captioning mandates. The 75 percent requirement for "pre-rule" programming refers to programming that was first exhibited or produced prior to January 1, 1998, the effective date of the FCC's captioning rules.

15 Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U. S. C. § 303 (u), § 330 (b).

16 47 C.F.R. § 79.1 (a)(1).

17 Communications Act of 1934, § 713(f) (codified at 47 U. S. C. 613 (f).

18 Henry Geller, *Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy*, 6-8 (prepared for the Aspen Working Group on Digital Broadcasting in the Public Interest, January 1998); *see also* Henry Geller, *1995-2005: Regulatory Reform for the Principal Electronic Media,* The Annenberg Wash. Program Nw. Univ. (1994).

Section IV.
Separate Statements

Joint Statement of Leslie Moonves and Norman Ornstein, Co-chairs

Many of the issues surrounding public interest obligations and broadcasting have been charged with controversy for decades. The controversy does not disappear with the advent of digital technology; indeed, in many areas, it intensifies. This reality was apparent when President Clinton appointed us as co-chairs of his Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters. By choosing a broadcaster and a non-broadcaster, the President hoped to bridge the gaps and come to some broad consensus about the best avenues to serve the public interest in the digital broadcasting age.

The two of us share many values in common, including a strong belief in the historic public trustee role of the broadcasting community. But we also have different perspectives on the appropriate role of Government in the regulation of broadcasting. Our goal throughout our deliberations has been to bridge our own gaps in viewpoint and perspective, while also providing a reasonable and innovative middle ground for the 20 disparate individuals who joined us on the Advisory Committee.

It would have been far easier to divide into two hostile camps, draw up "wish lists" to fit our own views, vote them up or down, and let the fights spill over into the political and policy arena after we went out of business. It would have been easy for Ornstein, because, with more non-broadcasters than broadcasters on the panel, his individual views would probably have been able to prevail. But it would also have been easy for Moonves to retreat to the rhetoric that some broadcasters have used when feeling threatened by Government and be applauded by his most vociferous colleagues as a champion of the industry.

Neither of us believed that position-taking and posturing would advance in any way the important debate that is needed on the public interest in the digital information age. So our focus throughout the past 15 months has been to find areas of consensus. That has frequently been quite difficult. Our deliberations have been often characterized, in diplomatic parlance,

by "frank and full" discussions—meaning, in plain language, contentiousness and sharp differences of opinion. But we applied an inclusive process, providing ample opportunities for each of our members to have input, and trying to accommodate strong individual views.

In the end, for the two of us and the overwhelming majority of the Advisory Committee's members, the desire to reach a broad consensus prevailed. As an Advisory Committee without any line authority, our power, if any, will come from the weight of our ideas and the credibility of our members. Appropriately, we have left many specifics to be worked out in the political and policy arenas—without, we hope, the baggage that would have accompanied a divided majority/minority report.

As the collection of individual views demonstrates, none of our members would have written this exact report if given unilateral power. That is true for the two of us. Moonves would have preferred a report relying more on volunteerism and cooperation than on Government mandates. Ornstein would have preferred a report with more requirements of broadcasters, especially in the area of free time for political candidates. (Both of us, however, strongly support the notion that, if Congress undertakes to enact comprehensive campaign reform, broadcasters should commit firmly to do their part to reform the role of television in campaigns.) Even if there are areas where the two of us would have taken different paths, we are both satisfied that the recommendations are a reasonable and appropriate balance.

In the individual views, most of our members have indicated their support for the overall report and recommendations, while pointing out the areas where they individually disagree. The disagreements with specific items range from qualified criticism to all-out opposition. But every recommendation we have made enjoys solid support from the bulk of our members. We are pleased that the overwhelming majority of our members, broadcaster and non-broadcaster alike, chose the consensus route. We look forward to joining with them in the debate over these issues that is sure to follow.

Statement of Charles Benton, Frank M. Blythe, Peggy Charren, Frank H. Cruz, Richard Masur, Newton N. Minow, Jose Luis Ruiz, Shelby Schuck Scott, Gigi B. Sohn, Karen Peltz Strauss, and James Yee; Cass R. Sunstein and Robert D. Glaser join in Part I only

I. Political Discourse

The FCC should require broadcasters to provide a reasonable amount of "free time," to national and local political candidates, under conditions that promote in-depth discussion of issues and ideas.

The Advisory Committee's recommendations on political discourse are well-intentioned, but insufficient.

We recommend that, unless Congress enacts comprehensive campaign finance reform legislation by the end of 1999:

- The FCC should require broadcasters to provide "free time" to national and local candidates for candidate-centered discourse;
- The FCC should consider whether a portion of this "free time" should be administered by political parties;
- In implementing this obligation, the FCC should consider whether it should specify an administrative scheme such as the "time bank" or "voucher" models presented to the Advisory Committee by the Alliance for Better Campaigns and the Center for Governmental Studies; and
- The FCC should give broadcasters broad discretion over the format of candidate appearances, except that qualifying "free time" segments must be of no less than 1 minute in duration, and the candidate should appear for no less than one-half of the duration of the segment.

The Advisory Committee recommendations on political discourse include, among other things: (1) a challenge to broadcasters to support "free time" proposals that are part of comprehensive campaign finance reform legislation and (2) broadcasters' voluntarily providing 5 minutes per night of free candidate centered discourse. For the reasons discussed below, we believe that these recommendations will likely fall short of achieving the very worthy goals of ensuring that citizens have broad access to candidate speech that results in informed decisions at the ballot box and reducing the influence of money on the political process.

First, despite what appears to be majority support in both Houses, Congress failed to pass comprehensive campaign finance reform last year, and is unlikely to do so in the future.[1] Despite this fact, it is possible that campaign finance reform legislation will be reconsidered. However, if Congress does not pass comprehensive campaign finance reform, including a "free time" component, by the end of 1999, the FCC should require broadcasters to provide a modest amount of free candidate-centered discourse. This approach allows Congress to have the first opportunity to act to broaden political speech. If Congress does not act, we believe that it is necessary for the FCC to step in.

Second, we believe that exclusive reliance on voluntary standards in this area will be ineffective. Many broadcasters provide candidate-centered discourse today and the new mandate will not affect them. Rather, this obligation is directed at the substantial number of broadcasters that have chosen not to do so. There is no reason to believe that voluntary standards will impel those broadcasters that choose not to carry any such programming to do so now. It is this reasoning that led the Advisory Committee to recommend mandatory minimum requirements for local public affairs programming and public service announcements. In light of the expanded capacity and increased opportunities that digital transmission will provide for broadcasters, the burden on broadcasters of providing a minimal amount of free candidate-centered discourse would be small. Among other things, the FCC has ruled that, under 47 USC §315, providing "free time" does not reduce a broadcaster's lowest unit rate to zero.

Although we recommend that the FCC should require broadcasters to provide "free time," the obligation should not be unlimited. The Advisory Committee has been presented with several "time bank" and "voucher" models that would result in broadcasters providing very modest amounts of "free time" for political candidates 60 days before a general election. It has also considered other models that would require broadcasters to provide some specific amount of time (for example, 5 minutes a night for the 60 days before an election). Although we do not endorse any particular model, we believe that the FCC should consider these well-conceived proposals, along with such other new proposals as may emerge in fashioning the "free time" requirement. None of these models will unreasonably burden broadcasters, and all provide them with flexibility in the choice of the format.

The goal of ensuring an informed electorate will not be achieved, however, if the benefits of "free time" are used only for 30 second attack ads and 7-second sound bites that are segregated onto one of multiple channels. If the FCC provides a benefit of "free time," it may, and should, also require that this time be of a specified minimum length, and that candidates actually appear for a specified amount of time. It should also prohibit broadcasters from segregating the candidate-centered programming onto one of multiple program channels. Such segregation would violate Federal candidates' rights to "reasonable access" to the broadcast airwaves,[2] and might also violate candidates' rights to equal opportunities.[3]

II. Mandatory Minimum Standards

The FCC should adopt processing guidelines based upon 3 hours per week of local news and 3 hours per week of locally originated or locally oriented educational and/or public affairs programming outside of local news.

We agree with the principle underlying the Advisory Committee's recommendation on mandatory minimum public interest requirements—broadcasters should be required to provide some minimum amount of public interest programming in return for the free use of the public airwaves. We write separately to address the absence of specific minima in the Report. At the very least, we believe it is critical to specify how many hours per week of each type of public interest programming should be carried, and to specify the time period in which it should be carried (to ensure that such programming is not relegated to hours when few viewers are watching).

In addition, to ensure that all broadcasters serve the public interest, the FCC should adopt minimum public interest requirements that are stronger and more specifically targeted to address the absence of local news and locally originated and locally oriented educational and public affairs programming over many broadcast stations.

We recommend, therefore, that the FCC adopt a processing guideline calling for 3 hours per week of local news and 3 hours per week of locally originated or locally oriented educational and public affairs programming outside of local news. A broadcaster that airs this minimum amount would receive automatic approval of that portion of its license renewal application that addresses local programming. Local programming, outside of local news, should be

dedicated to programming that addresses issues of local importance and/or is specifically tailored to meet a need in the community that is otherwise underserved, including minority communities. To ensure that such programming is not buried in "graveyard" time periods, the Commission should specify that a significant amount of this programming should be aired between 6 p.m. and 11 p.m. and that no programming to fulfill this mandate should be aired before 7 a.m. or after 11 p.m. Public service announcements would not fulfill this requirement.

The proposed recommendation has its roots both in the Communications Act of 1934 and the Telecommunications Act of 1996. Under the 1934 Act, television broadcasters are licensed to serve localities to which they are licensed.[4] It has long been understood both by the FCC and by broadcasters that at the core of this local licensing requirement is an obligation that broadcasters provide locally originated and locally oriented programming. Most broadcasters take this obligation to serve as public trustees for their communities seriously, and consequently provide programming that meets local needs. However, evidence presented to the Advisory Committee demonstrates that a significant number of broadcasters provide neither local news nor local public affairs programming, and avoid controversial topics, no matter how important.[5]

As discussed above, broadcasters receive a license to use public spectrum free of charge in exchange for providing inkind payment through programming services that are not market-driven. Under the same rationale, the FCC, pursuant to Congress' mandate in the Telecommunications Act of 1996, gave incumbent broadcasters free additional spectrum (for a period of no less than 9 years) to convert to digital TV. In the 1996 Act, Congress emphasized three times the need for digital broadcasters to provide programming and services that serve the public.[6] The processing guidelines discussed above will ensure that broadcasters that provide little or no local programming do not benefit from the free grant of spectrum in the digital world. We believe that these guidelines would not burden those broadcasters who already provide adequate amounts of local news and programming.

III. Multiplexing

The FCC should not consider a broadcaster's revenues in determining when new public interest obligations attach for multiplexing.

We agree with the broad principle, and most of the specific provisions, contained in the Advisory Committee's recommendation on multiplexing. Broadcasters that use their free, extra public spectrum to provide more services and garner extra revenue should provide increased public service.

We write separately to address one issue.

We do not believe that the FCC should consider a broadcaster's revenues in determining whether new public interest obligations attach. The Report suggests that new obligations should attach "upon the extra channels reaching a particular revenue goal...." Conditioning the

provision of public service on broadcasters' revenues will ensure that such service is never provided. Creative accounting can always ensure that any revenue "goals" the FCC adopts will never be attained, especially because much broadcasting revenue is traditionally obtained via "trade-outs" for inkind goods and services.

Importantly, consideration of revenues is unwarranted in light of the fact that broadcasters have been given multiple billions of dollars worth of public airwaves, at no cost, to convert to digital TV. Moreover, the ability to multiplex gives broadcasters far greater opportunities to increase revenues than are available today. Digital transmission technology currently permits broadcasters to provide at least five to six video programming streams of quality equal to today's television picture, as well as other nonprogramming services such as data, paging, internet, and telephone services. Rapid advances in digital compression will likely expand that capacity even more. Additional public service obligations should be commensurate with these additional benefits, and should not be conditioned on whether those services generate a predetermined amount of revenue or profit.

Statement of Charles Benton on Funding New Education Digital Broadcast Channels, in which Frank M. Blythe, Peggy Charren, Frank H. Cruz, Newton N. Minow, Cass R. Sunstein, Gigi B. Sohn, and James Yee join

The Administration and Congress should fund additional noncommercial spectrum capacity and noncommercial educational programming through a combination of several of the following options: (1) spectrum auctions; (2) digital broadcast ancillary and supplementary service fees; (3) pay or play fees; (4) a "2 percent solution" of a 2 percent fee on the sale of broadcast and/or telecommunications properties and a 2 percent fee on broadcasters' gross revenues; and (5) allocation of funds for this purpose through the reauthorization of Federal legislation supporting educational institutions, including the Elementary and Secondary Education Act, in 1999.

The recommendations of the Advisory Committee include a new and imaginative dedication of capacity to expand the flow of information and communication to students within and beyond our traditional school systems. This recommendation will be a hollow promise if Congress does not act to fund this potentially powerful capacity. The acquisition and use of knowledge will be the major resource for our society in the coming century and is pivotal for democracy, our quality of life, our economic development, and indeed our security. Without adequate funding we risk repeating the history of other noncommercial capacity reserves such as the marginalization of cable's public access, education, and government (PEG) channels, with franchise fees going into the general budgets of municipalities rather than being invested in public interest programming.

The Advisory Committee's recommendations propose that Congress and the Administration examine three funding sources for the new educational capacity: (1) spectrum auctions, (2) digital broadcast ancillary and supplementary services fees, and (3) "Play or Pay" fees. Items 1 and 2 might have been appropriate and sufficient funding sources but unfortunately have already been scored to balance the Federal budget. Moreover, the Federal Communications Commission's recent decision to levy a 5 percent gross receipts fee on only the most narrow set of "ancillary or supplementary" services will ensure that this source of funding will be inadequate.[7] Item 3, Play or Pay fees, is a good first step in suggesting alternative funding sources, but is unlikely to generate the predictable funding mechanism needed to support this new capacity.

For these reasons, we suggest new funding mechanisms to support new educational outlets and programming in the age of digital broadcasting. These mechanisms should include a 2 percent fee on the sale of broadcast and/or telecommunications properties and a 2 percent fees on the gross revenues of broadcast, cable, and satellite operators. This "2 percent solution" will provide the predictable funding mechanism needed to support what would then become the Advisory Committee's greatest legacy: a new local, educational telecommunications infrastructure. The programming provided on this infrastructure could address the educational needs for every American from preschooler to university student, from youngster to lifelong learner.

In an increasingly competitive global economy, it should be noted that other countries are making much better use of television in education than we are. For example, in England there are dedicated public and commercial school television services that now spend more than $50 million per year in producing new programs for school use. We spend a tenth of that for new school productions in a country with four times as many people. Further, the United Kingdom has adult education, training, and lifelong learning broadcast services that annually invest tens of millions more in new programming for public use. Digital television could bring computers and television together to meet educational needs in powerful new ways we can hardly imagine.

Therefore, the Administration and Congress should realize the special opportunity to examine these funding opportunities while reauthorizing the Elementary and Secondary Education Act in 1999. Some $20 billion from the Federal Government are made available annually for education; a portion of these funds should be allocated to educational institutions, libraries, and other community-based groups for access to the public airwaves with new educational programs for "the public interest, convenience and necessity." To ensure the participation of communities, Congress should require matching local funds to ensure multi-institutional cooperation around shared goals.

The full powers of digital television need to be mobilized for addressing our educational challenges in the next century.

As the Advisory Committee on Public Interest Obligations for Digital Television Broadcasters issues its Report, I wanted to express my concurrence with most of the Report's content.

Statement of Frank H. Cruz, in which Frank M. Blythe and Newton N. Minow join

Under the Chairs' leadership, we have crafted a document that will help guide broadcasting's future as it transitions into the digital age. However, I must register my strong concern that the Report does not go far enough in securing the role for public broadcasting in the digital future. My concerns center around the lack of an endorsement for public broadcasting as the entity that operates the new educational public interest channel, and the fact that the Report does not discuss cable television's carriage of a public service broadcaster's digital signal.

To begin, I wanted to commend the Report for recognizing the vitality of equal opportunities for all Americans in broadcast ownership, employment, and programming. As the Report acknowledges, opportunities for women and minorities should be fostered at all levels of broadcasting. The rationale for this policy is simple. America is enriched by a diversity of voices broadcasting their opinions over the airwaves. A diverse pool of broadcasters and programming is one of the best ways to ensure that an abundance of views are shared with the public. Digital television will provide numerous opportunities for entrepreneurial enterprises in station operation and programming. All Americans should reap the benefits of the digital revolution; the best way to ensure universal benefit is by promoting equal opportunities.

Next, I am glad that the Report recognizes that, as a first priority, Congress must secure long-term, stable, adequate funding for public broadcasting. Public broadcasters' record is unparalleled in public interest service. Although channels and choices will multiply in the digital age, most will be commercially supported, and any public services that commercial channels offer will necessarily be subordinate to their central need to return revenues to shareholders. Therefore, it is essential to the public interest that we support public broadcasting, whose sole mission is nonprofit public service. The Report acknowledges the vital nature of public broadcasting by urging Congress to create a trust fund to ensure permanent and adequate funding.

I am disheartened by the fact that the Report only presents public broadcasters as one option for operating the new educational channel. The Report should have rewarded public broadcasting for its long and accomplished public service history by recommending that public broadcasting stations be given the first opportunity to be entrusted with the special educational channel. Through giving local public television stations the first opportunity to operate each educational channel, the Report would have recognized that one of the prime benefits of digital technology is that it will revolutionize the educational process, particularly for those now underserved by information resources. Public broadcasters are dedicated and mandated to provide educational programming to all Americans. It simply makes sense that the Report recommend allowing public broadcasting to put its experience and expertise to use. Public broadcasters are already well advanced in their plans to deploy digital spectrum in the public interest, and stand ready to create and deliver abundant digital content. The educational channel would allow public broadcasting to truly fulfill its universal public service mandate. The Report should recommend that such a result be guaranteed.

Of course, I presume that any operation of the educational channel would be free from editorial control of Government entities. The role of the Department of Education and Federal Communications Commission must be explicitly defined so that the Government will not be involved in programming decisions, as this is not an appropriate role for it. The Report does not recommend that Government entities be removed from editorial decision making, and it should.

Finally, I would be remiss if I did not express my disappointment that the Report did not more fully address mandatory cable carriage of local broadcasters' digital signal (also known as "must-carry"). The Report does a disservice to digital signal must-carry obligations by merely endorsing must-carry as a concept, but shying away from recommending any sort of implementation scheme. At a minimum, the Report should have recommended that the FCC require that the digital signal(s) and all accompanying digital enhancements of nonprofit educational stations be carried by cable systems under any implementation scheme as soon as they begin digital broadcasts. More specifically, instead of "throwing its hands up" at an implementation schedule, the Advisory Committee should have urged the FCC and Congress to adopt regulations that require a cable operator to carry both the analog and digital signals (with enhancements) of public television stations and other operators of newly designated nonprofit educational channels such as the educational channel described herein, if different from public broadcasters.

Without must-carry obligations for the digital signals of public broadcasting stations, the public will be deprived of the opportunity to experience the expanded and enhanced public interest services made possible by this new technology, services that have been supported by tax dollars and direct contributions. Despite my feeling that the Advisory Committee should have gone farther in recognizing and strengthening the contributions of public broadcasting, I think the overall Report is something of which we, and all Americans, should be proud. It is the beginning of a blueprint for broadcasting's new millennium, an era that promises to be full of opportunities for public service and the entrepreneurial spirit.

Statement of Robert W. Decherd, Harold C. Crump, and William F. Duhamel, Ph.D.

This statement summarizes our response to the Report of the Advisory Committee with regard to the public interest obligations that should be applicable to over-the-air broadcasters as the nation's television system shifts from an analog to a digital transmission format. We applaud the Advisory Committee's conscientious efforts to achieve a consensus and agree with a number of the concepts set forth in the Report. We regret, however, that it appears that a majority of Advisory Committee members are not prepared to embrace a public interest model for the coming digital age which appropriately reflects (1) the tremendous commitments to localism and public service programming long demonstrated by the industry, and (2) the marketplace incentives which will ensure an ample supply of non-entertainment programming in the future.

Section II of the Advisory Committee Report espouses historical and legal notions from the history of television industry regulation that will have very limited currency in the digital age. We see no scarcity in electronic outlets for free expression now or in the future and thus take exception to this section.

Having worked diligently and participated faithfully in the work of the Advisory Committee, we are disappointed that we must disagree with many of the recommendations. We continue to believe everyone's purposes would be better served if the Advisory Committee had taken a more general approach such as the one set forth in our statement. The digital world is evolving at a stunning pace and no one can predict with certainty today how public interest obligations—or most other aspects of digital television—will play out. We believe quality journalism and public service will carry the day with viewers no matter what the technologies or delivery systems of the future might be.

Additional Public Interest Programming Expectations for Digital Broadcasters Who Choose to Multiplex

The Advisory Committee's report addresses "whether the public interest requires a different formula" for television broadcasters who decide to use their DTV allotments for multiple channels of commercial programming. The Report recommends that, after a 2 year moratorium for experimentation, Congress or the FCC should require the payment of fees or "inkind contributions" (e.g., dedication of one of the channels to public interest purposes, or provision of free time to political parties) by broadcasters who realize a substantial increase in revenue from multiplexing. With this fee or inkind arrangement in place, statutory or other public interest obligations would attach only to the primary channel.

We support the notion of a moratorium to allow broadcasters to explore the many possibilities offered by DTV but believe it is inappropriate at this point to contemplate the imposition of fees or the extraction of specific public interest concessions from broadcasters based only upon speculative assumptions about the possible use of DTV channels. Television broadcasters will have strong incentives to continue to provide news and other nonentertainment programming to meet the needs and interests of their audiences as the transition to DTV progresses. At this early stage in the DTV implementation process, however, it is impossible to determine precisely the manner in which the transition to digital broadcasting will unfold, or the economic impact of that transition on television broadcasters and the marketplace in which they compete. That transition will be achieved most rapidly and efficiently if broadcasters are free to experiment with HDTV, multiplexed SDTV, and other variations of digital transmission and to develop innovative programming and other services to take full advantage of the enormous potential of digital technology. The transition to DTV will be expensive and difficult for broadcasters. Congress and the FCC should proceed with caution and avoid the imposition of any additional burdensome regulatory requirements which may stifle experimentation and slow the implementation of digital technology.

In these circumstances, existing public interest obligations should be maintained but certainly should not be increased for broadcasters who determine to use their DTV allotments to

provide a single channel of high-definition television service. Those broadcasters will be providing a one-for-one replacement of existing NTSC service, which carries with it significant trusteeship obligations already tailored to that service. Similarly, because channels devoted to ancillary and supplementary services will be subject to fees under existing law, a broadcaster's decision to offer such services in addition to a single channel of DTV programming should not trigger any additional public interest obligations.

Television broadcasters who choose to transmit more than three channels of digital programming may reasonably be expected to devote some additional time to public interest programming. However, the imposition of fees or any sort of specific quantitative guidelines for additional public interest programming contributions are unnecessary and inappropriate. Accordingly, broadcasters choosing to multiplex their DTV offerings should be given the flexibility to determine the appropriate level and scheduling of such additional public interest programming and to decide whether that programming will be aired on one or more of their digital video channels. The community will be the judge of the sufficiency of these multiplexed program offerings. As the transition to DTV unfolds, broadcasters will learn from the reaction of the marketplace whether they have accurately gauged the needs and interests of their local audiences.

