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Frank Sala
Peter M. Sikora
Sonia A. Stockton
Virginia Stovall
Paul L. Sutton
TV-49, Inc.

FORMAL REPLY COMMENTS

Center for the Study of Commercialism
Channel 63, Inc.
Miller Broadcasting, Inc.
Pan Pacific Television, Inc.
Ponce-Nicasio Broadcasting, Inc.
Silver King Communications, Inc.
Rodney A. Smolla
Valuevision International, Inc.

INFORMAL REPLY COMMENTS

Hon. Edolphus Towns, United States House of Representatives

APPENDIX B

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

- I. Need and purpose of this action. This action is taken implement the provisions of the Cable Television Consumer Protection and Competition Act of 1992 relating to the development of mandatory cable carriage of home shopping stations.

- II. Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis. No comments were received in response to the Initial Regulatory Flexibility Analysis. However, comments received in response to the Notice of Proposed Rulemaking indicate that small, independent television stations that broadcast home shopping programming are concerned about their ability to compete effectively with television stations carried on cable systems.

- III. Significant alternatives considered and rejected. We considered two other options before adopting the policies and rules set forth in this Report and Order. The first option, to terminate the authorization of home shopping stations, would impede the ability of small, independent television stations that broadcast home shopping programming to compete effectively with television stations carried on cable systems. The second option, to continue authorization without eligibility for mandatory cable carriage, would seem to be prohibited by statute. It would also fail to provide cable subscribers with the access to local news and public affairs programming that Congress intended to foster in passing the 1992 Cable Act.

APPENDIX C

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 -- CABLE TELEVISION SERVICE

Section 76.56 is revised as follows:

§ 76.56 Signal carriage obligations

Section 76.56(b)(6) is removed.

APPENDIX C

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Part 76 -- CABLE TELEVISION SERVICE

Section 76.56 is revised as follows:

§ 76.56 Signal carriage obligations

Section 76.56(b)(6) is removed.

Federal Communications Commission Record

Separate Statement of Chairman James H. Quello

In the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 93-8.

The 1992 Cable Act directed the Commission to determine whether television stations that are "predominantly utilized for the transmission of sales presentations or program length commercials" serve the public interest. This determination is to be based on three factors: the viewing of "home shopping" stations, the competing demands for the spectrum occupied by such stations, and the extent to which they compete with shopping services provided by nonbroadcast services. Based on the record before us, and as described in the *Report and Order*, I concluded that home shopping stations serve the public interest. As a consequence, they now qualify for "must carry" status.

However, apart from the criteria established in the 1992 Cable Act, I am aware of strong sentiment that such stations are inconsistent with the overall public interest mandate of the Communications Act. See, e.g., H. Rep. 102-628 at 103-04 (Additional Views of Messrs. Ritter, Tauzin, Stattery, Kostmayer, Oxley and Fields). For that reason, I believe it would be appropriate for the Commission to initiate a more general reexamination of the issue of commercialism as it relates to the public interest.

A separate proceeding is desirable for a variety of reasons. First, I believe it would comport more with the concerns I have heard expressed about commercialism. Second, I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must carry rules.¹ Finally, the public interest standard assumes that the Commission will continuously evaluate changes in the media environment and in technology that affect its meaning.

The public interest standard of the Communications Act is the basic statutory charter under which broadcasters operate. But while the overall requirement is a constant, its

meaning changes over time to account for the evolution of the mass media, consumer needs and audience expectations. The changing nature of this continuing mandate may best be understood by gaining some historical perspective.