Retention by Public Television Stations of a Second Channel in Each Market to Be Devoted Primarily to Educational Programming

We strongly support the Advisory Committee's recommendation that, in each market, a second transition channel be retained permanently to be used for additional educational, instructional, and public interest programming by noncommercial TV stations. In this way, the availability of such programming can be expanded without displacing the programming currently available on PBS or commercial TV stations.

We also support the suggestion that the existing local public television station (or stations) be given the first opportunity to operate the additional educational DTV channel. We are opposed, however, to the Advisory Committee's suggestion that the FCC would have the power to approve or disapprove a plan for programming the station or for involving the local community in the station's operations; such additional regulatory oversight is unnecessary.

We also agree with the Advisory Committee's suggestion that the fees charged commercial broadcasters for ancillary and supplementary services can be used as one source of funding for the program services on these second channels. Further, the Corporation for Public Broadcasting (CPB) should continue to act as the umbrella organization for allocating funds to local noncommercial stations. Reliance on CPB to perform that function would also avoid the need for establishment of any new bureaucracy. Additionally, as the Advisory Committee suggests, Congress may wish to consider devoting a portion of the proceeds of the auctions of returned analog television channels to the support of additional noncommercial programming to serve local educational and informational needs.

We share the belief of other members of the Advisory Committee that the availability of a second public television channel would strengthen noncommercial broadcasting and provide new opportunities for public access to the airwaves, including outlets for independent program producers and local residents and community organizations. Additional spectrum dedicated to public use could also create a permanent pipeline for political candidates to communicate with the electorate.

Reliance on Voluntary Adherence by Television Broadcasters to Broadly Shared Public Interest Principles

As the Advisory Committee's Report recognizes, for many years, the great majority of broadcasters have voluntarily adhered to generally accepted, industry-wide principles in providing public interest programming to serve their local communities. We strongly believe that continued voluntary adherence to these salutary principles, updated as may be appropriate to reflect the intentions of television broadcasters as they enter the digital age, will serve the industry and the public well.

We are prepared to commit to the following public interest principles and objectives for the DTV era:

- Renewed and systematic efforts by station licensees to identify the concerns and interests of their local communities.
- A continuing commitment to provide public interest programming responsive to those concerns and interests.
- Provision of programming (including educational programming) specifically addressed and intended to be responsive to the needs and interests of children.
- Coverage of debates and other candidate forums.
- Voluntary provision by television stations of air time for uninterrupted statements by candidates for public office, to encourage a meaningful dialogue with the electorate on the central issues of their campaigns.
- Airing of town meetings and similar open forums for discussion of local issues by area residents, officials, and community leaders.
- Continuing efforts (such as closed captioning) to utilize available technology to make the benefits of broadcast television more widely available to individuals with disabilities.

We do not believe, however, that it is appropriate for the Advisory Committee either to identify the industry group expected to develop a new code, or statement of principles or standards, or to provide models of what such standards might look like. First, the NAB and the majority of broadcasters have made clear that the implementation of a new code by the NAB is not feasible. Any suggestion that a new code is expected, that it should conform to some "model," or that, as some members suggest, the FCC might step in if the industry does not produce such a document, is inconsistent with the concept of truly voluntary self-regulation.

Mr. Crump disagrees with this language and supports a new voluntary code of conduct to replace the old NAB Code of 1952.

Minimum Public Interest Requirements

The Advisory Committee's Report suggests that "not all broadcasters will subscribe to voluntary guidelines" and that "a set of mandatory minimum public interest requirements for digital broadcasters" should be developed. Indeed, some Advisory Committee members would use the occasion of the DTV transition as an excuse to reinstate governmentally mandated programming standards, such as formal ascertainment procedures and quantitative guidelines, that were rescinded as unnecessary and ineffective.

For the reasons set forth above, we strongly oppose the imposition of such mandatory standards. The vast majority of American broadcasters have demonstrated their awareness of and responsiveness to the concerns and needs of their local communities. The marketplace, moreover, provides very substantial incentives for broadcasters to provide locally oriented news and other informational and public service programming. These incentives will only increase in the digital era, and broadcasters will need maximum flexibility to experiment and develop suitable programming and other digital services. The dawn of the digital age should not be accompanied by a return to government micromanagement of programming service.

Disclosure of Public Interest Activities by Broadcasters

To assist individual communities in assessing and understanding the public interest programming efforts of local TV stations, television broadcasters should be encouraged to disseminate more broadly information on their efforts to identify and address local concerns in their public interest programming offerings.

We do not believe that it is necessary or appropriate for the FCC to impose specific additional recordkeeping or reporting requirements. Rather, television station owners navigating the difficult and expensive transition to DTV operations will have every incentive to take appropriate steps to ensure that they identify and satisfy the needs, interests, and tastes of their audiences.

Voluntary Provision of Airtime for Coverage of Federal Election Campaigns

We are cognizant of the widespread concern with respect to the increasingly important role of television spot advertising in political campaigns and of the accompanying issues such as negative campaigning and fundraising abuse. Therefore, broadcasters should be strongly encouraged to provide airtime to candidates on a voluntary basis for more meaningful discussion of campaign issues and proposals. A number of TV station licensees already do so, and others have expressed the intention voluntarily to provide such airtime in upcoming election periods.

Broadcasters also should be encouraged to consider, on a voluntary basis, a broad range of programming and other options to help elevate political discourse. This process should not be mandated by the Federal Government; it can and should be a voluntary standard agreed to and promoted by the industry and its leading members. Thus, the Advisory Committee should not attempt to articulate or endorse any particular plan for the use of airtime for political messages. Further, as the Advisory Committee Report notes, "television is only one part of a campaign system filled with serious problems." Broadcasters can and should be expected to do their fair share to contribute to solutions to those problems.

Disaster Warnings in the Digital Age

As the Advisory Committee Report recognizes, broadcasters have always taken seriously their fundamental public interest responsibility to warn viewers about impending natural disasters and to keep them informed about disaster-related events. We join in the Advisory Committee's exhortation to broadcasters to work with emergency communications specialists and equipment manufacturers to utilize digital technology to transmit emergency-warning and related information in a manner that will be as effective as possible, with minimal intrusion on bandwidth or undue burdens on broadcasters. We also agree that regulatory authorities should coordinate with manufacturers of DTV receivers to ensure that new digital TV sets and converters are fully capable of handling such emergency transmissions.

Disability Access to Digital Programming

We agree with the Advisory Committee recommendation that broadcasters should be encouraged to explore vigorously ways to provide greater access to the disabled, including expanded closed-captioning and video description where feasible, as well as creative uses of data streaming, in ways that will not create an undue burden on broadcasters. Again, as the Advisory Committee Report suggests, the FCC and/or other regulatory authorities should work with set manufacturers to ensure compatibility and maximum utilization of available technology. Broadcasters should not be subject to specific additional requirements, beyond those already enumerated for the television industry in general, by virtue of the initiation of DTV operations.

A New Approach to Public Interest Obligations

In the final section of its Report, the Advisory Committee states that "[a]pplying existing public interest obligations to [the] variegated universe [of DTV offerings] will not be easy, and will certainly not entail a simple one-for-one exchange." We strongly agree that "flexibility to fit the different patterns that will develop and that will change over time will be increasingly important."

We do not believe that the "pay-or-play" model identified in the Advisory Committee Report offers an appropriate model for future public interest regulation. In essence, it would appear to require broadcasters either to meet governmentally mandated standards or to pay an

alternative tax for use of the airwaves. We believe that this sort of approach would be inconsistent both with the tradition of public trusteeship on which broadcasting has been built and on the history of reliance, to the maximum extent possible, on the good-faith discretion of licensees to meet the needs of their audiences.

Conclusion

For the reasons set forth above, we recommend that Congress, the FCC, and the television industry proceed cautiously at this stage in the transition to digital, avoiding the imposition of any additional and onerous regulatory burdens that may stifle the rapid introduction of DTV service and the expanded programming services it will make possible. As the country moves forward with the introduction of digital television and we gain a clearer understanding of the future shape of the industry, it may then be appropriate to consider whether the adoption of any additional measures are warranted. At that point, we would expect to have a much more meaningful basis for evaluating any further steps.

Statement of Barry Diller

Since its invention, local broadcast television has performed the powerfully important service of delivering public interest programming, at no charge, to all Americans. If we mangle the transition to digital broadcasting, we will lose that unique public service.

I support the Advisory Committee's recommendations because, on the whole, they will help rather than hinder the preservation of free local broadcast television and its benefits as broadcasting enters the digital age.

One proposal will accomplish the opposite: the idea of taxing the provision of multiple free television signals. I disagree with it.

* * *

Free local broadcast television is the only video programming service that has provided everyone in the country, at no cost, with national and local news and information; public affairs and other programming serving the local community; public service announcements; programming for diverse and underserved audiences, such as shows for minority audiences and educational programs for children; and other public interest programming. Nothing on the horizon will change that fact.

It follows, in my view, that recommendations concerning the public interest obligations of digital broadcasters should flow from the following two principles.

1. Broadcasters have unique public interest obligations because broadcasting is our only free and ubiquitous video programming service.

2. Public interest obligations on broadcasters are meaningless unless broadcasting remains a free and ubiquitous video programming service.

The Advisory Committee's recommendation that broadcasters have minimum public interest requirements stems from the first principle. As trustees of the public airwaves, broadcasters must serve the public interest. In an ideal world, voluntary guidelines would suffice. In the real world of commerce and competition, where economic incentives run counter to the provision of public interest programming, it is appropriate for the Government to insist on enforceable minimum public interest standards.

Some disagree with the notion that the Government should adopt clear, minimum standards for broadcasters. Especially in an increasingly competitive television world, that position, if accepted, would inevitably diminish the amount of public interest programming broadcasting provides and seriously weaken the public trustee concept, which has for so long provided enormous benefits to the country. For similar reasons, I disagree with the notion that broadcasters should be able to shunt their public interest obligations on to others—the notion of "pay or "play," which the Report discusses but rightly declines to endorse.

Minimum public interest standards should be reasonable, flexible, and limited to areas appropriately subject to Government enforcement. Other areas should be handled through a voluntary industry code of conduct, and I agree with the Report's recommendation that the television industry adopt such a code.

Because television is available so widely, and because it is the country's main source of news and information, it is not surprising that television has become the main way that candidates reach voters. The problem, of course, is that it is an expensive way for candidates to reach voters. There is no question that this country's scheme for financing elections is a dirty mess and that the high cost of advertising is part of—though certainly not all of—the problem.

Broadcasters should participate in the solution, and I support the proposal that broadcasters issue a challenge to Congress on campaign finance reform. If Congress adopts real and comprehensive campaign finance reform, broadcasters should, can and, I expect, will ensure that candidates have enough free television time to reach voters.

Minimum standards, free time and other public interest efforts of broadcasters are ultimately meaningless if broadcasting does not continue to reach everyone in the country—the second principle I mentioned above. Broadcast channels that are not universally received cannot remain a free service; the advertising base would be too small to support a competitive product. The reality is that most viewers receive broadcast television through wires controlled by the local cable operator, and as Congress and the Supreme Court have found, it is appropriate to ensure that all broadcasters can reach everyone in their audience. I support the Advisory Committee on must-carry for digital broadcasters.

There is another regulatory issue that must be addressed if broadcasters are to continue to have the wherewithal to create and distribute public interest programming. Many of the Federal Communication Commission's outdated limits on television ownership no longer serve

their purpose. In fact, in the current highly competitive television landscape those rules hinder their purposes of competition, diversity, and localism. FCC rules wrongly prevent broadcasters from entering arrangements that would make it economically sensible to provide significant amounts of local programming, news, and other public interest programming. Although the topic of ownership goes beyond what the Advisory Committee was asked to address, we should not kid ourselves: current ownership rules seriously threaten broadcasters' ability to serve their local communities.

Finally, I wish to state my opposition to the Report's treatment of multiplexing by digital broadcasters. The Report suggests that a fee be imposed on broadcasters that provide multiple streams of programming. If broadcasters charge a subscription for such programming there are separate rules requiring fees on broadcasters, as the Report acknowledges. Thus, this proposal is solely about the provision by broadcasters of multiple free signals. The notion of taxing or otherwise penalizing free broadcasting defies logic. For decades, it has been Government policy to encourage the provision of free over-the-air television. There is nothing about digital technology that warrants the replacement of that policy with one that will discourage free television.

Many of the Report's other proposals can and should be refined as we learn more about the technology and economics of digital broadcasting. But in the pre-dawn of the digital television era, it was appropriate to bring this group together to consider the public interest obligations of digital broadcasters, and it is right to reaffirm the status of the broadcast industry as trustee of the public airwaves with real obligations to serve its audience.

Statement of James F. Goodmon Supporting Minimum Standards for Digital Television Broadcasters

Beginning with the first Advisory Committee meeting, when I handed out a copy of the original NAB Code to every member, I emphasized my view that it is very important to establish minimum public interest standards and a voluntary code of conduct for digital television broadcasters. Throughout the proceedings, I have consistently promoted that view. I believe that it is very important to *reaffirm* the principles of localism and public service as we enter the digital broadcasting era.

The consensus Report of the Advisory Committee takes a *moderate* position regarding digital broadcast "regulation." It goes something like this:

(1) In lieu of paying money for a digital broadcast license, the licensee will agree (in effect, enter into a contract) to "serve the public interest" through the operation of its station.

(2) What does "serve the public interest" mean? Good question—the Advisory Committee views this as a three-step process:

(a) All stations should be required to meet certain *minimum* standards of public interest performance. These minimum standards should be broad and flexible.

(b) A voluntary code of conduct should be put in place to encourage higher than minimum standards for the broadcast industry. (The NAB did a good job with this in the past.)

(c) All stations should be required to report quarterly on their public interest activities.

The devil, of course, is in the details, and the Advisory Committee encourages the FCC to work with broadcasters and public interest groups to hammer out the specifics. The Advisory Committee Report, with its attachments, includes some specific suggestions regarding minimum standards, the voluntary code, and quarterly reporting.

To my comments I am attaching the "Minimum Public Interest Requirements for Digital Television Stations" submitted by the Working Group on Minimum Public Interest Standards.[1] I chaired this Working Group. I need to point out that this is not a consensus proposal from the Working Group, although I do believe that a majority of the Advisory Committee supports its contents.

A suggested voluntary code is included in the full Advisory Committee report. (See Appendix B.) A suggested quarterly reporting format is included in the Advisory Committee Report. (See Appendix A.)

Our consensus Report necessarily avoids two widely divergent positions regarding broadcast "regulation." It is interesting that both poles of the argument use the "*free market*" principle (profit motive) as the basis for their positions. One states that there should be no regulation because the "*free market*" will (by definition) cause the stations to operate in the public interest. That is, the only way to make a profit is to operate in the public interest. Their argument is that regulation in any form is costly, stifles creativity, is onerous, outdated, and unnecessary. This leads, quickly, to the rejoinder that if broadcasters will not commit, in a meaningful and quantifiable way, to serve the public interest in return for the free use of public spectrum then their licenses should be auctioned in the "*free market*" to the highest bidder. Again, it is my feeling that the Advisory Committee Report takes a sensible middle road between the two extremes.

As a broadcaster, I do not view these minimum standards as *regulation*. In return for a license to use a public asset for private financial gain, a broadcaster agrees to serve the public interest. The broadcast company is fulfilling a contract between itself as the user of a public asset and the public body that owns the asset. *As with all contracts, both parties to the agreement need to know exactly the responsibilities that they have to each other*. With minimum standards spelled out, there is no question.

As a broadcaster I would like to know what is expected of me in serving the public interest. Required minimum standards and a voluntary code provide the benefit of certainty to broadcasters. I like to know what the rules are.

MINIMUM PUBLIC INTEREST REQUIREMENTS FOR DIGITAL TELEVISION STATIONS

Submitted by
Working Group on Minimum Public Interest Standards

Mandated Minimum Requirements

A. **Community Outreach.** Stations should be required to develop a method for determining or "ascertaining" a community's needs and interests. This process of reaching out and involving the community should serve as the station's road map for addressing those needs through news, public affairs programming, and public service announcements. Further public input should be invited on a regular basis through regular postal and electronic mail services. The call for requests for public input should be closed captioned. On a quarterly basis, the stations should report to the Federal Communications Commission and the public on how ascertained needs determined management decisions on developing public interest programming.

B. **Accountability.** Whether or not there are required minimums, stations should report quarterly to the FCC and the public on their public interest efforts. This report would include quantitative and qualitative information about PSAs, public affairs programming, news programs, children's programs, ascertainment, etc. These quarterly reports should be broadcast by the station and also provided through an on-line internet service. In addition, we believe the NAB Public Interest Report provided valuable information to this Committee and others and we would encourage the NAB to offer this report on an annual basis. Standardized Quarterly Reports from the stations would aid the NAB in this effort. (Another subcommittee has been assigned the task of preparing a proposed quarterly checklist for stations to place in their public files.)

   The station's public file documents would be made available by mail or posted through an on-line service to the community. "Electronic filing" opportunities for stations should be explored by the FCC.

C. **Public Service Announcements.** A minimum number of public service announcements should be required with an emphasis placed on locally-produced PSAs addressing the community's local needs. A certain percentage of those PSAs should be mandated to run in prime time and other day parts. (See Attachment for a suggested range of required numbers for PSAs and for a suggested phase-in period.)

D. **Public Affairs Programming**. Each broadcast station also should be required to devote a minimum amount of time to public affairs programming, again with an emphasis on local issues and needs. Highly visible time periods should also be spelled out for these important programs. Segments within a regularly scheduled newscast should not be counted toward the minimum time requirements for public affairs programming. (See Attachment for suggested minimum requirements and a suggested phase-in period.)

5) **Free Political Programming.** Programming time should be set aside for key political races. One of two methods could be selected for this requirement:

   (1) Broadcasters should provide at least five minutes of free political discourse each evening for the thirty nights prior to a primary or general election of candidate-centered races. Those programs should air between 6 p.m. and 11:30 p.m. In no case, would the minimum length of these political blocks be less than two minutes.

(2) Broadcasters would offer at least four hours of free political program time in the 60 days preceding primaries or general elections. One-half of this programming should be broadcast between 6 p.m. and 11:30 p.m. (For example, stations could program one-half hour per week for eight weeks prior to the election.) Station management could make the decision on how to block the time.

In either selection made above, news interviews of candidates would not count toward the total requirements of time.

Large political races often pose problems for broadcasters because of the sheer number of offices and candidates available. Local broadcasters should be encouraged to work together to provide outlets for as many candidates as possible. As an example, stations could work together to divide the offices and candidates among themselves.

6) **Closed Captioning.** A broadcast station should be required to provide closed captioning of all PSAs, public affairs programming, and political programming. A station should provide one fourth of such captioning by the close of the first year of its digital transmission, and increase the amount of such captioning by one fourth over each subsequent year. Because most stations will begin digital transmissions after 2002, this schedule will be consistent with the captioning schedule imposed by recent FCC rules that require most new programming to be captioned by 2006**.**

7) **Lowest Unit Charge.** The current "lowest unit charge" system used by stations for political advertising is very complex and difficult for stations and candidates to administer. Further, because of a change in industry sales policies to more of an "auction" selling system, the current "lowest unit charge" plan is confusing. For purposes of simplification and to provide a preferred rate to candidates, the current "lowest unit charge" used by stations shall be replaced by a "bonus rate" plan whereby one bonus political spot would be provided for every three spots paid for by the candidate. These "bonus rates" would apply only in commercials where the candidate appears and voices 75 percent of the total commercial spot.

8) **Issue Advertising.** Recent years have seen a sharp expansion of television advertising close to elections that qualifies as "issue advocacy," falling outside the legal definition of political advertising but is obviously purchased by groups with names like "Citizens for Good Government," that disguise from viewers the sponsor or founder of the message. To preserve the principle of disclosure to the public, stations should require purchasers of issue advertising, who use the name or likeness of a candidate for office within the viewing area of the station, to provide full information about the sponsor and officers of organizations funding the advertising within sixty days of an election, which the station should in turn make public before the election.

9) **Multi-casting.** Digital television offers opportunities for broadcasters to carry programming on multiple channels. And while the committee has discussed many alternatives for providing public interest requirements for these additional channel opportunities, it is the subcommittee's recommendation that a station's primary channel must meet all the public interest minimum requirements outlined in this document. The larger committee should have some latitude in developing requirements for these additional channels but in no case should a broadcaster be allowed an opportunity to pay a fee rather than meet these requirements on any channel unless that channel is a designated "ancillary" channel under FCC rules and a government imposed fee is charged.

10) **Diversity in Employment.** The committee recognizes that Equal Opportunity Rules implemented by the FCC resulted in significant improvements in diversity of employment in the broadcast industry. Realizing the courts have, at this time, invalidated those rules, the committee encourages the FCC to look for other opportunities to establish employment standards that meet the legal criteria and ensure non-discrimination in employment practices. If this is not possible, individual broadcasters should be encouraged to develop non-discriminatory policies for employment under a voluntary code.

[*Note to reader: The report of the Working Group also included sections on the importance of must-carry and an industry-adopted voluntary code of conduct.*]

ATTACHMENT

These are Proposed Ranges and Phase-In Periods for PSAs and Public Affairs Programming Requirements.

Public Service Announcements.

(1) Proposed range. The suggested range for the number of public service announcements required is from 110 to 150 per week for each station or channel. The suggested breakout by time period follows:

6:00 a.m. – 4:00 p.m	40 – 60
4:00 p.m. – 11:30 p.m.	30 – 40
11:30 p.m. – 6:00 a.m.	40 – 50

(2) Local Emphasis. At least one half of the spots should be locally- produced and directed toward local issues.

(3) Phase In Period. PSA requirements would be phased in with approximately one-third of the PSAs required in the first year of digital transmission, one third in the second year, and all numerical requirements met in the third year.

Public Affairs Programming. While we suggest that broadcasters be required to carry at least two hours of local programming each week, a suggested phase-in period might allow the following:

Year one	Weekly, one-half hour, locally-produced public affairs programming
Year two	Weekly, one hour or two half hours of programming
Year three	Weekly, two hours of public affairs programming

The first one-half hour of programming should be carried between the hours of six p.m. and midnight.

In year two and thereafter, one-half of all public affairs programming should be (a) broadcast between six p.m. and midnight and (b) locally produced and aimed at local community needs and interests.

Free Political Programming. Political programming should not be phased in. Minimum requirements should be met following implementation.

Statement of Paul A. La Camera

The opportunity for digital broadcasting brings with it a corresponding imperative for affirmation of the public interest obligations of those who are its beneficiaries. Accordingly, the Advisory Committee's Report ("Report") contains a number of key recommendations that I fully support. The Report contains other recommendations, however, to which I respectfully must dissent.

I endorse and, in fact, played a role in framing the Report's recommendation for "Disclosure of Public Interest Activities By Broadcasters." Enhanced disclosure will facilitate public review of each station's community service and serve as a self-audit for the broadcast industry. The industry has an enviable record of public service; it should not be reluctant to disclose it.

I also support the creation of a broadcast industry voluntary code of good practices prepared and administered by the broadcast industry. The broadcast industry is imbued with a public trust, and the implementation of a code of good practices will create a forum for public debate on evolving national and local standards for broadcast service. Self-regulation, if responsibly administered and enforced, will avert First Amendment tensions associated with government regulation and provide an impetus for continuing reassessment by the industry of its public interest stewardship.

Given the conspicuous role television plays in the nation's political discourse, I endorse Core Recommendation No. 6(b) that television stations voluntarily provide five minutes of time for appearances by candidates each evening during the 30-day period before an election from 5:00PM to 11:35PM (or the appropriate equivalent in non-eastern time zones). What is so compelling about the latter is that it offers a broadcaster flexibility and creativity, while advancing in a meaningful way the interests of a more fully informed electorate. This proposal would also serve to further the substantive and documented offerings already made by broadcasters in the form of political debates, campaign issue reports, candidate profiles, etc.

I am troubled, on the other hand, by other aspects of Section 6, notably the proposals regarding so-called "free air time" and the establishment of a "broadcast bank for airtime" to be controlled by political parties. Such approaches, while well intended, may very well exacerbate, rather than ameliorate, the abuses that exist within the current political campaign system.

I firmly endorse those portions of the Report addressed to Improving Education Through Digital Broadcasting, which in many ways could be one of the most far-reaching and beneficial products of the work of the Committee; Disaster Warnings In The Digital Age; Disability Access To Digital Programming; and Diversity In Broadcasting.

Conversely, I am not able to support Core Recommendation No. 3 for government mandated minimum public interest standards. "One size fits all" government mandated standards would not advance the public interest. Intrusive, content-based regulation that would likely flow

from government mandated standards would, on the other hand, impede experimentation and the development of digital television and frustrate attainment of the very goals the Committee envisions for this exciting new service.

In many ways, the 10th and concluding section, New Approaches to Public Interest Obligations In The New Television Environment, presents the greatest difficulty for me. The Report in this section, as well as in the section related to Multiplexing, would legitimatize the "pay or play" concept. "Pay or play" is repugnant to the underlying principles on which the nation's over-the-air broadcast service is based. The potential benefits that might come from a "pay or play" scheme could never achieve the sum of the public service contributions currently made by the broadcast industry.

Broadcasters do not ask to be relieved of their public interest activities or obligations. The great and exciting opportunity presented by digital technology, as noted at the outset, necessitates a corresponding affirmation of those responsibilities. However, certain sections of the final report, as I have tried to articulate, go far beyond these bounds into a new regulatory environment that threatens to undermine the special bonds that local broadcasters currently enjoy with their respective communities of interest and to retard the full potential that digital offers our medium and those we serve.

I have every confidence digital broadcasters will honor their public service responsibilities, and it is my hope that the work of this Committee will serve to facilitate continuing and constructive public and industry dialogue on the important issues contained in the Committee's Report.

Statement of Newton N. Minow, dissenting to Recommendation 6: Improving the Quality of Political Discourse, in which Charles Benton, Frank M. Blythe, and James Yee join

Howard Stern's new television show featured Stern shaving a young woman's pubic area. Have our broadcast standards descended to a level where public interest is confused with pubic interest?

Our assignment was to search for the meaning of the public interest in digital broadcasting. Will digital television only bring us clearer, brighter pictures of Howard Stern? Is it to bring us better, sharper sounds of Jerry Springer's bleeps and punches? Or can the public interest amount to more?

When digital channels became available, police wanted to use them for public safety. Firefighters wanted to use them to save lives. Schools and libraries wanted to use them for education. Hospitals wanted them for better health. Then, broadcasters decided they wanted them for digital television: to make more money.

Our Government said no to the police. No to the firefighters. No to the schools and libraries. No to the hospitals. And yes to the broadcasters. A gift—exclusive use of precious public property worth an estimated value up to $70 billion.

One wise public official, Senator Robert Dole—then Senate Majority Leader—objected. Senator Dole said, "We don't give away trees to newspaper publishers. Why should we give away more airwaves to broadcasters?" Senator Dole wanted broadcasters to pay for spectrum, just like everybody else. He asked why should we give away a national resource that could be worth as much as $70 billion? Think of giving Yosemite to the Coca Cola Corporation. Nobody listened. Congress did add a tardy reminder that those receiving such a generous gift from the public have a responsibility, in exchange for this gift, to serve the public interest. Our Advisory Committee was then created to try to figure out whether this means anything in the digital age.

Years ago, the National Association of Broadcasters (NAB) developed an excellent Code of Standards for television. Some in Government foolishly objected to the Code, attacked it in court as a violation of antitrust law and stopped this worthwhile effort. The Code does not exist today. Members of our Advisory Committee asked the NAB if it would revive the Code, provided Congress exempted it from the antitrust law. No, things are just fine without the Code, was the answer. The marketplace is the solution.

If the marketplace is the solution, broadcasters should want the digital channels to be auctioned. Broadcasters prefer a different kind of auction. This is an auction where candidates for public office buy back the public airwaves from broadcasters. We finished the most expensive off-year political campaign in American history with the lowest voter turnout in 50 years. Most of the hundreds of millions of dollars was spent on television advertising. Yet the NAB argues that television's unique capacity to use the public airwaves to inform and enlighten us should be left only to a marketplace auction. A Senator must raise $25,000 a week in fundraising throughout his term to participate in the broadcaster auction for campaign commercials. This puts us in the company of only two other countries in the world which do not require public service television time in political campaigns, Malaysia and Taiwan.

Other countries do better. British broadcasting in political campaigns serves the public interest. The British system grants political parties, by law, public service time on radio and television in the 3- or 4-week period before the election. The parties have complete freedom to make their cases; smaller parties receive time on an equitable basis. There is no sale or purchase of broadcast time, no money is involved. The campaign is mercifully short, and the voters are well informed. Indeed, because the campaign programs are simulcast on all channels, there is ample political discussion for the voters.

Digital broadcast licenses should not be awarded without a broadcaster's explicit commitment to provide public service time in campaigns and not to sell time. We now have a colossal irony. Politicians sell access to something we own: our Government. Broadcasters sell access

to something we own: our public airwaves. Both do so, they tell us, in our name. By creating this system of selling and buying access, we have a campaign system that makes good people do bad things and bad people do worse things, a system that we do not want, that corrupts and trivializes public discourse, and that we have the power and the duty to change.

Objectors to this idea claim it would violate the First Amendment. Can Congress constitutionally require broadcasters to provide time? Senator John McCain is a courageous man who suffered 4 years of torture as a war prisoner in Vietnam, 4 years to reflect on democracy and freedom. Senator McCain said: "Let me go back to the First Amendment thing. What the broadcasters fail to see, in my view, is that they agree to act in the public interest when they use an asset that is owned by the American public.…I have never been one who believes in Government intervention, but I also believe that when you agree to act in the public interest—and no one forced them to do that—you are then obligated to carry out some of those obligations....If I want to start a television station, I've got to get a broadcasting license. And that broadcasting license entails my use of something that's owned by the American public. So I reject the thesis that the broadcasters have no obligation. And if they believe that there is no obligation, then they shouldn't sign the statement that says they agree to act in the public interest. Don't sign it, OK?"

Senator McCain is right.

Our valiant co-chairmen, Norman Ornstein and Leslie Moonves, tried to bring our diverse group to consensus. But the price paid for this laudable effort to accommodate conflicting views left us with a low common denominator at a time when we need a broader vision equal to the promise of new digital channels. Today we take only timid, baby steps when we should take giant strides to match the giant leaps offered by this most promising technology. Our grandchildren will one day regret our failure to meet one of the great communications opportunities in the history of democracy.

Those broadcasters who do not want to serve the public interest in this way have an easy alternative. If they are unwilling to accept the privilege of exclusive use of valuable public property in exchange for public service, they can turn back the digital channels. They can be auctioned off for many billions of dollars, and the money can be earmarked for education. This is what our Nation did in the last century in the Morrill Act when we sold public lands and used some of the money to build our great land grant universities. Or they can be reassigned. The police, firefighters, schools and libraries, and hospitals are still standing in line.

Since the dawn of civilization, each generation has believed that from those to whom much has been given, much is required in return. Future generations who look back at the dawn of digital television will decide that our generation believed that from those to whom much has been given, nothing much is required in return.

Statement of Cass R. Sunstein, in which Charles Benton, Frank M. Blythe, Peggy Charren, Frank H. Cruz, Richard Masur, Newton N. Minow, Gigi B. Sohn, and Karen Peltz Strauss join

I agree with the report and recommendations of the Advisory Committee and write separately to emphasize two points. The first is that one of the central goals of the system of broadcasting, private as well as public, should be to promote the American aspiration to a *deliberative democracy*—a system in which citizens are informed about public issues and able to make judgments on the basis of reason. Thus broadcasting is no ordinary commodity, to be governed by the usual operation of the marketplace. Contrary to the suggestion of a former Chairman of the Federal Communications Commission, television is not "just another appliance," nor is it a "toaster with pictures."

The second point is that in order to promote the goals of a deliberative democracy, government should rely whenever possible on the least intrusive means, by fostering disclosure of information and voluntary self-regulation, and by using economic incentives.

Flexible Instruments

The Committee's recommendations are entirely consistent with the suggestion that Government should prefer, as its instruments of choice, (1) information, (2) voluntary self-regulation, and (3) economic incentives, as opposed to (4) more rigid Government controls. This approach is part and parcel of a quite general and highly salutary trend in Government regulation. [1]

Disclosure. As the Committee suggests, it would be especially desirable for every broadcaster to make public the full range of public interest and public service activities in which it engages every year. Every licensee should tell the public what it is doing. In the environmental area, disclosure requirements of this kind have done a great deal of good. [2] One virtue of such requirements is that they are relatively inexpensive, for the Government and for broadcasters alike. Another virtue is that they can enlist moral norms, public pressures, and social conscience on behalf of the public interest. I hope that the FCC will take prompt steps to implement them.

"Pay or play." It would be highly desirable for government to experiment with "pay or play" approaches in which broadcasters have an obligation to provide public service programming but can buy their way out by paying someone to provide that programming instead. Such approaches have also had considerable success in the environmental area, despite reservations very similar to those being expressed here; those reservations have generally been shown to be unconvincing. [3] Just as pollution is a kind of social "bad," public interest programming is a kind of social "good," and those who provide such a good should be better rather than worse off economically. A system in which those who do not provide public interest programming

must pay a kind of "fee" is far more flexible than one in which the Government imposes uniform obligations on everyone. [4]

The Public Interest and What the Audience "Wants"

Ours is a deliberative democracy, which aspires to a degree of reflection and deliberation, not merely to the expression of "preferences." Regulation of television should be undertaken with this aspiration firmly in view. In a deliberative democracy, there is a large difference between the public interest and what interests the public. The case for complete or near-complete deregulation, though pressed seriously before this Advisory Committee on constitutional and other grounds, has not been made out. There are five points here.

First: It is not the case that broadcasters are now engaged, in a systematic or scientific way, in catering to public tastes. There is a good deal of simple imitation, as networks provide a certain kind of programming simply by imitating whatever other networks are doing. [5] This imitative behavior actually creates a kind of homegeneity and uniformity, and thus makes for problems in terms of providing what viewers "want." [6]

Second: Television is not an ordinary product. When an ordinary producer gives consumers what they "want," this is because of the system of supply and demand, in which consumers pay a price, determined by the market, for a good that the producer supplies. But viewers do not pay a price, market or otherwise, for television. On the contrary, it is more accurate to say that viewers are a commodity, or a product, that broadcasters deliver to the people who pay them: advertisers. This phenomenon introduces some serious distortions. Advertisers have issues and agendas of their own, and the interests of advertisers can push broadcasters in, or away from, directions that viewers, or substantial numbers of them, would actually like. This is a substantial difference from the ordinary marketplace, one that can justify a governmental response. [7]

Third: The public's "tastes," with respect to television programming, do not come from nature or from the sky; they are partly a product of current and recent practices by broadcasters and other programmers. What people want, in short, is partly a product of what they are accustomed to seeing. It is also a product of existing social norms, which can change over time, and which are themselves responsive to existing fare. In an era in which broadcasters are providing a good deal of public interest programming, dealing with serious issues in a serious way, many members of the public will cultivate a taste for that kind of programming. In an era in which broadcasters are carrying sensationalistic or violent material, members of the public may well cultivate a taste for more of the same. "Just as culture affects preferences, so also do markets influence culture." [8]

Fourth: There is a difference between what people want as viewers (or consumers of broadcasting) and what they want as *citizens*. A democratic public, engaged in deliberation about the world of telecommunications, may legitimately seek regulations embodying aspirations that diverge from their consumption choices. When participants in democracy attempt to make

things better, and do not simply track their consumption choices, it is not helpful to disparage their efforts as "paternalism" or as "meddling." Consumers should not be confused with citizens; this is a form of democracy in action."[9]

Fifth: Individual choices by individual viewers may not produce an optimal level of public interest programming in light of the fact that the benefits of such programming are often enjoyed by third parties, and not fully "internalized" by individual viewers. For example, a culture in which each person sees a degree of serious programming is likely to lead to better political judgments; media portrayals of violence can produce harm to others; more knowledge on the part of one person often leads to more knowledge on the part of others with whom he interacts.[10] Perhaps most important, serious attention to public issues can lead to improved governance, through deterring abuses and encouraging governmental responses to social problems. In these various ways public interest programming can produce social benefits that will not be adequately captured by the individual choices of individual citizens.[11]

Sound-Bite Democracy, Sensationalism, and Competitive Pressures

No one should deny that there has been a great deal of wonderful, public-spirited programming in the United States. Moreover—and notwithstanding the qualifications described above—competitive pressures can do a great deal in providing programming that people would like to see. But competitive pressures also have a downside. They can lead to sensationalistic, prurient, or violent programming, and to a failure to provide sufficient attention to educational values, or to the kind of programming that is indispensable to a well-functioning deliberative democracy.[12] Thus I accept the suggestion that "[I]ncreasingly impoverished political debate is yet another cost of our current cultural trajectory. Complex modern societies generate complex economic and social problems, and the task of choosing the best course is difficult under the best of circumstances. And yet, as in-depth analysis and commentary give way to sound bites in which rival journalists and politicians mercilessly ravage one another, we become an increasingly ill-informed and ill-tempered electorate."[13] The idea of a voluntary "code" of good programming is specifically designed to respond to the problems that can be introduced by market pressures. Many journalists in the world of broadcasting would very much like to do better; competitive pressures are the problem, not the solution, and a voluntary code could help them and the public as well.

The Need for More Facts

Any system of regulation should contain built-in mechanisms for obtaining more information. Reasonable people may and do debate how much good would be done by (for example) having more educational programming on television and more public affairs broadcasting on each television station, at least if these come from uniform Federal mandates. Above all, there are important factual issues. How many children would watch compulsory educational programming? More particularly, how many more children would see good programming as a result of such programming? How many children would in any case be watching good pro-

gramming, on, for example, "Nickelodeon"? There are similar questions about public affairs broadcasting. If the broadcasters provided free airtime for political candidates, how many people would watch? And what kind of programming would be provided on that free airtime? The National Association of Broadcasters (NAB) has compiled information about existing public service activities, and it should certainly be commended for doing that. But the NAB study is based on extrapolations from a far from overwhelming response rate—merely 60 percent—and also on self-reporting, in response to a request for information from the NAB. As a result, the data may not be reliable. What the NAB has done is a commendable start toward a serious, sustained, and continuing public accounting.

Constitutional Law

In the course of our deliberations, some people have suggested that any regulation of broadcasting, or at least any "content" regulation of broadcasting, would violate the First Amendment to the United States Constitution. I do not believe that this is the correct reading of the First Amendment, and although this is not the occasion for an extended analysis of constitutional law, a few brief notes may be helpful.

It is true that the Government must tread cautiously whenever it purports to favor one kind of programming over another.[14] It is also true that the government can rarely, if ever, favor one viewpoint over another.[15] But the First Amendment does not enact a system of economic laissez-faire, any more than the due process clause enacts Herbert Spencer's *Social Statics*.[16] On the contrary, the First Amendment has, as one of its central goals, the creation of a system of deliberative democracy. Because this is one of the central goals of the First Amendment, content-based regulation that promotes democracy, in a way that favors no particular point of view, does not offend constitutional principles. (This was the central suggestion in *Red Lion* v. *FCC*,[17] and on this point *Red Lion* has not been overruled or even drawn into serious question.) Indeed, certain forms of regulation—producing more educational programming and more concern with public issues—are best understood as promoting, not undermining, First Amendment goals.[18] A system of economic laissez-faire may well compromise those democratic goals, or at least Congress, or the FCC, may reasonably conclude it does so. The recommendations of the Advisory Committee are in accord with the highest aspirations of our First Amendment tradition.

Additional Recommendations

Although I agree with the recommendations of the report, they seem to me to be too tepid in a few places. Even with a strong presumption against command-and-control regulation, I would tentatively favor two additional obligations.

The first is a requirement that in an election year, each broadcaster should offer a specific amount of free airtime to candidates (say, 3 hours), perhaps with a "pay instead of play" option for some or all of that time. The second is to give serious thought to the following simple idea: During every presidential election, a certain specific period should be set aside

for nationally televised debates, to be offered to the serious presidential candidates by all of the major networks, at the same time and for free. There has been a considerable level of voluntary activity in this direction, with specified hours (usually 4) being devoted to presidential and vice-presidential debates; what I am suggesting is that there should be a general understanding that this kind of arrangement will continue, even if there is no profit in it. It would of course be far better if this were done voluntarily and not by mandate; but I would not exclude the possibility of a mandate, to reaffirm the importance of the right of democratic self-government. It is not—I suggest—too much to expect American broadcasters to set aside a specified period (say, 4 hours) during each presidential election year, even if doing so is relatively expensive. This proposal is on the basic model of a national holiday, understood here not as a vacation but as a kind of civic obligation—designed to underscore the importance of democratic self-government, and to ensure a kind of celebration of that basic commitment.

Statement of Lois Jean White

As a member of the Advisory Committee I must make a stronger statement regarding the digital broadcast industry's obligations to the children and families of this Nation than is contained in the Advisory Committee's Report. The recommendations contained in the Report do little to promote, and nothing to secure, the interests of families and children. As the president of National PTA, I hold those obligations that directly affect children and families to be of tantamount importance and believe they must have a greater focus in the Report. Because we agree that the digital spectrum is a "national resource," we urge the use of that resource to directly support the educational, cultural, entertainment, and community needs of the Nation's citizens.

The absence of a discussion on children's educational programming in the recommendation section is very distressing. Child advocates fought long and hard for the current rule requiring the broadcasting of 3 hours per week of educational programming for children. In the digital age, with expanded broadcast capacity, this obligation should be increased to include airing no less than 1 hour of children's educational programming each day on the main channel. A related issue is that of violent content in children's programming; broadcasters should be required to reduce the amount of violence shown in programs that are targeted to children. Because we are aware of the impact of advertising on youth, we would further insist that advertising of alcoholic beverages, including beer and wine, and tobacco products be eliminated during those hours when children's programming is aired.

Broadcasters should also be strongly encouraged to make consistent use of a universal television rating system in tandem with the v-chip. Although both industry representatives and children's advocates agreed on a ratings system, recent studies show that broadcasters have not applied the ratings in a uniform or consistent manner, giving parents and families an incom-

plete or, at times, wholly inadequate "rating" of a program. The v-chip will never be a useful tool if the ratings system is not utilized to its fullest capacity.

As the world of digital television evolves, so will its capacity for interactivity, targeted marketing, datacasting, and data retrieval. Children and youth are vulnerable and must be protected from commercial exploitation and intrusive or deceptive marketing activities. Public interest obligations must be established to protect our children from these practices. Additionally, information transmitted via datacasting should be sent to all public schools and libraries in a station's broadcast area, however, this should not be the only public interest obligation that broadcasters need to fulfill. As a national resource, the digital spectrum could play an important role in providing aid to families and children by implementing a public service program that airs photographs of missing children. Providing this information would aid in the prevention, investigation, and recovery of missing children.

We strongly support the use of collected fees from multiplexing and ancillary and supplementary services to enhance the public interest in broadcasting—in particular, applying them to noncommercial education, community service, and children's programming. We are opposed to using general revenue funds that are currently targeted to other children's health and education programs for this purpose.

Because of the important need to fund and secure noncommercial educational, community service, and children's programming, we support new funding mechanisms. A 2 percent fee on the gross revenues of broadcast, cable, and satellite operators could provide a predictable funding stream to ensure increased programming that benefits our citizenry.

We have serious concerns with the "pay or play" opinion. Public interest obligations should not be bought or sold. An obligation is just that, a requirement to serve the public.

I believe that parents, broadcast media, content providers, and the Federal Communications Commission have a responsibility to support, monitor, and improve the quality of television programming. Our children are this Nation's future and we must protect their interests.

ENDNOTES

Statement of Charles Benton, Frank M. Blythe, et al.

1 See S. 25, 105th Cong., 1st Sess. (1997); H.R. 493, 105th Cong., 1st Sess. (1997).

2 47 USC §312(a)(7), *CBS v. FCC*, 453 U.S. 367 (1981).

3 47 USC §315(a). *See Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996).

4 47 USC §307(b)

5 *See, e.g., University of Miami, Content Analysis of Local News Programs in Eight U.S. Television Markets* (1997).

6 47 USC §§336(a)(2), 336(a)(5) & 336(d)

Statement of Charles Benton

7 See Report and Order, FCC No. 98-303 (released Nov. 19, 1998).

Statement of James Goodmon

1 I am in full agreement with the "Minimum Public Interest Requirements for Digital Television Stations" that is attached to my comments. In fact, if any of its provisions are inconsistent with the body of the full Advisory Committee Report (i.e., political programming), I support the matter as presented in the Working Group report.

Statement of Cass R. Sunstein

1 It is impossible to avoid Government regulation. A system of so-called "laissez-faire" amounts to the Government creation of property rights and governmentally conferred rights of exclusion. There is no avoiding Government regulation. (This is why the term "deregulation" is a misnomer.) The only question is what system of regulation makes best sense and does the most good.

2 *See* JAMES HAMILTON, CHANNELING VIOLENCE (1998)

3 *See* Robert Stavins, *What Can We Learn From the Grand Policy Experiment? Lessons from SO2 Allowance Trading*, 12 J. ECON. PERSP. 69 (1998).

4 Some members of the Advisory Committee appear to believe that public interest responsibilities are simply part of the public trust and that broadcasters should not be permitted to "buy their way" out of those obligations. With all respect, I believe that this is largely a bit of rhetoric. What if a broadcaster was willing to give $10 million to PBS in return for every minute, or every 30 seconds, of relief from a public interest responsibility? Would the Nation not be better off as a result? Of course, it may make sense to impose certain minimal duties on everyone, and of course any "play or pay" system must be carefully administered to ensure that American viewers do receive a large amount of public interest programming. But these are matters of relative detail, and could be handled by good administration.

5 *See* Sushil Bikchandani et al., *Learning from the Behavior of Others*, 12 J. ECON. PERSP. 151, 164 (1998); Robert E. Kennedy, *Strategy Fads and Competitive Convergence: An Empirical Test for Herd Behavior in Prime-Time Television Broadcasting* (Harvard Business School, January 1998).