A Brief History of the Public Interest Standard

When Congress enacted the Radio Act of 1927, it borrowed the expression "public interest, convenience or necessity" from the field of railroad regulation but did not independently define the term.² The Communications Act of 1934, which superseded the Radio Act and created the FCC, continued to leave the term "public interest" undefined.³

Congress purposefully left the regulatory standard open, with the details to be filled in by the FCC over time. This had much to do with the fact that radio was a new and complicated technology. The FCC's broad powers were based on the assumption that "Congress could neither foresee nor easily comprehend . . . the highly complex and rapidly expanding nature of communications technology."⁴ The Supreme Court affirmed in *FCC v. Pottsville Broadcasting Co.*, that the public interest standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit," and noted that the approach is "a supple instrument for the exercise of discretion."⁵

The public interest is not just a flexible standard; it is expressly forward-looking. For example, in 1983 Congress added a new section to the Act establishing "the policy of the United States to encourage the provision of new technologies and services to the public."⁶ The Supreme Court similarly has recognized that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."⁷

Consequently, I believe the Act directs the FCC to gauge the public interest by looking to the future, not the past. It simply is impossible to define the public interest merely by examining what it may have meant in 1929, or even 1969. A quick survey of past decisions underscores this point.

Federal Communications Commission Record

The Commission has revised its substantive public interest requirements over time in response to changing conditions. In 1941, the Commission decided that broadcast editorials violated the public interest, only to reconsider that policy eight years later.⁸ Similarly, in 1945 the Commission withheld renewal of a radio station license until the station agreed to sell time for paid editorials to the United Auto Workers.⁹ Since then, however, the Commission determined that licensees cannot be forced to sell time to a particular group. This more current view of the public interest was upheld by the Supreme Court.¹⁰

Even when the basic policies do not change, the Commission has modified their application. This has occurred because our understanding of the public interest undoubtedly has evolved along with society. Audience needs and expectations are not the same today as they were in the early days of radio.

Certainly audience sensibilities have changed. For example, in late 1937, hundreds of radio listeners complained about an episode of NBC's "Charlie McCarthy" program in which Charlie McCarthy and Mae West portrayed the title characters in a sketch entitled "Adam and Eve." The Commission investigated the matter and found nothing in the script objectionable. But some of Mae West's inflections were considered "suggestive." On this basis, the Commission sent NBC and its affiliates letters concluding that the program was "vulgar, immoral or of such other character as may be offensive to the great mass of right-thinking, clean-minded American citizens."¹¹

Of course, the Commission continues to actively enforce the indecency rules as part of the basic statutory requirement for broadcasters. I have been, and continue to be, a vocal supporter of the rules' enforcement in appropriate cases. But I think it may be just a bit unrealistic to use the same measure for "offensiveness" in 1993 that the Commission employed over half a century ago. The public interest requirement may be the same, but its application is quite different as conditions change.

The same is true for some of the Commission's other programming requirements. For example, eight Georgia radio stations were given only temporary renewals in 1958 because

the stations were devoted to a "news and music" format. The Commission informed the stations by letter that full-term license renewals had been denied because their program schedules consisted "almost entirely of recorded music."¹² I doubt that the public interest would be served if the Commission imposed this rigid view on the radio industry today.

Similar examples abound. The Commission has suggested in the past that the public interest was not served when stations scheduled commercials within news programs, or when they aired "too many" soap operas.¹³ In 1937 the Commission questioned the license renewal of a station that produced a program called "The Friendly Thinker" that offered advice on business affairs, love and marriage. Although the show's host was not an astrologer and disclaimed any supernatural powers, the Commission noted that such advice programs were objectionable because they tended to mislead the public. The Commission renewed the license only after the station discontinued the program.¹⁴ If such a view of the public interest prevailed today, many, if not most, licenses would be at risk.

Our approach to broadcast advertising also has evolved. In 1936, the Commission ordered a renewal hearing for a licensee that had aired commercials that made "exaggerated claims" for a weight loss product.¹⁵ Just imagine the number of minor celebrities that would have to find honest work if the Commission mounted a new crusade to ensure the effectiveness of diets.