6 *See id.*

7 *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994).

8 ROBERT FRANK & PHILIP COOK, THE WINNER-TAKE-ALL SOCIETY 201 (1995).

9 *See* C. Edwin Baker, *Giving the Audience What It Wants,* 58 OHIO STATE L. J. 311 (1997).

[10] *See* BAKER, *supra* note 7, at 350-367.

[11] *See id.* at 355-56; *see also* HAMILTON, *supra* note 2.

[12] *See* HAMILTON, *supra* note 2.

[13] *See* FRANK, *supra* note 8, at 203.

[14] *See, e.g., Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981).

[15] *See, RAV v. St. Paul,* 505 U.S. 377 (1992).

[16] *See, Lochner v. New York,* 198 U.S. 45, 61 (1905) (Holmes, J., dissenting).

[17] 395 U.S. 367 (1969).

[18] *See, Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994); *Turner Broad Sys, Inc., v. FCC,* 117 S. Ct. 1174 (1997), and Justice Breyer's concurring opinion, *id.* at 1186.

Appendixes

A. Public Interest Programming and Community Service Certification Form

PUBLIC INTEREST PROGRAMMING AND COMMUNITY SERVICE CERTIFICATION FORM

LICENSEE		NETWORK AFFILIATION	NIELSEN DMA	HOME PAGE ADDRESS (IF ANY)	
CALL SIGN	**CHANNEL NO.**	**COMMUNITY OF LICENSE**	**STATE**	**COUNTY**	**ZIP CODE**

NEWCASTS

1. The licensee typically airs ____ hours of newscasts per week.

2. Of these hours, _____ are typically devoted to local newscasts.

PUBLIC AFFAIRS

3. The licensee has aired at least [ ] hours* per week of programming addressing national or local public affairs during the past three months. ❑ YES ❑ NO

4. The licensee has aired programming addressing national or local public affairs during the past three months that exceeds (by at least one hour) the weekly minimum listed in question 3. ❑ YES ❑ NO

5. List in Exhibit A a representative sample of programs and/or segments aired during the past three months that addressed national or local public affairs, the day and time each aired, and what issue(s) each addressed.

POLITICAL/CIVIC DISCOURSE

6. The licensee has provided at least five (5) minutes per day, at no charge, for federal, state, or local candidate-centered discourse (*e.g.,* debates, interviews, candidate "uses" as defined in 47 U.S.C. §315(a)) in the 30 days before a general election. ❑ YES ❑ NO ❑ NOT APPLICABLE THIS QUARTER

7. The licensee has aired at least _____ (minutes/hours) of programming during the past three months (not including candidate-centered discourse in question 6 or paid advertising) addressing election- or ballot referendum-related matters in the 30 days before a general election.

8. List in Exhibit B a representative sample of programs and/or segments that aired during the past three months (not including paid advertising) that addressed candidates, elections and/or ballot referendums, the day and time each aired, and what candidates/elections or ballot referendums each addressed.

9. As a matter of policy, the licensee does not sell advertising to state or local candidates in the 30 days before a general election. ❑ YES ❑ NO

UNDERSERVED COMMUNITIES

10. The licensee has aired at least _____(minutes/hours) of programming during the past three months to meet the needs of underserved communities, *i.e.,* demographic segments of the community of license to whom little or no programming is directed, for example, people of color, the elderly, gays, and lesbians.

11. List in Exhibit C a representative sample of programs and/or segments that aired during the past three months that met the needs of an underserved community, the day and time each aired, and the underserved audience segment each addressed.

LOCAL PROGRAMMING (NOT LISTED ELSEWHERE IN THIS REPORT)

12. The licensee has aired at least _____ (minutes/hours) of locally originated or locally oriented programming, programming primarily devoted to coverage of local issues and/or programming providing opportunity for local self-expression (not listed elsewhere in this report) during the past three months.

13. List in Exhibit D a representative sample of programs and/or segments aired during the past three months that were locally originated or locally oriented, addressed local issues, and/or provided opportunity for local self-expression (not listed elsewhere in this report), the program length, the day and time each aired, and what local issue(s) each addressed.

PUBLIC SERVICE ANNOUNCEMENTS

14. The licensee airs at least [ ]* locally originated public service announcements during a three-month period. ❑ YES ❑ NO

15. At least [ ]* of these public service announcements are aired between 6 a.m. and midnight. ❑ YES ❑ NO

16. The licensee airs at least [ ]* other public service announcements during a three-month period. ❑ YES ❑ NO

17. At least [ ]* of these public service announcements are aired between 6 a.m. and midnight. ❑ YES ❑ NO

18. List in Exhibit E a representative sample of no fewer than five local and five national issues addressed by public service announcements during the past three months.

ASCERTAINMENT

19. The licensee undertakes efforts to ascertain the programming needs of various segments of their communities. ❑ YES ❑ NO

20. List in Exhibit F a representative sample of these efforts.

COMMUNITY SERVICE

21. List in Exhibit G any community service programs, community outreach, or other similar non-broadcast activities directed to serving the community of license undertaken during the past three months.

LOCAL MARKETING AGREEMENTS AND EXTENDED TIME BROKERAGE AGREEMENTS

22. The licensee leases or sells three hours or more per day to an entity other than the licensee pursuant to a local marketing agreement or time brokerage agreement. ❑ YES ❑ NO

23. The licensee retains editorial control over all political programming which dies not constitute candidate "uses" as defined in 47 U.S.C. §315(a), retains control over the station's political broadcasting files, and has taken steps to ensure that no political programming decisions are made by entities other than the licensee. ❑ YES ❑ NO

24. If the answer to any part of question 22 is no, please explain in Exhibit H.

CERTIFICATION

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE TITLE 47, SECTION 312(a)(1), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

I certify that the statements in this certification are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Name of Licensee _____

Signature _____ Date _____

***Minimums as determined by the Federal Communications Commission.**

B.
Model Voluntary Code of Conduct for Digital Television Broadcasters

MODEL VOLUNTARY CODE OF CONDUCT FOR DIGITAL TELEVISION BROADCASTERS

1. Broadcasters are public trustees. As public trustees, broadcasters have public interest obligations, most of which are met voluntarily, not as a result of governmental mandate. Many of these obligations are simply good business. Some of them may or may not be good for business; they are followed because of the important democratic, economic, cultural, and civic functions of those who provide television programming for the American public.

   The Federal Government also imposes some public interest obligations on broadcasters, and throughout the history of broadcasting, it has seriously considered imposing additional obligations. It has restrained itself partly because of its understanding of free speech principles and partly because of its belief that broadcasters are voluntarily doing what should be done.

2. Most broadcasters take their public interest obligations seriously, going well beyond the requirements of law.[1] Whether or not it is profitable to do so, they offer public service announcements; provide educational programming for children and take account of their particular needs; offer many community services; cover substantive issues in a serious way; serve the diverse social groups that represent the full community of viewers; avoid exploitation and sensationalism; offer programming for those who are deaf and hard-of-hearing and others with disabilities; help promote both accountability and deliberation; and give detailed and serious attention to important public issues, public debates, and elections.

3. The purpose of a code is to reflect an explicit and voluntary commitment to certain basic principles and aspirations, and to help ensure that broadcasters generally act as public trustees, and are not penalized in the marketplace for doing what public trustees should do. A code helps to ensure that broadcasters promote the educational, civic, cultural, and democratic goals of television, to counteract the short-term pressures that sometimes threaten to compromise those goals, and to reflect good practices on which there is a broad industry and public consensus.

4. In a period of remarkable innovation with respect to communications technologies, it is especially important that those who provide television programming continue to promote the democratic, educational, and other goals historically associated with broadcasting. Broadcasters should use the extraordinary opportunities provided by these new technologies to carry out these time-honored goals, with particular reference to providing educational and democratic services, and to serving the diverse range of people, and the diverse range of social groups, who enjoy and learn from television.

RESPONSIBILITY TOWARD CHILDREN

1. Broadcasters have an obligation to serve children. Educational programming can serve as a supplement to schooling and to good parenting; harmful programming can undermine the efforts of parents and schools alike. Sometimes parents have a hard time monitoring the

viewing habits of their children, and broadcasters should help them. Broadcasters have an obligation to provide beneficial and educational programming for children.

2. Broadcasters should attempt to ensure that children are not exposed to excessively violent programming or programming that is otherwise harmful to or inappropriate for children. Broadcasters should avoid programming that encourages criminal or self-destructive behavior; they should also be sensitive in presenting sexual material that children might encounter.
3. Programs designed primarily for children should take into account the range of interests and needs of children of various ages, from instructional and cultural material to a wide variety of entertainment material. In their totality, programs should contribute to the sound, balanced development of children to help them achieve a sense of the world at large and make informed adjustments to their society. In seeking balance, broadcasters should attempt to provide programming for children of diverse ages, recognizing that television is watched by very young children and also by near-adults.
4. Because of the potential importance of television to children's development, and to their feeling of belonging to their community, broadcasters should serve children of different religious, demographic, racial, and ethnic groups.
5. Each broadcaster should endeavor to provide a reasonable amount of educational programming for children each week. Broadcasters should also endeavor to inform viewers of whether the programs are not suitable for children of various ages.
6. Children are allowed to watch programs designed primarily for adults, and broadcasters should take this practice into account in the presentation of material in such programs when children may constitute a substantial segment of the audience.
7. Broadcasters should take care to ensure that advertising or promotional materials on programming directed toward children is appropriate for the relevant audience , and that it does not contain exploitative or excessively violent materials.
8. Television can play a significant role in preparing children for the rights and responsibilities of citizenship. Broadcasters should therefore endeavor to provide appropriate news and public affairs programming for children, including news relevant to children in the local community.

COVERING ELECTIONS

1. A well-functioning democracy depends on access to information and ideas, particularly in the context of elections. An informed citizenry is vital to a democracy that prizes both accountability and deliberation. Television should play a constructive role in promoting these values; new and emerging technologies should be harnessed to this goal.
2. Each station should devote a significant amount of time to coverage of Federal, State, and local elections, as well as initiatives and referendums, and to the substantive issues involved in the electoral process.

3. Coverage should be substantive and issue-oriented. It should not emphasize the sensational and the prurient. It should concern itself with claims and disagreements on matters of substance. Consistent with the exercise of legitimate station discretion, stations should endeavor not to give excessive or undue attention to sensational accusations or to issues of "who is ahead," at the expense of other issues.
4. Each station should provide ample opportunity for candidate-related and candidate-centered programming, focusing on races and candidates that the station believes are important and deserving of attention by its viewers. Stations may, at their discretion, use a combination of means—including debates, interviews, features, and grants of free time to candidates—to achieve this goal.
5. In the 30-day period before an election, each station should endeavor to provide, at minimum, 5 minutes of candidate-centered programming each night, between 5 p.m. and 11:35 p.m. Stations should choose the important races and candidates, and choose the appropriate formats, from 1-minute presentations by candidates to mini-debates to features to interviews to free airtime. The 5 minutes need not be contiguous. Consistent with station discretion and democratic goals, it is preferable to ensure that candidates provide something other than short "soundbites" (an appropriate goal is 1 minute or more of speaking time).
6. Stations are encouraged, in any election period, to give special attention to the most important elections and elections issues, whether they are Federal, State, or local. Consistent with the exercise of legitimate editorial discretion to select the most important races and themes, stations should endeavor to provide reasonable access to candidates for State and local office as well as to Federal candidates for office, and also to proponents and opponents of ballot initiatives. Stations should therefore not adopt any blanket policy of refusing to sell time to candidates for office and those seeking to express views on ballot initiatives.
7. Coverage of elections should be fair and balanced.
8. Each station should ensure that its coverage of elections, initiatives, and referendums, as well as its candidate-related and candidate-centered programming, is closed-captioned to the extent that providing such captioning does not impose an undue burden on the station.

Treatment of News, Public Events, and Emergencies

News

1. A television station's news programming should be both substantive and well-balanced. Especially because they serve educational and democratic functions, stations should devote substantial attention to both local and national issues of general importance.
2. Morbid, sensationalistic, or alarming details not essential to a factual report, especially in connection with stories of crime or sex, should be avoided. News should be broadcast in such a manner as to avoid panic and unnecessary alarm. News programming should attempt to avoid prurience, sensationalism, and gossip.

3. News reporting should be factual, fair, and without bias.
4. A television broadcaster should exercise particular discrimination in the acceptance, placement, and presentation of advertising in news programs so that such advertising should be clearly distinguishable from the news content.
5. Commentary and analysis should be clearly identified as such.
6. Pictorial material should be chosen with care and not presented in a misleading, sensationalistic, or prurient manner.
7. All news interview programs should be governed by accepted standards of ethical journalism, under which the interviewer selects the questions to be asked. Where there is advance agreement materially restricting an important or newsworthy area of questioning, the interviewer should state on the program that such limitation has been agreed on. Such disclosure should be made if the person being interviewed requires that questions be submitted in advance or participates in editing a recording of the interview prior to its use on the air.
8. Stations should make an effort to devote enough time to public issues to permit genuine understanding of problems and disagreements.

Public Events

1. A television broadcaster has an affirmative responsibility to be informed of important public events and to inform the public of these events, in order to provide coverage consonant with the ends of an informed and enlightened citizenry.
2. The treatment of such events by a television broadcaster should provide adequate, substantive, and informed coverage of relevant issues, including issues of local concern.

Emergencies

1. Broadcasters should provide accurate and timely coverage of emergencies and disasters, sufficient to inform members of the public about the relevant problem and how to avoid danger to themselves and others. Coverage of emergencies and disasters should avoid undue alarmism and sensationalism.
2. Broadcasters should endeavor to provide textual presentations of all emergency programming in real time and ensure that such presentations incorporate substantially the entire text of the audio portion of such programming.

COMMUNITY RESPONSIBILITY

1. Television broadcasters and their staffs occupy positions of unique responsibility in their communities and should conscientiously endeavor to be acquainted fully with the community's needs and characteristics in order to better serve the welfare of its citizens.
2. Requests for time for the placement of public service announcements or programs should be carefully reviewed with respect to the character and reputation of the group, campaign,

or organization involved; the public interest content of the message; and the manner of its presentation.

3. Public service announcements should not be relegated to off-hours, such as late night and early morning, but should be distributed throughout the broadcast day and during primetime.
4. Stations should devote substantial time to the provision of public service announcements. Typically, broadcasters have provided well over 75 public service "spots" per week;[2] they should endeavor to continue this practice, as community needs dictate.
5. Broadcasters are encouraged to engage in various public service activities such as telethons, blood drives, and related activities in order to give assistance to charitable causes locally and nationally.
6. In accordance with the educational and democratic functions of broadcasting, stations should provide reasonable access to those members of the local community who wish to use the airwaves to discuss issues of local concern. Broadcasters should therefore provide appropriate coverage of topics of particular concern to the local community.
7. Broadcasters should offer programming that serves the needs of diverse members of the local community, including traditionally underserved and disadvantaged groups. Broadcasters should be sensitive to the diversity of the communities that they serve and attempt to fulfill their responsibility to the full range of relevant groups, including but not limited to religious, demographic, racial, and ethnic groups.

Controversial Public Issues

1. Television provides a valuable forum for the expression of responsible views on public issues of a controversial nature. Television broadcasters should seek out and develop with accountable individuals, groups, and organizations, programs relating to controversial public issues of importance to fellow citizens and give fair representation to opposing sides of issues that materially affect the life or welfare of a substantial segment of the public.
2. Requests by individuals, groups, or organizations for time to discuss their views on controversial public issues should be considered seriously and on the basis of their individual merits, and in the light of the contribution that the use requested would make to the public interest, and to a well-balanced program structure.
3. Broadcasts in which stations express their own opinions about issues of general public interest should be clearly identified as editorials. They should be unmistakably identified as statements of station opinion and should be appropriately distinguished from news and other program material.
4. Stations should give attention to controversial issues of distinctively local concern.

Special Program Standards

1. **Anti-social behavior; crime.** The treatment of criminal activities should attempt to convey their social and human effects. The presentation of techniques of crime in such

detail as to be instructional or invite imitation should be avoided.

2. **Violent materials.** Violence, psychological but especially physical, should be portrayed responsibly, and not exploitatively. Presentation of violence should avoid the excessive, the gratuitous, the humiliating, and the instructional. The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or sound, should be avoided. Programs involving violence should venture to present the consequences to its victims and perpetrators. Particular care should be exercised where children may see, or be involved in, the depiction of violent behavior.
3. **Sexual violence**. Programs should not present rape, sexual assault, or sexual violence in an attractive or exploitative light.
4. **Sexually oriented material**. Obscenity is not constitutionally protected speech and is at all times unacceptable for broadcast. Where significant child audiences are expected, special care should be exercised in addressing sexual themes; in particular children, should not be depicted as sexual objects for the control and use of others. Consistent with artistic freedom, programming that involves sexuality should not be exploitative, humiliating, or demeaning. In evaluating programming involving sexuality, broadcasters should consider the composition of the audience, the context in which sensitive material is presented, and the scheduling of the relevant programming.
5. **Self-destructive behavior: drugs; gambling; guns; alcohol.**
   (1) The use of illegal drugs or the abuse of legal drugs should not be encouraged or shown as socially acceptable. Glamorization of addiction, drug use, and substance use should be avoided, especially when children are likely to be viewing.
   (2) The use of gambling devices or scenes necessary to the development of a plot or as appropriate background is acceptable only when presented with discretion and in moderation, and in a manner which would not excite interest in, or foster, unlawful betting, or be instructional in nature.
   (3) Consistent with artistic freedom, the use of guns as instruments of unlawful violence should not be glamorized or encouraged.
   (4) Consistent with artistic freedom, the use of liquor and the depiction of smoking in program content should not be glamorized and should generally be de-emphasized. When shown, they should be consistent with plot and character development.
6. **Professional advice/diagnosis/treatment.** Professional advice, diagnosis, and treatment should be presented in conformity with law and recognized professional standards.
7. **Subliminal perception.** Any technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold of normal awareness is not permitted.
8. **Hatred of social groups**. Consistent with the commitment to robust public debate, stations should not use group-based hatred in an exploitative manner, and stations should attempt not to fuel hatred against members of any social group, or to promote racial, religious, ethnic, or sexual violence.

9. **Humane treatment of animals.** The use of animals, consistent with plot and character delineation, shall be in conformity with accepted standards of humane treatment.
10. **Game programs; contests.** Quiz and similar programs that are presented as contests of knowledge, information, skill, or luck must, in fact, be genuine contests; and the results must not be controlled by collusion with or between contestants, or by any other action which will favor one contestant against any other.

None of these provisions shall be understood or interpreted to restrict appropriate artistic freedom or the expression of diverse views on public issues.

Responsibility Toward Individuals Who are Deaf and Hard of Hearing

1. Broadcasters should ensure that their programming is responsive to the needs of citizens with disabilities. To this end, broadcasters should ensure that programming is accessible, through the provision of closed captioning and other means, to the extent that doing so does not impose an undue burden on the broadcaster. Particular efforts should be made to provide full access to news and public affairs programming.
2. Citizens who are deaf and hard of hearing are sometimes at risk of a form of disenfranchisement or even physical danger, because steps are not taken to ensure that television broadcasting is available to them. Technological means exist to overcome this problem ; these means are increasingly available and feasible.
3. To the extent that no undue burden is involved, stations should take special steps to ensure that information about disasters and emergencies are fully accessible to those who are deaf and hard of hearing, including captioning in "real" time.
4. To the extent that no undue burden is involved, stations should attempt to carry out the responsibilities described in the preceding sections in such a way as to ensure as to ensure reasonable access by those who are deaf and hard of hearing.

Revisions and Enforcement Authority

1. There shall be a continuing committee entitled the Television Code Board to be composed of not more than nine members, all of whom shall be from subscribers to the Television Code. These members shall be appointed by the President of the National Association of Broadcasters, ensuring reasonable participation by each network and by an appropriately diverse range of subscribers.
2. The Television Code Board shall meet twice each year.
3. The Television Code Board is authorized and directed:
   (1) To consider and recommend amendments to the television Code;
   (2) To provide special recognition of those stations that have provided excellent public service in the preceding year;

(3) To consider claims and charges made by the Code Authority General Manager about noncompliance with the Code;

(4) To withdraw the NAB seal from any station for continuing or egregious violations, in accordance with the provisions below; and

(5) To compile detailed information about compliance with the Code and public service activities by television broadcasters, and to make such information available to the public.

4. There shall be a position designated as the Code Authority General Manager. The Code Authority General Manager is authorized and directed:

(1) To maintain a continuing review of all programming material presented over television;

(2) To receive, screen, and clear complaints about television programming , compliance with this Code, or amendments to this Code;

(3) To define and interpret words and phrases in this Code;

(4) To develop and maintain appropriate liaison with relevant and appropriate private and public institutions;

(5) To inform, promptly and responsibly, any station of complaints and commendations;

(6) To make recommendations about amendments to this Code;

(7) To provide recommendations for special recognition for excellent public service in the preceding year;

(8) To make public all relevant information about compliance and noncompliance with this Code and about public services and public interest activities of broadcasters.

ENFORCEMENT

Compliance with this Code is voluntary, and not mandatory, on the part of all stations. Compliance and noncompliance will be treated in the following way:

1. A seal of approval will be given to those who are shown to comply with its provisions.
2. Special public recognition may be given to those stations that have compiled an excellent public service record in the past year. Such recognition may be awarded for, among other things:

(1) Meeting the needs of children in a sustained and creative way,

(2) Offering substantive and extended coverage of elections, including interviews, free air time, and debates.

(3) Offering substantive and extended coverage of public issues,

(4) Providing outstanding news programming,

(5) Providing opportunities for discussion of problems facing the local community,

(6) Charitable activities.

3. At the time of license renewal, a notation will be given to the FCC that there has been compliance or continuing or egregious noncompliance with the Code. This notation will lack any legal force or effect.
4. The Television Code Board shall monitor compliance and report to the public the names of complying, noncomplying , and specially commended stations.
5. The Television Code Board should report continuing or egregious violations of the code to Congress, the public, and FCC on an ongoing basis. These reports will lack legal force and effect.

A Brief History of Broadcasting Codes

The purpose of this section is to provide some background information about the history of the idea of a broadcasting code.[3]

Origins and Precursors: The Spectrum and Roosevelt

The idea of a broadcasting "code" has a long history; cooperative agreements, designed to promote the public interest or shared financial goals, are nothing new. The National Association of Broadcasters (NAB) was founded in 1923, and it first attempted to produce a degree of self-regulation in 1926, as a response to the "chaos" widely perceived to have been produced by interference and piracy. Some progress was made, but ultimately the agreement broke down; hence, legislation was necessary, in the form of the Radio Act of 1927.

The initial NAB Code was produced in 1928. It included some content guidance, but it was quite vague and also lacked an enforcement mechanism. Just 1 year later the NAB adopted a new Code, involving ethics and standards of commercial practice. For example, the Code banned "fraudulent, deceptive or obscene" material, "false, deceptive, or grossly" exaggerated advertising claims, and "offensive" material. But the continuing imprecision of this code, together with the lack of an effective enforcement mechanism, made it something of limited usefulness.

The next major step resulted from President Roosevelt's National Recovery Administrative Codes in 1933. The NAB submitted a code of fair practices to the NRA, and on November 27, 1933, President Roosevelt signed it and gave it the force of law. The result included a seven-person Broadcaster Code Authority, designed to supervise compliance. But the National Recovery Act was struck down in 1935 by the Supreme Court, and the Code Authority was eliminated along with the "law" that President Roosevelt had signed.

After the New Deal, and Increased Content Control

Soon thereafter the NAB produced a new voluntary code, which was largely ignored. But in 1938 the NAB produced another, more specific code and also an explicit enforcement authority, the NAB Code Committee. Part of the reason for the new development was the increasing willingness of the FCC to regulate both structure and content and a specific warning, by the

Chairman of the FCC (after the broadcast of War of the Worlds), that without industry self-policing, Government involvement was likely.

The 1938 Code included a number of important provisions. Among other things, it (a) required broadcasters to allot time fairly for discussion of controversial views; (b) banned the sale of time for the airing of controversial views; (c) asked broadcasters to cooperate with educational groups for the airing of educational programming; (d) required fair and accurate news programs; and (e) regulated commercials by limiting the time and length of advertisements. There were also prohibitions on hard liquor advertising. A code committee would enforce the Code by determining whether a station was in compliance. Notably, the head of the FCC publicly approved the Code, and the ACLU described it as "a great step forward in formulating a policy in the public interest."

Television

All of these steps involved radio, but the 1938 code was the unmistakable precursor of the eventual television code. In its first period, television witnessed a pattern that generally characterized the past debates over radio and late twentieth century debates over television: legislative concern, proposed legislation, steps toward self-regulation, and little or no legislation or regulation.

In 1951, members of Congress proposed a National Citizens Advisory Board for Radio and Television, to oversee programming content. At about the same time, the NAB began to draft its first television code in 1952, apparently in direct response to a congressional threat of legislation.[4] The new Code had a broad reach, emphasizing in particular educational and cultural programming. It also contained content restrictions on display of violent action and sexual material.

Compliance with the Code was voluntary. (Note also that station operators who were not members of the NAB were eligible to subscribe.) Its enforcement provisions were quite modest. The basic mechanism came in the form of a clearinghouse for complaints. In addition, subscribers could display a Code seal (the NAB "Seal of Good Practice"), and permission to display the seal would be withdrawn for "continuing, willful, or gross" violations. Thus the only formal sanction was that the noncomplying station owner could not display the seal. But there were informal pressures too. Stations who sought license renewal were likely to have prompt FCC processing if they adhered to the Code. Moreover, some people believe that subscription to the Code was appealing to those who bought advertising time, because the Code contained limits on the length and frequency of commercials, which would enhance the prominence of the announcement. Some stations in the United States did not adhere to the Code, but the vast majority chose to do so.

Family Viewing

In 1962, the FCC proposed to make parts of the Code into a legal mandate. The industry successfully resisted this step. But there was a continuing pattern of interaction among

regulatory proposals, legislative reaction, public concern, and self-regulation. Of these the most important involved 1970s concerns about violence on television. The industry responded through the "family viewing policy," saying that inappropriate entertainment programming would not be shown between 7 p.m. and 9 p.m. eastern standard time. This was a distinctive form of self-regulation. But the Writers Guild of America challenged the policy on first amendment grounds (see below), arguing that the policy was not voluntary self-regulation but was in fact a product of government coercion.

In a controversial decision, the trial court accepted the challenge, and barred the NAB from enforcing the policy.[5] The court of appeals overturned the decision on the ground that the district court was not the right forum to resolve these issues in the first instance.[6] The Court of Appeals said that the issue should first be resolved by the FCC. Although the decision of the Court of Appeals was jurisdictional, that court suggested considerable doubt about the district court's judgment: "It simply is not true that the First Amendment bars all limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public."[7]

The FCC ruled in 1983 that there had been no Government coercion and that the NAB had adopted the family viewing policy voluntarily. In its key passage the FCC wrote, "voluntary industry action is often preferable to governmental solutions, and an industry frequently addresses a problem in order to forestall regulation by the Government; conversely, it is not unusual for a regulatory body to forego enacting rules when the regulated industry voluntarily adopts standards which deal with a perceived problem."[8] In June 1979, however, the Justice Department filed the antitrust suit described in detail below, resulting in the demise of the television code.

In the 1980s, continuing congressional concern about televised violence led to a new law exempting from the antitrust law networks, broadcasters, cable operators and programmers, and trade association, in order to permit them to generate standards to reduce the amount of violence on television.[9] But there was considerable doubt about whether an explicit exemption was necessary; a 1993 opinion from the Department of Justice said that the industry could cooperate to reduce television violence without offense to the law of antitrust.[10]

In June 1990 the NAB issued new "voluntary programming principles" to cover violence, indecency and obscenity, drugs and substance abuse, and violence. The new standards were reaffirmed in June 1991, and in 1992, ABC, NBC, and CBS issued and agreed to adhere to a set of new standards. Thus in the 1990s self-regulation can be found in various places: the advance parental advisory system, joint advisory guidelines issued by the four networks, NAB principles, and an annual public assessment, by the four networks, of television violence.

A Note on the First Amendment

It is possible to argue, as some have, that a code of the sort suggested here would create serious first amendment problems. But this is a mistake. The first amendment applies to government, not to private industries. By itself, a code is a private set of guidelines, and

private guidelines by themselves raise no first amendment issue. If a private group decides to impose restrictions on the speech of its members, and government is not involved, the first amendment is entirely irrelevant. We therefore believe that a voluntary form of self-regulation, of the kind suggested here, creates no first amendment problem.[11]

For first amendment purposes, there is no difference between a system in which individual broadcasters decide what programming to offer, and a system in which the industry as a whole engages in self-regulation with the help of a code. In neither case is a government mandate involved, and hence the first amendment is irrelevant.

Of course the issue would have to be analyzed differently if a code were a product of government threat, and were effectively required by government , In that case, the first amendment would come into play.[12] There can be no question that a governmentally *mandated* code, not voluntary but taking the form that we have outlined, would raise legitimate constitutional problems. This does not necessarily mean that the first amendment would be *violated*; the question would be whether any content regulation in the code could survive constitutional scrutiny, and to answer that question, each code provision would have to be investigated separately. The key point is that if government mandated a code, or even used compliance or noncompliance with a code for its own regulatory purposes, any such governmental action would have to be tested for compliance with first amendment principles, including the serious constitutional limits on content regulation.

Hence, it is extremely important that we are arguing on behalf of a code as a simple recommendation to private organizations, above all the NAB, and *not* as a proposed mandate from the government, either the FCC or Congress. (The point is fortified by the fact that this Committee is a body consisting of private citizens appointed for advisory purposes, rather than as a coercive act from a governmental body.) Indeed, this Committee has no coercive powers. Thus our attitude to the code is very much in the spirit of the NAB's own report on community service—as a suggestion about non-governmental ways for the broadcasting industry to fulfill its public responsibilities.

Antitrust Law

In this section we offer a brief analysis of the antitrust issues raised by the proposed code. This is not an exhaustive discussion of an issue that is, in some of the details, quite complex. It is meant instead as a supplement to the analysis provided by the United States Department of Justice, which, we believe, is likely to be accepted by a court confronted with a challenge to any code. The discussion is necessarily a bit technical in parts.

A. **Brief conclusion**: The provisions that we are discussing are *not* likely to violate the antitrust laws. This is because (1) they would not have a significant anticompetitive effect, and without such an effect, there can be no violation of the antitrust laws; (2) it is unclear if any plaintiff could show an antitrust injury, and there is no violation of the antitrust laws without such an injury; and (3) the provisions would probably survive the "rule of reason,"

because any adverse effects on competition would be justified by the distinctive nature of the broadcasting media, which has been understood, historically, as an industry with a special obligation to the public interest.

There is considerable legal authority on behalf of our general conclusion. The United States Department of Justice has analyzed the issues in such a way as to give significant support to the legality of what we are discussing. (See Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, attached as Exhibit A.) Notably, two district courts have upheld important aspects of prior codes. The leading district court ruling that might be thought to point the other way—often taken to be fatal to a code—was actually quite narrow. Thus there is no obvious legal authority against the kind of proposal that we are discussing here.

The best judgment is that courts would uphold a code that does not amount to price-fixing, or to a form of self-regulation designed in some way to increase broadcaster profits or to exclude new entrants. Of course the safest course would be for Congress to enact a law specifically authorizing codes of this kind, though we believe that this is not necessary.

B. **Two favorable precedents**. In two important cases, aspects of the Code were upheld against private antitrust attack. A district court refused to issue an injunction against code standards forbidding cigarette advertising, despite a claim that these standards were inconsistent with the antitrust laws.[13] The court concluded that the plaintiff was not likely to prevail on the merits. The court referred in particular to the dangers posed by cigarette smoking and claimed that the standards and guidelines in the code serve the "public interest."[14]

A lower court also upheld the provisions involving standards for advertising for children.[15] The rule at issue there said that children's program hosts or primary cartoon characters "shall not be utilized to deliver commercial messages within or adjacent to the programs which feature such hosts or cartoon characters." The provision applied as well "to lead-ins to commercials when such lead-ins contain sell copy or imply endorsement of the product by program host or primary cartoon character." The plaintiff attacked the restrictions, claiming that it restricted the ability of hosts and actors to obtain free employment for delivery of commercials.

The court said, "There is not the slightest indication of any anti-competitive purpose in the creation of the rule," especially since there was no evidence of a motive "to benefit one class of performers competitively over another class of performers."[16] The court found it relevant that the rule "resulted from a bona fide concern on the part of various groups, and the FCC, regarding fair and ethical methods to be used in television advertising directed to children."[17] This was "a reasonable rule of conduct regarding good practice by its members in the public interest and is not in violation of the antitrust laws."[18]

In these cases, the court basically concluded that the restrictions were reasonable and in the public interest. This was a sufficient justification for the restriction.

C. **An apparently unfavorable (but extremely narrow) precedent**. Ultimately the Code met its demise as a result of an antitrust action brought by the Justice Department in 1979,

based on an allegation that certain provisions of the Code violated the Sherman Act. We discuss this case in some detail, because it is often used as authority against the legality of any broadcasting code. This was actually a very narrow ruling that should not result in a successful legal challenge to a code of the kind that we are endorsing.

A narrow complaint. The Justice Department's complaint was quite narrow. It involved not the Code in general, but three specific kinds of advertising restrictions:

- Time standards, limiting the amount of commercial material that could be broadcast in an hour;
- Program interruption standards, which imposed a limit on the maximum number of commercial announcements per program as well as on the number of consecutive announcements per interruption;
- The multiple product standards, which prohibited the advertising of two or more products or services within a single commercial if the commercial was less than 60 seconds in length.

Note that each of these restrictions could be understood as a traditional form of collusion—as an effort by broadcasters to ensure high prices for advertisements. If, as is sometimes thought, broadcasters "deliver" viewers to advertisers in return for money, these parts of the code could be seen as illegitimate efforts to increase the return to broadcasters over the price that would prevail in an entirely competitive market. This is undoubtedly the concern that underlay the Justice Department's somewhat surprising decision to initiate the suit.

The ruling in brief. Basically, the court held that the multiple product standards were per se unlawful, but that the time standards and program interruption standards could not be tested without an inquiry into the facts.[19] This was a narrow ruling because it dealt only with a small segment of the old Code, involving an apparent effort to increase profits at the expense of advertisers.

The ruling in a little detail. A little background: Antitrust law applies a "per se rule" of illegality to certain obviously anticompetitive agreements. (Price-fixing agreements are the most obvious case.) It applies a "rule of reason," calling for a balancing test, to agreements that may or may not be anticompetitive. When the rule of reason is applied, it is necessary to find out a lot of facts.

On summary judgment in the case, the key issues were, first, whether the three agreements were so obviously anticompetitive that they were unlawful per se, and second whether, if they were not illegal per se, they were invalid under the "rule of reason," which requires—to offer a bit more detail—an inquiry into the facts of the business, the nature of the restraint, and the justification offered on its behalf.

The district court held that the time and product interruption standards were *not* invalid per se. In the court's view, the distinctive characteristics of the broadcasting industry argued against a per se rule of invalidity. Because broadcast frequencies are scarce, because the whole area is subject to regulation, and because of the fact that there are only 60 minutes in an hour (!), no simple solution would be sensible.

On these two issues, the court also denied summary judgment for the government under the "rule of reason," concluding that there were material issues of fact. The legal question was whether the time standards would have the effect of raising or stabilizing the price of commercial time (this was the antitrust problem); it was possible, the court said, that any such effect would be trivial in light of the importance of other factors. If this was true, the code would not violate the Sherman Act. This is because there is no antitrust violation without a significant adverse effect on competition.[20]

By contrast, the court held that the multiproduct standard was per se unlawful. In its view, this rule was akin to a standardization agreement by which food manufacturers set a standard for the ingredients that would be used in their products. This form of standardization was per se illegitimate. Thus, the court actually invalidated only one provision of the code, on the theory that it was analytically akin to a system for price-fixing. At the same time, the court denied summary judgment for the NAB.

The aftermath. After the court's ruling, the NAB suspended enforcement of all code provisions. In public it claimed that it would seek an appeal, but a consent judgment was issued, in which the NAB agreed, for 10 years, to cease monitoring and enforcement of the three disputed code provisions. The agreement also prohibited enforcing the standards for children's programming time. Thus, the district court's narrow decision—untested in any court of appeals—has loomed over the debate about codes.

An antitrust challenge to a new code? The best prediction is that a code of the sort that we are discussing would not violate the antitrust laws. In its most recent analysis of the problem, the Department of Justice reached this conclusion in suggesting that networks could agree to guidelines and principles to reduce unnecessary violence on television.[21] The Department of Justice concluded that "the conduct that was at issue in the NAB case differs significantly from that covered by" an agreement on televised violence.[22] In the NAB case, the problem was raising "the price of time," to "the detriment of both advertisers and the ultimate consumers of the products promoted on the air."[23] By contrast, an agreement covering violence should "be likened to traditional industry standard-setting efforts that do not necessarily restrain competition and may have significant procompetitive benefits."[24] In the view of the Department of Justice, "efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis."[25]

More particularly, a code of the sort we are discussing should probably be upheld for the following reasons.

(a) This is not an ordinary form of collusion. It is not as if broadcasters are saying that advertisers must pay a minimum of $X per advertisement. This is very far from the usual domain of price fixing. Hence no per se rule is likely to attach.

(b) It is possible that the restrictions under discussion would have little or no adverse effect on competition; they may even have good effects on competition.[26] Without a significant adverse effect on competition, there is no antitrust violation. Even with a code, programmers would compete over a great many things, including the kinds of

programming regulated by a code. The code might in a sense be procompetitive, because it would ensure television coverage of materials in which there is a substantial public interest and which might otherwise not be provided. This is so especially in light of the fact that stations would compete for viewers with respect to the kinds of programming covered by the code.

(c) It is not entirely clear that any plaintiff would have an antitrust injury. The self-regulation that we are discussing would allow a wide range of choices and options for consumers and producers. Perhaps some producer of some marginal programming could claim that he was unable to sell his product because of (for example) free air time for candidates; but this would be an extremely speculative injury. Perhaps viewers could argue that they were deprived of certain programming that they would like; but in view of the wide range of options available to viewers, this too is speculative. Perhaps some stations or programmers could contend that a code limited their freedom; but it is not clear that this would count as an antitrust injury, especially in light of the fact that the code is voluntary.

(d) In light of the distinctive nature of the television market, a code of the sort under discussion would probably survive a "rule of reason" inquiry. The effect on competition would be quite limited, if indeed there would be any adverse effects at all. The restriction, such as it is, could be defended as a means of promoting competition,[27] and also various public interest goals, e.g., education of children, access for the handicapped, democratic and civic functions. This idea is bolstered by the line of cases analyzing restrictions by trade associations and similar entities.[28]

Our most basic conclusion is that any antitrust challenge to a code of the sort we have endorsed would be most ill-advised, and extremely unlikely to succeed.

ENDNOTES

1 *See Broadcasters Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service* (National Association of Broadcasters, Wash. D.C.), April 1998.

2 *Id.* at 6 (noting that the typical television station runs an average of 137 public service announcements per week).

3 We draw here on a variety of sources, including Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667 (1995).

4 *See* Daniel L. Brenner, Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1529 (1975).

5 *Writers Guild of Am. W. v. FCC*, 423 F. Supp. 1064 (C. D. Cal.1976), *vacated sub nom. Writers Guild of Am. W. v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 US 824 (1980).

6 *Writers Guild of Am. W. v. ABC*, *supra*.

7 *Id.* at 364.

[8] 95 FCC 2d at 710.

[9] *See* 47 U.S.C. 303c.

[10] *See on next page,* Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, United States Department of Justice, to Senator Paul Simon (D-Ill) (Nov. 29, 1993).

[11] *See Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (private contract raises no first amendment issue); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 482 U.S. 522 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[12] *See Writers Guild of Am. W. v. FCC*, 423 F. Supp. 1064 (C. D. Cal.1976), *vacated sub nom. Writers Guild of Am. W. v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 US 824 (1980).

[13] *See American Brands Inc v. NAB*, 308 F. Supp. 1166 (DDC 1969).

[14] *Id.* at 1169.

[15] *See American Fed'n of Television & Radio Artists v. NAB*, 407 F. Supp. 900 (SDNY 1976).

[16] *Id.* at 902. An anticompetitive effect is also sufficient to trigger antitrust scrutiny, but it is not at all clear that restrictions of the kind we are discussing would have such an effect. See below.

[17] *Id.*

[18] *Id.* at 903.

[19] *U.S. v. NAB*, 536 F. Supp. 149 (1982).

[20] *See, e.g., U.S. v. Arnold, Schwinn Co.*, 388 U.S. 365, 375 (1967), overruled on other grounds in *Continental TV v. GTE Sylvania*; *Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979).

[21] *See* Letter of Sheila Anthony, Assistant Attorney General, *supra* note 10.

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 4.

[26] *Compare Smith v. Pro Football*, 593 F.2d 1173, 1183 (D.C. Cir 1978).

[27] *See* Letter of Sheila Anthony, *supra* note 10, at 4

[28] *See, e.g., NCAA v. Board of Regents*, 468 US 85 (1984); *Allied Tube and Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988).

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530
November 29, 1993

The Honorable Paul Simon
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

I am writing in response to your letter of November 17, 1993, also signed by Representative Dan Glickman, requesting the views of the Department of Justice on the antitrust implications of collective efforts by persons in the television industry to address the effects of violence on television.

Your letter notes the expiration on December 1, 1993, of the Television Program Improvement Act of 1990, which provided in part that "the antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast materials." This legislation was intended to address uncertainty regarding the application of the antitrust laws to such activities, apparently based largely on United States v. National Association of Broadcasters, 536 F. Supp. 149 (D.D.C., 1982) ("NAB"), an antitrust case brought by the Department that challenged certain standards in the NAB's Television code that restricted the sale of commercial advertising time. You not that given the expiration of the 1990 Act, there may again be uncertainty about the application of the antitrust laws to continuing collective efforts to address television violence.

Your letter describes some of the collective activities undertaken in the industry to address television violence during the last three years. We understand that industry representatives have met to discuss television violence and have developed a set of general guidelines and an advisory message program. You request the Department's guidance on the antitrust risks to the industry of continuing to engage in cooperative activities with the goal of reducing gratuitous violence on television.

The Department of Justice does not believe that the antitrust laws should present any barrier to the activities described in the Television Program Improvement Act of 1990 notwithstanding the coming expiration of that statute. During the consideration of the bills that led to the exemption, the Department expressed the view that the legislation dealt with major issues largely unconnected to the proper functioning of an unregulated and competitive economy, see letter to Chairman Jack Brooks from Deputy Assistant Attorney General John Mackey on H.R. 1391, June 12, 1989 (copy enclosed). The conditions of the exemption—that any

guidelines be truly voluntary and that collective activity not result in the boycott of any person—let us to conclude that activities covered by the exemption were not likely to be anticompetitive. Indeed, as you letter suggests, the legislation was intended more to address antitrust uncertainty voiced by the industry than a belief that such activities in fact would violate antitrust law.

You request in particular the Department's interpretation of the NAB case, which apparently was the principal source of antitrust concern when the Television Program Improvement Act was under consideration. In the NAB case, the Department challenged under Section 1 of the Sherman Act certain television advertising standards in the NAB's Television Code. These provisions (1) limited the number of minutes of commercials per broadcast hour ("time standards"), (2) limited the number of commercial interruptions per program and the number of consecutive announcements per interruption ("program interruption standards"), and (3) prohibited the advertising of two or more products in a commercial shorter than sixty seconds, otherwise known as the "multiple product standard." The Code also contained a number of other television and programming standards that were not challenged.

In ruling on cross motions for summary judgement, the court held that item (3) above, the "multiple product standard," constituted a pre se violation of the antitrust laws and granted summary judgment as to the standard to the government. If found the multiple product standard to be an artificial device which required advertisers to purchase more commercial television time than they might wish and in excess of what they would be able to purchase if free market conditions prevailed.

The court declined to apply the per se rule to items (1) and (2) above—the time and program interruption standards—citing unusual characteristics of television broadcasting that may be disruptive of the "assumed link between supply and price that underlies the per se treatment of supply restrictions." The court noted the scarcity of broadcast frequencies, the inherent limit on the number of broadcast minutes, and the broadcasters' licensing obligation to operate in the public interest.

With respect to the rule of reason analysis required where a per se rule was inapplicable, the court found disputed issues of fact on whether the time standards actually affected the supply of commercial time and even if supply was affected, what effect that limitation would have on price. Likewise, the record was not sufficient to determine whether the program interruption standards fostered an anticompetitive standardization of station format or the likely economic effects of standardization in that instance. Therefore, summary judgment on items (1) and (2) above—the time and program interruption standards—was not granted.

After the court's decision on the summary judgment motions, the NAB case was settled by a consent decree that prohibited any code, rule, by-law, guideline or standard limiting or restricting (1) the quality, length, or placement of non-program material appearing on broadcast television; or (2) the number of products or services presented within a single non-program announcement on commercial television.

The conduct that was at issue in the NAB case differs significantly from that covered by the expiring antitrust exemption in the Television Program Improvement Act. The government's basic contention in NAB was that the challenged commercial advertising restrictions had as their actual purpose and effect the artificial manipulation of the supply of commercial television time, with the end that the price of time was raised, to the detriment of both advertisers and the ultimate consumers of the products promoted on the air. Indeed, without access to an important advertising forum, smaller, newer, competitors in some product areas could be at a significant disadvantage. At the same time, with fewer advertising slots and high demand, the broadcasters could charge anticompetitive prices for commercial time.

In our view, the NAB case should not be read as prohibiting the kind of activities that the Television Program Improvement Act was enacted to encourage. Such activities may be likened to traditional industry standard-setting efforts that do not necessarily restrict competition and may have significant procompetitive benefits. Absent unequivocal anticompetitive purpose or effect, as the multiple product standard was found to have in NAB, product standard setting is evaluated under an antitrust rule of reason that balances any potential anticompetitive effects against procompetitive benefits. The Supreme Court observed in Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) ("Allied Tube"), that "(w)hen private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition ... those private standards can have significant procompetitive advantages. It is this potential that has led most lower courts to apply rule of reason analysis to product standard-setting by private associations." 486 U.S. at 500-01.

We believe that efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis. The measures you describe the industry having taken since the passage of the Television Program Improvement Act and further comparable cooperative activities are in the Department's view unlikely to be found anticompetitive. They are not intended to, nor can we predict that they would have the effect of, significantly decreasing competition among broadcasters, cable operators or other advertisers. They entail voluntary guidelines, and the Supreme Court noted in Allied Tube that concerted efforts to enforce product standards face more rigorous antitrust scrutiny than efforts to agree upon such standards, 486 U.S. at 501, n. 6. We are aware of no indication that the measures already taken or those that may be taken in the future would be biased by any participants' economic interests in stifling product competition. The Television Program Improvement Act's protection did not extend to boycotts of any person, and we assume that further efforts by the industry to alleviate the negative impact of violence in telecast materials also would not entail such conduct.

Moreover, as the Supreme Court indicated in Allied Tube, potential procompetitive effects would be an important part of the antitrust analysis of voluntary television violence guidelines. Such guidelines could serve to disseminate valuable information on program content to both advertisers and television viewers. Accurate information can enhance the demand for,

and increase the output of, an industry's products or services. For example, viewers, including particularly parents, may react to uncertainty about the nature of violence in television programming by reducing television viewing in their homes. Violent television programming is seen by many as distasteful or harmful, and reasonable voluntary industry efforts to alleviate such negative effects can be likened to reasonable safety standards that improve the quality of, and thus the demand for, an industry's products.

In sum, the Department does not believe that continuance of the activities that have been exempted from the antitrust laws by the Television Program Improvement Act—including measures already taken or comparable cooperative measures that may be taken in the future—should present substantial antitrust risks. Certainly, such conduct would not raise the direct commercial competitive concerns that were presented by the commercial advertising restrictions that the Department challenged in the NAB case.

We appreciate very much your concerns with the negative effects of gratuitous television violence, and we hope our comments on the antitrust aspects of collective industry efforts to alleviate those effects will be helpful.

Sincerely,

Sheila F. Anthony (signed)
Assistant Attorney General

C. Statement of Principles of Radio and Television Broadcasting

STATEMENT OF PRINCIPLES OF RADIO AND TELEVISION BROADCASTING

Issued by the Board of Directors of the National Association of Broadcasters

PREFACE

The following Statement of Principles of Radio and Television Broadcasting is being adopted by the Board of Directors of the National Association of Broadcasters on behalf of the Association and commercial radio and television stations it represents.

America's free over-the-air radio and television broadcasters have a long and proud tradition of universal, local broadcast service to the American people. These broadcasters, large and small, representing diverse localities and perspectives, have strived to present programming of the highest quality to their local communities pursuant to standards of excellence and responsibility. They have done so and continue to do so out of respect for their status as daily guests in the homes and lives of a majority of Americans and with a sense of pride in their profession, in their product and in their public service.

The Board issues this statement of principles to record and reflect what it believes to be the generally-accepted standards of America's radio and television broadcasters. The Board feels that such a statement will be particularly useful at this time, given public concern about certain serious societal problems, notably violence and drug abuse.

The Board believes that broadcasters will continue to earn public trust and confidence by following the same principles that have served them well for so long. Many broadcasters now have written standards of their own. All have their own programming policies. NAB would hope that all broadcasters would set down in writing their general programming principles and policies, as the Board hereby sets down the following principles.

PRINCIPLES CONCERNING PROGRAM CONTENT

Responsibly Exercised Artistic Freedom

The challenge to the broadcaster often is to determine how suitably to present the complexities of human behavior without compromising or reducing the range of subject matter, artistic expression or dramatic presentation desired by the broadcaster and its audiences. For television and for radio, this requires exceptional awareness of considerations peculiar to each medium and of the composition and preferences of particular communities and audiences.

Each broadcaster should exercise responsible and careful judgement in the selection of material for broadcast. At the same time each broadcast licensee must be vigilant in exercising and defending its rights to program according to its own judgements and to the programming

choices of its audiences. This often may include the presentation of sensitive or controversial material.

In selecting program subjects and themes of particular sensitivity, great care should be paid to treatment and presentation, so as to avoid presentations purely for the purpose of sensationalism or to appeal to prurient interest or morbid curiosity.

In scheduling programs of particular sensitivity, broadcasters should take account of the composition and the listening or viewing habits or their specific audiences. Scheduling generally should consider audience expectations and composition in various time periods.

Responsibility In Children's Programming

Programs designed primarily for children should take into account the range of interests and needs of children from informational material to wide variety of entertainment material. Children's programs should attempt to contribute to the sound, balanced development of children and to help them achieve a sense of the world at large.

Special Program Principles

1. Violence.

Violence, physical or psychological, should only be portrayed in a responsible manner and should not be used exploitatively. Where consistent with the creative intent, programs involving violence should present the consequences of violence to its victims and perpetrators.

Presentation of the details of violence should avoid the excessive, the gratuitous and the instructional.

The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or by sound, should be avoided.

Particular care should be exercised where children are involved in the depiction of violent behavior.

2. Drugs and Substance Abuse.

The use of illegal drugs or other substance abuse should not be encouraged or shown as socially desirable.

Portrayal of drug or substance abuse should be reasonably related to plot, theme or character development. Where consistent with the creative intent, the adverse consequences of drug or substance abuse should be depicted.

Glamorization of drug and substance abuse should be avoided.

3. Sexually Oriented Material.

In evaluating programming dealing with human sexuality, broadcasters should consider the composition and expectations of the audience likely to be viewing or listening to their stations and/or to a particular program, the context in which sensitive material is presented and its scheduling.

Creativity and diversity in programming that deals with human sexuality should be encouraged. Programming that purely panders to prurient or morbid interests should be avoided.

Where significant child audience can be expected, particular care should be exercised when addressing sexual themes.

Obscenity is not constitutionally-protected speech and is at all times unacceptable for broadcast.

All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter.

ENDNOTE

This statement of principles is of necessity general and advisory rather than specific and restrictive. There will be no interpretation or enforcement of these principles by NAB or others. They are not intended to establish new criteria for programming decisions, but rather to reflect generally-accepted practices of America's radio and television programmers. They similarly are not in any way intended to inhibit creativity in or programming of controversial, diverse or sensitive subjects.

Specific standards and their applications and interpretations remain within the sole discretion of the individual television or radio licensee. Both NAB and the stations it represents respect and defend the individual broadcast's First Amendment rights to select and present programming according to its individual assessment of the desires and expectations of its audiences and of the public interests.

(Adopted October 1990; reaffirmed 1992).

D.

Innovative Approaches to Public Interest Responsibilities: A Comparative Analysis

Innovative Approaches to Public Interest Responsibilities: A Comparative Analysis

The purpose of this appendix is to offer some discussion of various possible innovative approaches to public interest obligations, and to compare them to more conventional approaches.* Our shared ground is that broadcasters should attempt to contribute to the educational, civic, and democratic goals of a well-functioning democracy. The question is what methods are best suited to achieving those goals and whether it is possible to think of more creative means for doing so. Thus we discuss a wide range of proposals, from deregulation to spectrum auctions to a system of "digital drop-ins," by which government would support a substantial amount of public interest programming.

Some of the most interesting proposals below attempt to promote public interest goals by allowing considerable flexibility for broadcasters, as, for example, by allowing them to provide public interest broadcasting or instead to pay for someone else to do it, or by paying a spectrum fee (from an auction or from a set price) that might be used to support public interest broadcasting.

We have been greatly assisted by a number of presentations and documents, including those by the Media Institute, a working group of the Aspen Institute, and Hugh Carter Donahue. The public through electronic mail submissions, faxes, and attendance at meetings has also made substantial contributions to the Committee. We are very grateful for the creative thinking and assistance provided by these organizations and individuals. These ideas were vigorously debated within the Committee. Given the innovative and new approach taken by many of these proposals, the Committee chose not to reach any final judgment and conclusions or make any specific recommendations.

I. Traditional Regulation: The Public Trustee Model

The traditional approach to regulation of broadcasting has treated broadcasters as public trustees, obligated to meet a large set of public service responsibilities. Because broadcasters get exclusive use of a scarce public resource—the airwaves, it has been deemed appropriate to subject them to national commands designed to ensure promotion of the public interest. Perhaps the public trustee model should be "carried over" to the digital era, though there are complexities in deciding exactly how the model applies in a new setting. There are serious questions about the extent to which federal commands should be specific (so as to ensure compliance) or vague and general (so as to allow room for private adaptation).

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* The Advisory Committee thanks Angela Campbell and the Aspen Institute's Communications and Society Program directed by Charles M. Firestone and Amy Korzick Garmer for the submission, *Toward a New Approach to Public Interest Regulation of Digital Broadcasting: A Preliminary Report of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest,* on which this Appendix is based.

Advantages: It is reasonable to think that direct mandates are the simplest way to ensure compliance with public interest responsibilities. If, for example, broadcasters are told to provide three hours of educational programming per week, or five hours of free air time for candidates per year, the public interest may be well-served simply by virtue of the mandate. Other approaches might be easier to evade and less effective.

Disadvantages: In general, this approach may be anachronistic in light of the new communications market, with so many more options. As historically understood, the public trustee model also has a degree of rigidity—a kind of "one size fits all" notion that is ill-suited to varying needs on the part of stations and viewers alike. Command-and-control approaches can also be counterproductive and have unintended bad side-effects.

II. Economic Incentives: Pay or Play, Spectrum Checkoff

In the environmental area, there have been many innovations designed to create efficient, or low-cost, ways of promoting regulatory goals. A creative illustration consists of "emissions trading," by which polluters are given a right to pollute a set amount, and permitted to trade that right with others.[1] The basic idea is that pollution is a public bad, and therefore people should be able to save money from doing less of it (and in that way lose money from doing more of it). If the right to pollute can be traded, there will be strong incentives to come up with low-cost ways of reducing pollution, and the result should be a system in which we obtain pollution reductions most cheaply. Existing experience with emissions trading approaches have shown many advantages.[2]

This basic approach—using economic incentives—might be adapted to the area of public interest programming. Indeed, the Children's Television Act now authorizes licensees to meet part of their obligation to children by demonstrating "special efforts . . . to produce or support [children's educational] programming broadcast by another station in the licensee's marketplace."[3] The idea might be generalized. Suppose, for example, that public interest programming is considered to be a "public good," in the sense that the public is better off with more of it. Suppose too that some broadcasters are good at providing such programming, and can do so in a cost-effective manner, whereas others are not so good at it, and can do so only at great expense. Adapting the environmental law model, it might be provided that broadcasters should have a choice: provide public interest programming of a certain defined level; or pay a certain amount to someone else who will do so.

A mild variation on this approach would involve what has been called the "spectrum check-off" model. On this model, broadcasters are given a choice: adhere to public interest responsibilities as nationally determined; or pay a fee for the use of the spectrum. The payment would be used for public broadcasting of one kind or other. This approach is somewhat less fine-tuned, and somewhat simpler, than the "pay or play" model. Under "spectrum check-off," there is only one "deal," whereas under "pay or play," there could be a number of trades every year.

Advantages: This approach might ensure a high level of public interest broadcasting, and do so in a way that ensures that such broadcasting will be provided by those most willing and able to do it. Thus the "pay or play" approach might combine the virtues of the public trustee model with the virtues of deregulation. Under this approach, people who do not want to provide public interest programming, or who can do so only at great expense, can make mutually beneficial deals with others who are willing to do so. This could serve both broadcasters and the public.

Disadvantages: In the environmental area, emissions trading does not work where it creates "hot spots," that is, areas that are highly polluted. A problem with "pay or play" is that it may result in the failure, on the part of some or many broadcasters, to do anything but "pay," with the consequence that many viewers do not see such programming—and with the further consequences that broadcasters who provide such programming may be hurt in the marketplace. In addition, there are symbolic and expressive values to uniform public interest obligations. Some people think that these obligations should apply to everyone and that no broadcaster should be allowed to buy its way out.

III. PAY PLUS ACCESS

Under this approach, broadcasters would pay a fee for a right to use the spectrum; the fee might be determined via auction or might be determined by government. At the same time, public interest obligations would be removed. In addition, broadcasters would be asked to allow a specified amount of programming in the public interest—in other words, to set aside an identified amount of time for political candidates, educational programming, or diverse viewpoints. It would be possible to imagine various combinations of the three ingredients of this approach: payment, relief from general public service obligations, and access.

Advantages: As compared with economic incentives, this approach would tend to ensure that some public interest programming was on every station. Many people think that this is important—that certain programming, for example candidate speech, should not be relegated to certain channels that are rarely watched. Thus this approach might do better in serving democratic goals. As compared with the public trustee model, this approach would better ensure that people will provide public interest programming who have the incentive to do so well.

Disadvantages: For those skeptical of "pay or play," this approach might create similar problems. It also would involve a degree of administrative complexity. It is possible that people would simply change the channel when the "access" material was on the station.

IV. DISCLOSURE OF PUBLIC INTEREST AND PUBLIC SERVICE ACTIVITIES

We have emphasized the importance of disclosure of public interest and public service activities. It would be possible to think that disclosure should be the exclusive governmental mandate, and that the market should be used for all specific decisions. Perhaps, then, government should restrict itself to a disclosure requirement.

Advantages: Disclosure might well trigger public-interested reactions on the part of broadcasters and diverse segments of the public. In the environmental context, disclosure has by itself done enormous good in terms of achieving low-cost pollution reductions.[4] The same may well be true here. If broadcasters are required to disclose their public interest activities, there may well be a kind of competition to have more such activities, and to create a kind of "race" to do better. Moreover, disclosure is a minimal mandate, not by itself requiring anything. Perhaps what emerges from the market, influenced as it is by the pressures that come from disclosure, is best for society, especially in light of the increasing range of programming options.

Disadvantages: In advance, it is impossible to know how much good would be done by disclosure on its own. Perhaps the good results in the environmental area will not be replicated here. If disclosure by itself has few effects, there is insufficient reason to think that whatever results is necessarily "best." Disclosure may, in short, be too close to deregulation.

V. Spectrum Auction Without Public Interest Obligations

The FCC has experimented with an auction approach to allocating scarce communications resources. It would be possible to suggest that instead of being required to pay a "fee" for spectrum, to be set by government, broadcasters should receive licenses via any auction, where the market would set the relevant prices. The proceeds from the auction could be used however the taxpayers see fit.

Advantages: It is usually better to have the market, rather than government, set the fees for goods and services. And if deregulation is an appropriate solution, a spectrum auction might well be part of a complete deregulatory package, in which broadcasters purchase "space" (at market prices) and then supply the relevant goods (also at market prices).

Disadvantages: Operation of so general an auction could be somewhat complicated. Some people believe that there would be serious questions of equity if digital "space" were put up for sale anew, especially in light of various investments that have already been made. Most important, this approach is unacceptable if the case for deregulation has not been made out. If, for example, there are various forms of market failure, it is reasonable to think that broadcasters should provide more public interest programming that the market guarantees (see below).

VI. Complete or Near-Complete Deregulation

One possible approach, explicit in some of the suggestions that we have received, is to eliminate any public interest obligations. It might be thought, for example, that the market for communications is providing sufficient services for everyone, and that serious constitutional questions are raised by any governmental control of programming content. Even if the constitutional questions are not so serious, perhaps this form of government intrusion into the editorial discretion of broadcasting stations is no longer acceptable.

Advantages: Perhaps deregulation could do as well as any other approach at ensuring that viewers see what they want to see. It would certainly save money and reduce administrative burdens for broadcasters, a fact of general importance for the industry and of particular importance for many small and local stations. In light of the broad availability of options—including cable—it might be thought that there is no longer any reason for government control of content. On this view, any public interest programming should be funded by taxpayers, to the extent that they are willing to do so; broadcasters should not be required to pay for that programming on their own.

Disadvantages: There is good reason to believe that the communications market will not meet all social needs. Many people do not have cable television at all, and they rely instead on broadcasting. The market for broadcasting may well underproduce educational programming for children, and also programming relating to elections and other democratic concerns. There are large "external" benefits from such programming, and individual viewers may not adequately take account of those benefits in individual choices.[5] The fact that advertisers are involved in determining program content suggests that the communications market is not an ordinary one; since broadcasters deliver viewers to advertisers—since viewers are in this sense commodities rather than consumers—it is not at all clear that the communications market will simply provide viewers what they "want."[6] In any case people are citizens as well as consumers, and they may well, in their capacity as citizens, want broadcasters to produce more public interest programming than the market produces on its own. And if broadcasters are receiving licenses for free, it makes sense to say that they should be required to provide something in return.

VII. Degreulation with Licensing Fee, with Proceeds Devoted to Public Interest Broadcasting

Some people have suggested that government should deregulate the market, and allow broadcasters to show whatever they wish, but that it would be appropriate to impose a licensing fee, the proceeds to go to public interest broadcasting. Of course the licensing fee might be established via auction.

Advantages: Like the deregulation option, this one would eliminate any government control of the content of broadcasting. But it would impose a quid pro quo: broadcasters would have to pay a certain amount as a licensing fee, with the proceeds to go to public interest broadcasting on, for example, PBS.

Disadvantages: Like the deregulation option, this approach may well produce too little educational viewing for children and too little attention to democratic and civic affairs. It is risky to leave all public interest obligations with PBS; our tradition has sought to impose minimal duties on all stations who receive broadcasting licenses.

VIII. DIGITAL DROP-INS IN THE PUBLIC INTEREST AND THE QUESTION OF "RESERVING" PUBLIC INTEREST "SPACE"

It has been suggested that when the 1600 channel analog television system becomes obsolete, some part of the spectrum should be specifically reserved, by government, for civic discourse or local and public affairs programming. The networks that produce such programming might be funded by money received from auctioning off a portion of the analog stations. The basic idea would be to ensure "space" for public broadcast stations that would serve civic aspirations. These stations could in turn develop relevant expertise and obtain niche markets, as for example, C-Span has done.

Advantages: This approach would involve little control of commercial broadcasters. At the same time, it would ensure a large level of civic and democratic programming. The goal would be to use new technologies to expand on the PBS model, creating a number of "little," and private, public stations.

Disadvantages: If it is desirable to ensure a certain level of public interest programming on all stations, this approach will be inadequate. There are also questions about the extent to which it is appropriate for government to reserve "space" for programming of a specific content, and about how strong a role government might have in overseeing those stations.

ENDNOTES

[1] *See* Ackerman and Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

[2] *See id.*; Robert Stavins, *What Can We Learn From the Grand Policy Experiment? Lessons from SO2 Allowance Trading*, 12 J. ECON. PERSP. 69 (1998).

[3] 47 USC 303b(b)(2).

[4] *See* JAMES HAMILTON, CHANNELING VIOLENCE (1998).

[5] *See* C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO STATE L.J. 311, 352-83 (1997); *see also* JAMES HAMILTON, *supra.*

[6] *See* C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994).

E.

History of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters

History of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters

President Clinton established the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters—or PIAC, for Public Interest Advisory Committee—on March 11, 1997.[1] The President charged the Advisory Committee with determining how the principles of public trusteeship that have governed broadcast television for more than 70 years should be applied in the new television environment created by the Telecommunications Act of 1996. Specifically, the President requested that the Advisory Committee advise Vice President Gore on the public interest obligations of digital television broadcasters as this new transmission technology replaces existing analog broadcasting techniques.

Under the mandate of the Telecommunications Act, Congress assigned existing television broadcasters an additional 6 megahertz of spectrum to facilitate the transition from analog to digital transmission technologies. New digital transmission protocols will enable broadcasters to offer high-definition television, additional channels, new programming formats and information services, and other innovations.

Because of its expected impact on broadcast programming, industry practices, and marketplace competition, digital television is the most significant transformation in the history of broadcast television. Not surprisingly, it raises new questions about how public interest obligations that have historically applied to television broadcasters should evolve.

On June 28, 1997, President Clinton appointed Leslie Moonves, President of CBS Television, and Dr. Norman Ornstein, Resident Scholar at the American Enterprise Institute, to co-chair the Advisory Committee. Along with 19 prominent Americans appointed as members of the panel on October 22, 1997, the Advisory Committee was directed to explore the complex ramifications of digital television and to develop formal recommendations concerning the public interest obligations of digital broadcasters. (See Appendix G for biographies of Advisory Committee members.)

Members of the Advisory Committee were selected on the basis of their leadership in the commercial and noncommercial broadcasting industry, computer industries, film and video production, the artistic community, academic institutions, public interest organizations, and the advertising community. A twentieth member was appointed in December 1997, bringing total Advisory Committee membership to 22.

Initially, the President gave the Advisory Committee a June 1, 1998, deadline for submitting a report and recommendations to Vice President Gore. The President extended that deadline first to October 1, 1998, and then to December 31, 1998.

During its 15-month life—October 1997 to December 1998—the Advisory Committee met on eight occasions: six in Washington, DC, one in Los Angeles, California, and one in Minneapolis, Minnesota. At those meetings, the Advisory Committee heard from expert panels,

solicited the views of the public, and deliberated on the most appropriate policies for advancing the public interest in digital broadcasting.

EXPERT PANELS AND PUBLIC OUTREACH

The depth of the Advisory Committee's investigations is evidenced by the twelve presentations and discussions hosted by expert panels and individuals during the five fact-finding meetings held from October 1997 to April 1998. These presentations covered the following topics:

October 22-23, 1997: Washington, DC

1. **The Evolution of the Public Interest Standard in Broadcasting.** Broadcast attorney Erwin Krasnow of Verner, Liipfert, Bernhard, McPherson & Hand, described the complex historical changes in the public interest standard in broadcasting since its inception in 1927.
2. **Relevant Provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's Implementation Efforts.** Karen Edwards, the Designated Federal Officer of the Advisory Committee and a telecommunications attorney with the National Telecommunications and Information Administration, explained the statutory and administrative framework that will guide the evolution of digital television and any public interest requirements.
3. **What Makes Digital Technology Different?** Richard E. Wiley, Senior Partner in the law firm of Wiley Rein & Fielding, Chair of the Advisory Committee on Advanced Television Service (ACATS), and the former Chairman of the FCC, offered an overview of the technical bases of digital television and the complex implications for the Advisory Committee's recommendations
4. **HDTV Demonstration.** James Goodmon, President and CEO of Capitol Broadcasting and Tom Beauchamp, Chief Engineer at *WRAL-TV* in Raleigh, North Carolina, disucssed the superiority of digital transmission technology and demonstrated the difference in picture quality between a high definition digital signal and an analog signal.

December 5, 1997: Washington, DC

1. **Perspectives from the Public Interest Community.** Leaders of prominent public interest organizations—Andrew Jay Schwartzman, President and CEO, Media Access Project; Paul Taylor, Executive Director, Free TV for Straight Talk Coalition; and Mark Lloyd, Executive Director, Civil Rights Forum—explained their desire to secure free airtime for political candidates, ensure responsiveness to local communities, foster diversity of expression, among other concerns.
2. **Perspective from the Broadcast Industry.** Leading broadcasters—Robert Wright, CEO, NBC; W. Don Cornwell, CEO, Granite Broadcasting; and Robert T. Coonrod, President and CEO, Corporation for Public Broadcasting—discussed the industry's

commitment to public trusteeship and localism, and the complexities and risks of moving to digital television transmissions.

January 16, 1998: Washington, DC

1. **The Technology of Digital Broadcasting and the Implications for New Programming Services.** Robert D. Glaser, the Chairman and CEO of RealNetworks, Inc., and two industry analysts—Bruce M. Allan, Vice President for the Broadcast Division at Harris Corporation and Josh Bernoff, Principal Analyst for New Media Research at Forrester Research, Inc.—discussed innovative programming services that digital technologies will make possible and the complications this creates in fashioning public interest obligations.

2 **Closed Captioning and Video Description of Broadcast Programming.** Karen Peltz Strauss, Legal Counsel for Telecommunications Policy for the National Association of the Deaf, and three other experts on disability access explained how new digital transmission technology will facilitate versatile new types of closed captioning and video description that can make television more accessible to individuals who have hearing and vision disabilities.

   The panel comprised James Tucker, Superintendent, Maryland School for the Deaf; Larry Goldberg, Director, CPB/WGBH National Center for Accessible Media; and Nolan Crabb, Editor, Braille Forum, American Council of the Blind.

3. **Natural Disaster Information Services.** Peter Ward, Chairman of the U.S. Geological Survey's Working Group on Natural Disaster Information Systems, discussed how digital television offers new and innovative ways to warn persons at risk of impending natural disasters, and explained that utilizing the technology to its fullest extent will require close coordination among broadcasters, television set manufacturers, and emergency communications specialists.

4. **Educational Programming in the Digital Era.** Peggy Charren, Visiting Scholar at the Harvard University Graduate School of Education and founder of Action for Children's Television, hosted a panel of five experts who described the exciting new possibilities that digital television offers for improving educational programming.

   The panel comprised Gordan Ambach, Executive Director, Council of State School Officers; Janet Poley, President, American Distance Education Consortium; Marilyn Gell Mason, Director, Cleveland Public Library; Fred Esplin, General Manager, KUED-TV, Salt Lake City, Utah; and Gary Poon, Executive Director, Digital Television Strategic Planning Office, PBS.

March 2, 1998: Los Angeles, California

1. **Independent Programming and Access in the Digital Age.** At a meeting at the University of Southern California's Annenberg School for Communications, a panel of prominent independent producers and community leaders, moderated by James Yee, Executive Director, Independent Television Service, expressed concern about the challenges they face getting access to local and national television outlets.

The panel comprised Gerald I. Isenberg, Chairman, Caucus for Producers, Writers & Directors and Executive Director, Electronic Media Programs, USC School of Cinema-Television; Herbert Chao Gunther, President and Executive Director, Public Media Center; Kelley Carpenter, Director, Southern California Indian Center; and Marian Rees, Marian Rees Associates, Inc. and Co-Chair, National Council for Families and Television.

2. **Political Broadcasting.** University of Chicago Law School Professor Cass R. Sustein hosted a panel of three experts who explored the possibilities of providing additional airtime for political speeches by parties and candidates.

   The panel comprised Tracy A. Westen, President, Center for Governmental Studies and Adjunct Professor, Annenberg School for Communication; P. Cameron DeVore, Senior Partner, Davis Wright Tremaine LLP; and Paul Taylor, Executive Director, The Free TV for Straight Talk Coalition.

April 14, 1998: Washington, DC

1. **Survey of Broadcasters' Public Service Activities.** Paul A. La Camera, President and General Manager of WCVB-TV in Boston, hosted a panel that reviewed the community services that many broadcasters currently provide—ranging from public service announcements to political debates to charity fundraising. The panel comprised William D. McInturff of Public Opinion Strategies and Jack Goodman of the NAB.

In addition to these panels, dozens of scholarly papers and special reports were submitted to the Advisory Committee from various parties, including major reports by the Aspen Institute's Communications and Society Program, the National Association of Broadcasters, the Benton Foundation, Media Access Project, the Media Institute, and numerous individual law review and news articles. Many Advisory Committee members also submitted significant testimony or reports on topics under review.

PUBLIC OUTREACH

To ensure that its deliberations could be followed by interested parties in the television industry, academia, the political area, and the general public, the Advisory Committee made a considerable outreach effort. The Advisory Committee established a website and listserv—www.ntia.doc.gov/pubintadvcom/pubint.htm—where meetings were announced and a wide variety of documents, including meeting transcripts, were posted. Dozens of additional documents were listed on the website and made available on request to the Secretariat of the Advisory Committee. In addition, audio recordings of Advisory Committee meetings were posted on the World Wide Web using RealAudio.

Public response to Advisory Committee deliberations was extensive. Several score of formal comments were sent to the Advisory Committee via e-mail, and dozens of members of the public appeared in person at Advisory Committee meetings.

SPECIAL PIAC SUBCOMMITTEES

Most of the efforts involved in framing the Advisory Committee's formal recommendations were undertaken by members of the following four subcommittees:

- **Broadcaster Code of Conduct Task Force.** After analyzing the former Television Code of the National Association of Broadcasters, this subcommittee, chaired by Cass Sunstein of the University of Chicago Law School, recommended principles and language for a new code of conduct for broadcasters.
- **Educational Programming Task Force.** This subcommittee reviewed the full Advisory Committee's discussion of educational programming in the digital age—especially two proposals involving public broadcasting—and developed recommendations on that basis. Lois Jean White, President of the National PTA, served as Chair.
- **Minimum Public Interest Standards Working Group.** Under the leadership of James Goodmon, President and CEO of Capitol Broadcasting, this subcommittee drafted a set of mandatory minimum requirements for broadcasters.
- **Disclosure Requirements Working Group.** This subcommittee drafted recommendations concerning the types of information about public interest performance that the Advisory Committee believes broadcasters should disclose. Gigi Sohn, Executive Director of Media Access Project, chaired the subcommittee.
- **Datacasting Working Group.** After examining the new capabilities that datacasting will make possible, this subcommittee, headed by Robert D. Glaser, Chairman and CEO of RealNetworks, Inc., drafted recommendations on the public interest options available to broadcasters who choose to datacast.

Following its five fact-finding meetings, the Advisory Committee held three meetings to discuss issues and formulate recommendations. Those meetings were held in Minneapolis on June 8, 1998; Washington, DC, on September 9, 1998; and Washington, DC, on November 9, 1998.

As this record of investigation and deliberation suggests, the recommendations of the Advisory Committee represent one of the most sustained, thorough inquiries into the public interest obligations of television broadcasters ever conducted. (For a description of previous studies of this subject, see Section I.) The Advisory Committee has actively sought the views of the most diverse interests—including the general public—while attempting to reconcile divergent perspectives into a workable policy consensus. The Advisory Committee hopes that this report will serve as a valuable benchmark during future policymaking in the Administration, Congress, and Federal Communications Commission.

ENDNOTE

[1] Exec. Order No. 13038, 62 Fed. Reg. 12065 (1997).

F.

Executive Order No. 13038 and Charter of the Advisory Committee

Executive Order No. 13038 of March 11, 1997*

Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the "Act"), and in order to establish an advisory committee on the public interest obligations of digital television broadcasters, it is hereby ordered as follows:

Section 1. *Establishment.* There is established the "Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters" ("Committee"). The Committee shall consist of not more than 15 members appointed by the President. Members shall be chosen from the private sector, including members of the commercial and noncommercial broadcasting industry broadcasting industry, computer industries, producers, academic institutions, public interest organization, and the advertising community. The President shall designate a Chair from among the members of the Committee.

Sec. 2. *Functions.* On or before June 1, 1998, the Committee shall report to the Vice President on the public interest obligations digital television broadcasters should assume. For the purpose of carrying out its functions the Committee may, in consultation with the Assistant Secretary of Commerce for Communications and Information, hold meetings at such times and places as the Committee may find advisable.

Sec. 3. *Administration.* (a) To the extent permitted by law, the heads of executive departments, agencies, and independent instrumentalities shall provide the Committee, upon request, with such information as it may require for the purpose of carrying out its functions.

(b) Upon request of the Chair of the Committee, the head of any executive department, agency, or instrumentality shall, to the extent permitted by law and subject to the discretion of such head, (1) make any of the facilities and services of such department, agency, or instrumentality available to the Committee; and (2) detail any of the personnel of such department, agency, or instrumentality to the Committee to assist the Committee in carrying out its duties.

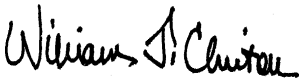
*Executive Order 13038 was amended by Executive Orders Nos. 13065, 13081, and 13102 to, among other things, extend the reporting deadline of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters to December 31, 1998.

(c) Members of the Committee shall serve without compensation for their work on the Committee. While engaged in the work of the Committee, members appointed from the private sector may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law and as the Chair, in consultation with the Assistant Secretary of Commerce for Communications and Information, may allow as needed, for persons serving intermittently in the Government service (5 U.S.C. 5701-5707), to the extent funds are available for such purposes.

(d) To the extent permitted by law and subject to the availability of appropriations, the Department of Commerce shall provide the Committee with administrative services, staff, and other support services necessary for performance of the Committee's functions.

(e) the Assistant Secretary of Commerce for Communications and Information, or his designee, shall perform the functions of the President under the Act, except that of reporting to the Congress, in accordance with the guidelines and procedures established by the Administrator of General Services.

Sec. 4. *General.* The Committee shall terminate 30 days after submitting its report, unless extended by the President.



William J. Clinton

THE WHITE HOUSE,

March 11, 1997

Charter of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters

(As amended)

ESTABLISHMENT

The Secretary of Commerce, pursuant to Executive Order No. 13038, hereby establishes the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters ("Committee).

OBJECTIVES AND DUTIES

1. The Committee shall provide advice on the public interest obligations that digital television broadcasters should assume. The Committee will study and recommend what public interest responsibilities should accompany the broadcasters' receipt of digital television licenses.
2. The Committee will draw upon the expertise of its members and other sources to provide advice and make recommendations to the Vice President through the Assistance Secretary of Communications and Information, who also reports to the Secretary of Commerce. The Committee will submit its report on or before October 1, 1998.[1]
3. The Chairpersons may, from time to time, invite experts to submit information to the Committee and may form subcommittees of the Committee to review specific issues.[2]
4. The Committee will function solely as an advisory body, and will comply fully with the provisions of the Federal Advisory Committee Act (5 U.S.C. app. 2).

MEMBER AND CHAIRPERSON[3]

1. The Committee shall consist of up to 25 members to be appointed by the President. The President shall appoint a balanced representation of members from the private sector, including members of the commercial and noncommercial broadcasting industry, computer industries, producers, academic institutions, public interest organizations, and the advertising community.
2. The Chairpersons shall be members of the Committee and will be appointed by the President.
3. Members will be appointed for the duration of the Committee and serve at the discretion of the President. Vacancy appointments shall be for the remainder of the unexpired term of the vacancy.

ADMINISTRATIVE PROVISIONS

1. The Committee will report to the Vice President through the Assistant Secretary of Communications and Information, who also reports to the Secretary of Commerce.

2. The Committee will meet no less than twice a year, except that additional meetings may be called as deemed desirable by the Chairpersons and the Assistance Secretary for Communications and Information. Meetings are expected to be held in the Washington, D.C. metropolitan area.[4]
3. The Office of the Assistance Secretary for Communications and Information will provide staff support for the Committee.
4. Members of the Committee will not be compensated for their services. Although members may, upon request, be allowed travel and per diem expenses as authorized by 5 U.S.C. §5701 et. seq., no funding is currently planned to support member travel.
5. The annual cost of operating the Committee is estimated at $500,000, which includes 4 person-years of staff support.
6. The Committee may establish such subcommittees of its members as may be necessary, subject to the Department of Commerce Committee Management Handbook.
7. Members of the Committee and its subcommittees shall not be considered special government employees for any purpose and will not be subject to sections 201-03, 205, 207-09, 218, and 219 of Title 18 U.S. Code, Chapter 11 Conflict of Interest Rules.
8. To the extent permitted by law, the heads of executive departments, agencies, and independent instrumentalities shall provide the Committee, upon request, with such information as it may require for the purpose of carrying out its functions.
9. As provided by Executive Order No. 13038, the Committee, in consultation with the Assistant Secretary for Communications and Information, may accept the use of any of the facilities and services of any executive department, agency, or instrumentality offered by the head of such department, agency, or instrumentality to the Committee to assist the Committee in carrying out its duties. Existing Department of Commerce procedures for the acceptance of such facilities and services will be followed.
10. Notwithstanding any other Executive Order, the relevant functions of the President under the Federal Advisory Committee Act, as amended, except that of reporting to Congress, shall be performed by the Assistant Secretary for Communications and Information, or his designees, in accordance with guidelines and procedures issued by the Administrator of General Services.

DURATION

The Committee shall terminate on October 31, 1998, unless earlier terminated or renewed by proper authority by appropriate action.[5]

Raymond G. Kammer, Jr.
Acting Chief Financial Officer and
Assistant Secretary of Administration

Notes

1 Paragraph was amended on June 17, 1998, to change the reporting deadline from June 1, 1998, to Oct. 1, 1998.

2 Paragraph was altered on Dec. 3, 1997, to change "Chairperson" to Chairpersons."

3 Paragraphs 1 and 2 or this section were amended on Dec. 3, 1997, to increase the Committee size from 15 to 25 members and to add a co-chair position.

4 Paragraph amended Dec. 3, 1997, to change "Chairperson" to "Chairpersons."

5 Paragraph amended on June 17, 1997, to change the Committee termination date from July 1, 1998, to Oct. 31, 1998.

G.

Biographies of Advisory Committee Members

Biographies of Advisory Committee Members

LESLIE MOONVES, CO-CHAIR

Leslie Moonves is President and Chief Executive Officer of CBS Television. He joined the Network as President, CBS Entertainment in 1995 and was promoted to his current position in 1998. In his current position, Mr. Moonves is responsible for the programming, sales, and marketing operations of all CBS broadcast efforts, including CBS Entertainment, CBS News and CBS Sports, as well as its affiliate relations, research and planning, and advertising and promotion functions. Mr. Moonves also oversees CBS enterprises, which includes CBS's domestic syndication and international sales units. Under his aegis, CBS has risen from third to second place in the ratings, and is now challenging NBC's leadership position.

Mr. Moonves has put CBS in its current ratings position by developing successful new series, orchestrating key scheduling moves, and building a prolific television movie franchise. Since joining the network, he has developed the hit comedy "Everybody Loves Raymond," acquired "JAG" (now ranked among television's top dramas), and moved "Touched By An Angel" to Sunday night, where it has skyrocketed into a perennial top-10 series. He has also built the "CBS Sunday Movie" into the number one movie showcase in television.

For the 1998-99 season, Mr. Moonves ushered in a primetime schedule that features the season's top new dramas, "L.A. Doctors" and "Martial Law," and two of the top freshman comedies, "The King of Queens" and "Becker," starring Ted Danson. Mr. Moonves has also played an integral role in the formation of "60 Minutes II," which is scheduled to premiere on the CBS Television Network in January 1999.

In addition, Mr. Moonves has transformed CBS Productions, the Network's in-house production arm, into the number three supplier of network programming. After recruiting some of the industry's top creative executives, CBSP placed 6 new series on the CBS schedule and had a record 12 series on the air at the beginning of the fall season.

Previously, Mr. Moonves was President of Warner Brothers Television, where he oversaw the television division that supplied the greatest number of programs to network television for 9 consecutive years, including "ER" and "Friends." Just prior to leaving Warner Brothers, he made television history by setting an unprecedented 22 series on the networks' fall schedules. From 1989 to 1993, Mr. Moonves was President of Lorimar Television.

Mr. Moonves is also a member of President Clinton's Advisory Committee on the Arts, and serves on the board of directors of the Los Angeles Free Clinic, the Board of Trustees of the Entertainment Industries Council and the Motion Picture Association of America's Executive Committee on Television Violence, and the board of governors of the UCLA Center for Communications Policy. He is also a trustee of the American Film Institute and is a past president of the Hollywood Radio and Television Society.

Mr. Moonves is a graduate of Bucknell.

NORMAN J. ORNSTEIN, CO-CHAIR

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research and an election analyst for CBS New. In addition, Dr. Ornstein writes regularly for *USA Today*, as a member of its Board of Contributors, and authors the column "Congress Inside Out" for *Roll Call* newspaper. Currently, he is leading a coalition of scholars and others in a major effort to reform this Nation's campaign financing system.

Dr. Ornstein has worked with Al Franken as a commentator and pollster for the Comedy Central Television Network's political coverage, and is a senior advisor to the Times Mirror Center (now the Pew Research Center) for the People & the Press. He has a near 20-year history as a consultant, contributor, and/or guest on such television programs as "Nightline," "Today," "Face the Nation," and "The MacNeil/Lehrer NewsHour," (now "The NewsHour with Jim Lehrer"). Dr. Ornstein has also served as co-director of the Renewing Congress Project—a comprehensive examination of Congress that has played a major role in the reforms of the past three Congresses. He writes frequently for *The New York Times, The Washington Post,* and other major newspapers and magazines. His books include: *Lessons and Legacies: Farewell Addresses from the U.S. Senate; Debt and Taxes: How American Got Into Its Budget Mess, and How We Can Get Out of It,* with John H. Makin; and *Intensive Care: How Congress Shapes Health Policy,* with Thomas E. Mann.

Dr. Ornstein holds a Ph.D. from the University of Michigan.

CHARLES BENTON

Charles Benton is President and Chairman of the Board of the Benton Foundation—a leading advocate for communications in the public interest—and chairman of Public Media Inc., a film and video publisher and distributor. His career, as a businessman, as a foundation president, and in government service has largely been devoted to the field of public interest communications.

Beginning with work at Encyclopedia Britannica Films and as President at the Encyclopedia Britannica Education Corporation, Mr. Benton established himself in the field of educational, informational, cultural, and entertainment media. He has experience managing various holdings, including Public Media Inc., Films Incorporated, Home Vision, and Lionheart Television Inc., which distributed the work of BBC, ABC Australia, and several independent producers to public and commercial stations throughout the United States.

In 1978, President Carter appointed Mr. Benton as Chairman of the National Commission on Libraries and Information Science and as Chairman of the First White House Conference on Library and Information Services, held in November 1979. In 1980, he was reappointed for an additional 5-year term, during which time he was elected Chairman Emeritus by unanimous vote of NCLIS commissioners.

Throughout his career, Mr. Benton has been an active board member and advisor for organizations in the arts, education, and communications, including service on the original Illinois Arts

Council Board, and current service on the Illinois Humanities Council. He served on the boards of the Eisenhower Exchange Fellowships and the American Assembly for more than 30 years, and was a trustee of the University of Chicago, Hampton Institute, and National College of Education for numerous terms. In film and television, Mr. Benton was a member of the founding board of the American Film Institute, served on the board of Chicago's major public television station (WTTW) for 10 years, and was President of the National Citizen Committee for Broadcasting in the 1970s.

Mr. Benton was President of the William Benton Foundation when it initiated and provided the $200,000 grant that the League of Women Voters used to fund the televised presidential forums during the 1976 primaries. Those forums led to the televised presidential debates sponsored by the League later in 1976—the first such event since the Nixon-Kennedy debates of 1960. In 1981, Mr. Benton established the new Washington, DC-based Benton Foundation, which has since become a leader of communications policies and projects in the public interest.

A graduate of Yale University, Mr. Benton did postgraduate work at Northwestern University and the National College of Education. Early in his career, he taught fifth grade at the Washington Elementary School in Evanston, IL

Frank M. Blythe

Frank M. Blythe is Executive Director and a founding member of Native American Public Telecommunications, Inc. (NAPT). In this position, he promotes Native American programs and educational videos as a national program developer, producer, distributor, and marketer. Mr. Blythe is the NAPT Director for American Indian Radio on Satellite Network, the Co-Director for the American Indian Higher Education Consortium's Distance Education Network, and the Director of Vision Maker Video.

Previously, Mr. Blythe was Project Director for Tribal Information Infrastructure Planning, which included six tribal partners, and was a Co-Executive Producer of the 2-hour series, "Storyteller of the Pacific," which premiered on PBS. He has also produced such television and radio programs as "Native America Calling," "American Indian Artists-II," and "I am Different From My Brother." He began his career as a radio disc jockey, and later became a radio and television operations manager.

Mr. Blythe has served on various national public broadcast boards, task forces, and local community service boards and committees. He earned a bachelor's degree in Radio-Television from Arizona State University, where he also pursued graduate studies. He also studied at the Harvard University Advanced Management Program.

Peggy Charren

Peggy Charren founded Action for Children's Television (ACT), the 10,000-member national child advocacy organization that has encouraged responsible broadcasting since its inception in 1968. She is also a visiting scholar at the Harvard University Graduate School of Educa-

tion, where she serves on the Technology Council. Her views on television and society have been solicited by virtually every major educational institution in this country and at symposia from Oxford to Tokyo.

Before she founded ACT, Ms. Charren directed the Newton, Massachusetts, Creative Arts Council, developing artistic programs for children in schools. She also once owned and operated Quality Book Fairs, another enterprise focused on children, and was a director of the film department of WPIX-TV in New York City.

Ms. Charren was awarded the Presidential Medal of Freedom in 1995, a Peabody Award in 1992 and an Emmy in 1988. She also received the Annenberg Public Policy Center Award from the University of Pennsylvania for Lifetime Contribution to Excellence in Children's Television and a "Women that Make a Difference" Award from the International Women's Forum, both in 1996. She has been celebrated for her pioneer work on behalf of the world's children by the American Academy of Pediatrics, Big Sisters, the Commonwealth of Massachusetts, and the National Conference of Christians and Jews.

Ms. Charren is author, or co-author, *of The TV-Smart Book for Kids; Television, Children and the Constitutional Bicentennial*; and *Changing Channels: Living (Sensibly) with Television.*

She has served as a director and advisor to the Library of Congress, the Children's Museum, the 20th Century Fund Task Force on the Future of Public Broadcasting, the Center for Psychological Studies, The American Repertory Theater, the Carnegie Commission on the Future of Public Broadcasting, the National Science Foundation, the National Women's Political Caucus, the New England Foundation on the Arts, the Massachusetts Civil Liberties Union, and National Video Resources.

Ms. Charren holds academic degrees with honors from Radcliffe College and Connecticut College and honorary degrees from eight colleges and universities.

HAROLD C. CRUMP

Harold C. Crump is Vice President of Corporate Affairs for Hubbard Broadcasting, Inc., a position he has held since 1997. Previously, Mr. Crump was President and General Manager of KSTP-TV in Saint Paul, Minnesota. In his 43 years in broadcasting, Mr. Crump has also been President and Chief Executive Officer of Crump Communications, Inc.; owner and operator of WCSC-TV in Charleston, South Carolina; President of the Broadcast Group of H&C Communications, Inc. in Houston; Executive Vice President and General Manager of VTVF in Nashville; and General Manager of 21st Century Productions.

Since 1985, Mr. Crump has served on the Board of Directors of Broadcast Music, Inc. He has been a member of Boards of Directors of the NBC Affiliates, the Television Bureau of Advertising, and the Minnesota Broadcasters Association. He is past President of the Tennessee Association of Broadcasters and the Nashville Advertising Federation, and is active in national and local charitable organizations.

Mr. Crump earned a BBA in advertising from the University of Mississippi.

FRANK H. CRUZ

Frank Cruz was re-elected Vice Chairman of the Corporation for Public Broadcasting (CPB) Board of Directors in 1998. He was appointed to the CPB Board of Directors by President Clinton in 1994, and has chaired the Board's Audit and Finance Committee since 1996. His CPB board term expires in January 2000. Mr. Cruz is President of Cruz & Associates, a financial consulting firm. He is also the former Chairman of Gulf Atlantic Life Insurance in California, the first Hispanic-owned life insurance company in the United States.

A veteran businessman and broadcaster, Mr. Cruz was a founder of Telemundo, the Nation's second Spanish language network, and KVEA-TV in Los Angeles, where he served as Vice President and later General Manager. As General Manager, he increased network revenues by 40 percent and was responsible for programming Telemundo's Western region. Mr. Cruz is also a former news reporter for KABC-TV and KNBC-TV in Los Angeles. His awards include the Emmy and the Golden Mike for coverage of Latin American issues and U.S.-Hispanic community events. Previously, he was an Associate Professor of History at California State University-Long Beach and Sonoma State University.

Mr. Cruz currently serves on the board of directors of Health Net. He has also held leadership positions on the Los Angeles Area Chamber of Commerce, Rebuild Los Angeles, The Latino Museum, the University of Southern California School of Public Administration, and Partnership 2000, and is Chairman Emeritus of the California Institute for Federal Policy Research.

In December 1992, Mr. Cruz participated in President Clinton's Economic Summit in Little Rock, Arkansas. A frequent lecturer and public speaker, he has written several books on U.S. and Latin American history. Mr. Cruz holds a BA and an MA from the University of Southern California.

ROBERT W. DECHERD

Robert Decherd is Chairman of the Board, President, and Chief Executive Officer of A.H. Belo Corporation, positions he has held since 1987. He has worked for Belo or its principal newspaper subsidy, *The Dallas Morning News*, since 1973. During the 1980s, Mr. Decherd led Belo's effort to become publicly held and devised its initial corporate management structure. Prior to 1987, he served as Vice President, Executive Vice President, Chief Operating Officer, and President of the company.

Belo owns 17 network-affiliated television stations—3 of which are located in top-15 markets and 7 of which are in the top-30 markets; 4 local or regional cable news channels; and 6 daily newspapers, including *The Dallas Morning News* and *The Providence Journal*.

Mr. Decherd was elected to the Belo Board of Directors in 1976. He also serves as a director of Kimberly-Clark Corporation. He received the James Madison Award from the Freedom of Information Foundation of Texas, Inc. in 1989, and the Henry Cohn Humanitarian Award

from the Anti-Defamation League in 1991, and the Freedom of Speech Award from the Media Institute in 1998. In 1994, he became the youngest inductee to the Texas Business Hall of Fame.

Mr. Decherd graduated, *cum laude*, from Harvard College, where he was President of *the Harvard Crimson*, recipient of an Honorary Freshman Scholarship, winner of the David McCord Award for Literary Contributions, and Class Orator for the Class of 1973.

BARRY DILLER

Barry Diller is Chairman and Chief Executive Officer of USA Networks, Inc., a diversified media and electronic commerce company that was formed in 1998 after HSN, Inc., acquired the majority of Universal's television assets. USA's assets include the USA Network; the Sci-Fi Channel; USA Broadcasting; Studios USA, which includes first-run production and distribution, television movies and mini series, and network production and development; and Home Shopping Network, Ticketmaster and Internet Shopping Network, whose primary service is First Auction. The company also owns a controlling interest in Ticketmaster Online-CitySearch, Inc., a leading provider of local content and live event ticketing on the World Wide Web.

From December 1996 to February 1998, Mr. Diller was Chairman and Chief Executive Officer of HSN, Inc., which was formed in December 1996 through the merger of Silver King Communications, Inc., Home Shopping Network, Inc., and Savoy Pictures Entertainment, Inc. Mr. Diller joined Silver King Communications as Chairman and Chief Executive Officer and Home Shopping Network as a member of the Board of Directors in August 1995. He was elected Chairman of the Board of Directors of Home Shopping Network, Inc., in November of that year.

From December 1992 to December 1994, Mr. Diller was Chairman and Chief Executive Officer of QVC, Inc. Just prior to that position, he served as Chairman and Chief Executive Officer of Fox, Inc. In that capacity, he guided Fox through the purchase of seven television stations in major U.S. markets, the formation of Fox Television Stations, Inc., and the creation of Fox Broadcasting Company—a satellite-delivered national television program service.

Mr. Diller was Chairman of the Board of Directors of Paramount Pictures Corporation for the 10 years prior to joining Fox. In March 1983, in addition to running Paramount, he became President of the conglomerate's newly formed Entertainment and Communications Group, which included Simon & Schuster, Inc., Madison Square Garden Corporation, and SEGA Enterprises. Prior to joining Paramount, as ABC Entertainment's Vice President, Prime Time Television, Mr. Diller pioneered the made-for-television "Movie of the Week," and "novels for television," now known as miniseries.

Mr. Diller serves on the boards of the Seagram Company Ltd., the New York Public Library, the Museum of Television and Radio, and AIDS Project Los Angeles. He is also a member of the Board of Councilors for the School of Cinema-Television at the University of Southern California and the Executive Board for the Medical Sciences at UCLA.

William F. Duhamel

Dr. William Duhamel is President of Duhamel Broadcasting Enterprises, a corporation that owns KOTA Radio and KOTA-TV, Rapid City, South Dakota; KDUH-TV, Scottsbluff, Nebraska; KSGW-TV, Sheridan, Wyoming; KHSD-TV, Lead-Deadwood, South Dakota; and KDDX-FM, Spearfish-Rapid City, South Dakota; and operates KZZI-FM, Belle Fourche under an LMA.

Dr. Duhamel began his career in broadcasting in 1955 as a late night disc jockey for KOTA Radio in Rapid City, South Dakota. During the mid-1960s, he was an Assistant Professor of Quantitative Methods and Managerial Economics at the Northwestern University School of Business and an Econometrician at Whirlpool Corporation. In 1967, Dr. Duhamel returned to Rapid City as KOTA-TV Station Manager, then General Manager, and finally President.

Dr. Duhamel has been a member of the South Dakota Health and Educational Facilities Authority since its inception in 1972, a position he has been reappointed to five times by four Governors. He is a member of the Board of Directors of Children's Care Hospital and Schools in Souix Falls, and a member of their Advisory Board in Rapid City.

Dr. Duhamel is a member of the Executive Committee of the Television Music License Committee; a member of the Board of Affiliate Enterprises, Inc.; past Chairman of the NAB Hundred Plus TV Market Committee; President and Secretary of The 97 Television Stations; past member of the NAB Television Board of Directors, the ABC Television Affiliates Board of Governors, and the CBS Radio Affiliates Board; past board member of the Rocky Mountain Broadcasters Association; and past President and board member of the South Dakota Broadcasters Association.

Currently, Dr. Duhamel is a Director of Rushmore Bank and Trust, a 4th Degree K of C, and a Rotarian. He is a eucharistic minister and lay lector at the Cathedral of Our Lady of Perpetual Help and Chairman-elect of the Rapid City Chamber of Commerce, and has served on the Boards of Rapid City Regional Hospital, Downtown Rapid City Development Corporation, St. Martin's Academy, Mount Marty College, and the Central States Fair.

Dr. Duhamel received bachelors and master's degrees in economic accounting from St. Louis University and his Ph.D. in management from Stanford University Graduate School of Business.

Robert D. Glaser

Robert D. Glaser is founder and Chief Executive Officer of RealNetworks, an Internet software company that develops and markets software products and services that enable users of personal computers and other consumer electronic devices to send and receive audio, video, and other multimedia services over the Internet. Since its inception in 1994, RealNetworks has had a tremendous impact on the industry through the delivery of streaming real-time multimedia.

Previously, Mr. Glaser was Vice President for Multimedia and Consumer Systems at Microsoft Corporation. During his 11 years at Microsoft, he was responsible for formulating the company's entry into multimedia technology and the consumer digital appliance market. Mr. Glaser developed and brought to market successful pioneering products in the areas of multimedia, computer networking, and desktop applications.

Mr. Glaser is a part owner of the Seattle Mariners baseball team, founding Chairman of the U.S. Library of Congress Atrium Group, and a board member of the Electronic Frontier Foundation, the Washington Public Affairs Network, the Foundation for National Progress, the Target Margin Theater Company of New York, and Dwight Hall, the umbrella organization for Yale University student community service.

Mr. Glaser received his BA and MA in economics and a BS in computer science from Yale University in 1983.

JAMES FLETCHER GOODMON

James F. Goodmon became President and Chief Executive Officer of Capitol Broadcasting Company, Inc. (CBC) in 1979, after serving the company in various other capacities for the previous 11 years. CBC consists of two television stations, WRAL-TV in Raleigh and WJZY-TV in Charlotte; a radio station, WRAL-FM in Raleigh; numerous radio sports networks; a satellite distribution company; and other communication-related companies. In June 1996, CBC obtained the first HDTV (high definition television) license through WRAL-TV: The station broadcast the first digital television signal on July 23, 1996.

Mr. Goodmon also serves on the Board of Directors for the 1999 Special Olympics World Summer Games and the Board of Trustees for the North Carolina Center for Public Television, and on the boards of many other local and national organizations. He was the first President of the North Carolina Partnership for Children.

Mr. Goodmon is a recent inductee into the Journalism Hall of Fame at UNC-Chapel Hill. He holds an honorary Doctor of Laws degree from Pfeiffer College.

PAUL A. LA CAMERA

Paul A. La Camera became President of WCVB-TV in Boston in 1997 after a 25-year career at the station. He was with WCVB when it first went on the air in March 1972, and served as Station Manager from 1988 to 1994, when he was appointed Vice President and General Manager of the Boston ABC network affiliate. WCVB is owned by Hearst-Argyle Television. The station has received nearly every award possible in its industry, and is widely considered to be one of America's best commercial television stations.

Mr. La Camera's career in television began in community relations and local program production. The station's primetime nightly television newsmagazine, "Chronicle," is an example of the type of quality, local programming that Mr. La Camera has helped bring to television.

When it was first aired on January 25, 1982, it represented a first in local programming—it remains so today. Mr. La Camera has also overseen a myriad of other precedent-setting local/national productions, including the "Pop Goes the Fourth" and "Holiday at Pops"—Boston Pops concerts that air annually on the national A&E Network.

A Boston native, Mr. La Camera is a trustee of Boston's Catholic Charities organization; serves on the Board of Directors of the United Way of Massachusetts Bay, the University of Massachusetts Medical Center Foundation, Boston's Italian Home for Children, and the Greater Boston Chamber of Commerce; and chairs the Government Relations Committee of the New England Broadcasting Association. He is a past President of both the Massachusetts Broadcasters Association and the National Broadcast Association for Community Affairs.

Prior to joining WCVB, Mr. La Camera was the Director of Communications for the Greater Boston Chamber of Commerce and worked as a reporter for the *Boston Record American and Sunday Advertiser*.

A graduate of Holy Cross, Mr. La Camera has also earned Master's degrees in journalism and in urban studies from Boston University, and in business administration from Boston College. He was honored with the Medal of Hope of the Boston-based Organization for a New Equality (O.N.E.) and has received community service awards from the Anti-Defamation League, the National Conference of Christians and Jews, the Boston Boy Scout Council, and the Salvation Army.

Richard Masur

Richard Masur is an actor and in his second term as President of the Screen Actors Guild who is known to audiences for his roles on film and in television. Mr. Masur recently starred in the Fox television series "Significant Others," and co-starring in *Forget Paris,* directed by Billy Crystal, and *Multiplicity*, starring Michael Keaton and directed by Harold Ramis—two feature films release in the past few years.

Over his 25-year performing career, Mr. Masur has starred in more than 35 feature films, including *Risky Business*, *My Girl*, *Heaven's Gate*, and *Under Fire*. He has also appeared in 35 made-for-television movies, three of which—*Adam*, *Fallen Angel*, *and When the Bough Breaks*—are among the top-10 rated television movies of all times. Mr. Masur received an Emmy nomination for his performance opposite Farrah Fawcett in the television film *The Burning Bed*.

Some of Mr. Masur's recent television credits include roles in HBO's much-heralded production *And the Band Played On*, *Hiroshima*, and *Undue Influence* with Brian Dennehy. He has also starred in numerous popular television series such as," "Picket Fences," "Rhoda," and "One Day At A Time," and guest starred in countless major network comedies and dramatic series.

While continuing to act in films and television productions, Mr. Masur has also directed a number of projects. He first effort, *Love Struck*, a 23-minute film that he wrote and directed, was nominated for an Academy Award for Best Live Action Short Film, and his second, *Torn*

Between Two Fathers—an Afterschool Special—earned him a nomination for the Directors Guild of America Award. He has also directed episodes of "The Wonder Years" and "Picket Fences."

Mr. Masur is also Treasure of the Motion Picture & Television Fund Corporation, President of the Screen Actors Guild-Producers Industry Advancement & Cooperative Fund, and a member of the Board of Directors of the Artists Rights Foundation. In addition, he serves on the Advisory Council to the California Senate Select Committee on the Entertainment Industry.

NEWTON N. MINOW

Newton N. Minow is Counsel to the law firm of Sidley & Austin. He was appointed as the first Annenberg University Professor of Communications Policy and Law at Northwestern University in 1987, and also served as Director of The Annenberg Washington Program in Communications Policy Studies from 1987 to 1996.

Mr. Minow is a former Chairman of the Federal Communications Commission and a former Chairman of the Public Broadcasting Service. He has co-authored and contributed to several books on the public interest and broadcasting, including *Abandoned in the Wasteland: Children, Television and the First Amendment; How Vast the Wasteland Now; For Great Debates*; and *Presidential Television*. He also served as Chairman of the Carnegie Foundation and of the RAND Corporation.

Mr. Minow is a graduate of Northwestern University, and has been awarded honorary degrees by Brandeis University, the University of Wisconsin, Northwestern University, Columbia College, Governors State University, DePaul University, the University of Notre Dame, Santa Clara University, Barat College, The Rand Graduate School, and Roosevelt University.

JOSE LUIS RUIZ

Jose Luis Ruiz was formerly the Executive Director of the National Latino Communications Center (NLCC) in Los Angeles, California. NLCC is a nonprofit media arts resource center that serves as an institutional force and advocate for developing and presenting high-quality films and television programs about the Latino experience.

Mr. Ruiz has been a producer and director in the film and television industry since 1970. He was a staff producer/director for KABC, KNBC, and KCET from 1970 to 1976. His film and television programs cover music, arts, and drama as well as social, political, and economic issues. Mr. Ruiz has been most recognized for his documentary films and his articulation of a vision for institutionalizing a Latino presence in film and television.

Television programs produced and directed by Mr. Ruiz have received numerous awards, including: 11 Emmy nominations and 4 Emmy award; and the 1997 Nosotros Golden Eagle Award for Outstanding Documentary for his documentary, *Chicano! History of the Mexican-American Civil Rights Movement.*

Mr. Ruiz is President of the Mexican-American Solidarity Foundation Alumni and is a founding member of the Board of Directors of the National Association of Latino Arts and Culture. He has served as a member of the Ad Hoc Latino Media Advisory Committee of the Smithsonian Institution, the 1984 Los Angeles Olympic Committee, and panels of the National Endowment for the Humanities and the National Endowment of the Arts.

Mr. Ruiz attended East Los Angeles College and graduated from the University of California at Los Angeles, where he majored in film studies.

SHELBY SCOTT

Shelby Scott is a general assignment reporter for WBZ-TV in Boston, Massachusetts, and President of the American Federation of Television and Radio Artists (AFTRA), a position she was elected to in 1993. Previously, Ms. Scott served as National First Vice President of the 77,000 member-performer union.

Before her election as President of AFTRA, Ms. Scott was President of the Boston Local of AFTRA and Chair of AFTRA's Women's Committee and the Broadcast Steering Committee. Her major awards include the United Press International's Tom Phillips Citation for Excellence in Reporting and the William F. Homer Jr. Award from Suffolk University for Excellence in Journalism.

Ms. Scott earned a BA from the University of Washington's School of Communication. She has also received an Honorary Doctor of Humane Letters from Notre Dame College in New Hampshire.

GIGI B. SOHN

Gigi B. Sohn is Executive Director of Media Access Project (MAP), an organization that she joined in 1988 as a staff attorney. She served as Deputy Director from 1990 through 1996. Previously, Ms. Sohn practiced administrative law for a private firm.

MAP is a nonprofit public interest law firm that represents listeners and viewers before the FCC, the courts, and Congress on such issues as: broadcast, cable, and satellite and telecommunications regulation; minority and female ownership and employment in the mass media; and public access to new technologies.

The *American Lawyer* recently selected Ms. Sohn as one of the country's top 45 "Public Sector" lawyers under the age of 45. In making that selection, the magazine stated that Ms. Sohn "has emerged as the strongest—and on some issues the only—voice for the public interest amid the mass media communications turmoil." For the past 4 years, Ms. Sohn has represented scores of nonprofit organizations and their members before the FCC and Congress on the issue of digital television. In addition, she has discussed digital television in dozens of media appearances and in other public fora.

Ms. Sohn has also been an active participant in the District of Columbia Bar. She was elected to a 3-year term on the Bar's Board of Governors in June 1997. From 1994 to 1997, she served as Co-President of the Gay and Lesbian Attorneys of Washington.

Ms. Sohn earned her degree in broadcasting and film, *summa cum lau*de, from the Boston University College of Communication. She received her law degree from the University of Pennsylvania Law School.

KAREN PELTZ STRAUSS

Karen Peltz Strauss is an attorney who works with consumer and professional organizations at the local, State, and Federal levels to secure advances in telecommunications and television access. As Legal Counsel for Telecommunications Policy for the National Association of the Deaf, she is a leading advocate for individuals who are deaf and hard-of-hearing and co-author of several pieces of Federal legislation, including: Section 713 of the Telecommunications Act of 1996, which mandates closed captioning of television programming; the Television Decoder Circuitry Act, which requires all television sets under 13 inches to have built-in closed captioning decoders; and Title IV of the Americans with Disabilities Act, which mandates nationwide telephone relay services.

A highly published author, Ms. Peltz has testified several times before Congress as an expert witness. She has been the recipient of several awards for her outstanding efforts to expand telecommunications access for deaf and hard-of-hearing individuals, including the Mayor of the District of Columbia's Andrew Wood Advocacy Award in 1997, and the H. Latham Breuning Humanitarian Award in 1993.

Ms. Peltz Strauss earned her BA, *summa cum laude*, from Boston University. She also holds a JD from the University of Pennsylvania Law School and an LLM from the Georgetown University Law Center.

CASS R. SUNSTEIN

Cass R. Sunstein is the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago Law School and a member of the Department of Political Science at the university. Mr. Sunstein began his legal career as a clerk for Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court and Justice Thurgood Marshall of the U.S. Supreme Court. He later became an Attorney-Advisor in the Office of the Legal Counsel of the U.S. Department of Justice. A member of the American Academy of Arts and Sciences, Mr. Sustein has authored more than 100 academic articles and a number of books, including *Democracy and the Problem of Free Speech* (1993)—winner of the Goldsmith Book Award from Harvard University; *Free Markets and Social Justice* (1997); *Legal Reasoning and Political Conflict* (1996)—selected as an outstanding academic book of the year by Choice; *The Partial Constitution* (1993); *One Case At A Time* (forthcoming in early 1999); *The Cost of Rights* (forthcoming in early 1999, with Stephen Holmes); and *Administrative Law and Regulatory Policy* (1998, with

Justice Stephen Breyer, Richard Stewart, and Matthew Spitzer). Mr. Sunstein has also taught at Harvard and Columbia, has testified before Congress on numerous occasions, has helped draft legislation in many areas, and has been involved in law reform and constitution-making efforts in South Africa, China, Poland, Ukraine, and Russia, among others.

He is a 1975 graduate of Harvard College and received his law degree from Harvard Law School, magna cum laude, in 1978.

Lois Jean White

Lois Jean White is President of the National PTA—the 6.5-million member parent-teacher association. She has also: served on the National PTA's Education Commission, Individual & Organizational Development Commission; been past-President of the Tennessee State PTA; served as the State PTA's first Vice-President, Second Vice-President and Cultural Arts Chairman; and served as the first Vice-President, third Vice-President and parliamentarian for the Knoxville Council PTA. In addition to her work with the PTA, Ms. White is a member of the Alpha Unit of the Tennessee Association of Parliamentarians and was a board member of the Knoxville Museum of Art. She is a retired flutist of the Oak Ridge (Tennessee) Symphony and is a private flute instructor in Oak Ridge and Knoxville.

Ms. White received a bachelor's degree in music from Fisk University and has done extensive graduate work in music at Indiana University.

James Yee

James Yee is Executive Director of Independent Television Service (ITVS)—a position he has held since 1993. ITVS is a national nonprofit corporation authorized by Congressional legislation to operate in the public interest to enhance the diversity and innovativeness of the programming available to public broadcasting. ITVS's mission is to bring point-of-view programming that involves creative risk and addresses the needs of underserved or unserved audiences, particularly minorities and children, to television audiences. Mr. Yee administers an annual budget of $8 million for production, distribution, promotion, and administrative support services.

Previously, Mr. Yee was Executive Director of the National Asian American Telecommunications Association (NAATA), a media arts organization that funds, packages, and presents Asian/Pacific American programming on public television, public radio, film festivals, and in educational settings. As NAATA's first Executive Director, Mr. Yee helped to develop the organization into a nationally recognized outlet for multicultural program on PBS, for its film festival in the Bay Area, and CrossCurrent, NAATA's distribution service.

Earlier in his career, Mr. Yee worked in the public television station system at WGBH Television in Boston. He was Associate Producer on the national teen television series, "REBOP," and was responsible for story research and development and onsite production, and assisted

the series producer in all aspects of production and post-production. He has also advised on numerous independent films and video productions.

Mr. Yee received a national Emmy Award for Best Cultural Documentary for "a.k.a. Don Bonus," and numerous other awards for programs that were funded during his tenure at ITVS and NAATA, including: the coveted duPont Award for Excellence in Journalism *for When Billy Broke His Head…and Other Tales of Wonder*, and *A Healthy Baby Girl*; Academy Award nominations for *Nobody's Business* and *Girls Like Us;* An Academy Award for *Breathing Lessons*; several awards for filmmaking excellence at the Sundance Film Festival; and national Emmys for *Nobody's Business* and *Girls Like Us.* Earlier in his career, Mr. Yee taught middle school students in New England.

Mr. Yee sits on a number of boards, including the PBS Satellite Interconnection Committee, Center for Investigative Journalism, San Francisco Film Commission, Pacifica Radio Foundation, Western Public Radio, KPFA Radio, Film Arts Foundation, UCLA AmerAsian Journal, California Association of Non-profits, and the Community Training Assistance Center (CTAC). He has been a panelist, lecturer, and presenter in many venues, including University of California/Berkeley, University of Hawaii, San Francisco State University, Aspen Institute, National Endowment for the Arts, Corporation for Public Broadcasting, John d. & Catherine T. MacArthur Foundation, California Arts Council, and the Sundance Film Festival.

Mr. Yee earned a Bachelor in liberal arts from Fairleigh Dickinson University and a master's in teaching from Antioch College. He was also an Urban Studies Fellow at the Massachusetts Institute of Technology.

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