On a more basic level, the notion of what may be considered "excessive" advertising has changed over time. In 1930, William S. Hedges, then president of the National Association of Broadcasters, testified before Congress regarding the quantitative advertising limits that the NAB then enforced. He said that at his station, "no more than one minute out of the 30 minutes is devoted to advertising sponsorship. In other words, the radio listener gets 29 minutes of corking good entertainment, and all he has to do is to learn the name of the organization that has brought to him this fine program."¹⁶

Not only does today's audience expect to give up more than a minute in exchange for a corking good sitcom, the Commission concluded that those viewers are the best judge of how much advertising is too much. The Commission found

in 1984 that the number of alternatives available to viewers is the best protection against over-commercialization. The tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for viewers.¹⁷

Such an approach was unthinkable to the Federal Radio Commission. In fact, in 1928 it expressly rejected the argument that listeners could shift away from "irksome" broadcasts in a decision placing four stations on probation. The FRC noted that the listeners' "only alternative, which is not to tune in on the station, is not satisfactory, particularly when in a city such as Erie only the local stations can be received during a large part of the year. When a station is [devoted to excessive advertising] the entire listening public is deprived of the use of a station for a service in the public interest."¹⁸

It is beyond dispute that the current Commission must consider a very different media environment than did the FRC. The number of television stations increased by 50 percent between 1975 and 1992; more than half of all households receive ten or more over-the-air TV signals; over 90 percent of all households are passed by cable and over 60 percent subscribe; the average cable subscriber receives more than 30 channels; other competitive video providers are increasingly available, and national DBS service is anticipated next year.¹⁹ The Commission's recent decision to curtail the financial interest and syndication rules recognizes that broadcast television now faces stiff competition from other media. In just a few years, the broadcast networks have experienced sharp declines in their audience shares, from over 90 percent in the mid-1980s to less than 60 percent today.²⁰

Given these developments, I think that the Commission's interest in preventing over-commercialization is far different today than we may have considered necessary in the past.²¹ The public is not deprived when a given station chooses a specialized format, such as home shopping, and, as discussed below, may even benefit.

Home Shopping Stations and the Public Interest

I will not repeat the discussion contained in the *Report and Order* regarding the extent to

which home shopping stations devote time to traditional public service programs. But quite frankly, I was surprised at the extent to which this is true. In addition to the formal comments submitted for the record, the Commission was flooded with correspondence attesting to the community service provided by these stations.

In the space of a few days, dozens of individuals and organizations from across the country wrote to urge the Commission to decide this proceeding in favor of home shopping stations. They included government officials from all levels, non-profit and charitable organizations, educational and cultural institutions, public safety groups, medical professionals, service organizations, as well as representatives of various constituencies, including women, minorities, the elderly, the disabled, the homeless and children.²² For the most part, these commenters urged us to find that home shopping stations serve the public interest in the same way as broadcasters with more traditional formats — by providing information vital to their communities.

But I think this proceeding implicates a broader public interest question that goes to the heart of the future of broadcasting. We are constantly told of the brave new electronic future in which an array of services will be available on call directly to consumers. They include home shopping, home banking, pay-per-view events and a host of other interactive services.

People probably are not thinking about what has been called the "electronic superhighway" when they joke about Ginsu knives and cubic zirconium jewelry. And while the products being sold at the moment on some channels may attract ridicule in some quarters, it is evident that home shopping services are a precursor to this promising future in which consumers may use their TVs for more than just passive viewing.

In this regard, there may be an important distinction between the issue of "commercialism," raised by some commenters, and that of providing a home shopping service. The record in this proceeding reveals that this service seems to be quite popular with the general audience. But the benefits take on added significance for people who are in some way incapacitated.

Federal Communications Commission Record

The Director of the Suffolk County Office of Handicapped Services wrote that home shopping "is both a convenience and a necessity for people with disabilities."²³ Similarly, the volunteer coordinator of an organization that serves the homebound elderly pointed out that the Home Shopping Network "provides [them] a means to shop from their own living room, some 'company', and entertainment for folks who won't or don't get out of their home or see another soul from day to day to day."²⁴ The director of an extended care facility for the elderly added that a home shopping program "may not mean as much to healthy and mobile people such as you and I, but if you could see [the people confined in this situation], the significance of your decision would certainly be put into perspective." For those who are "not physically able to travel to local shopping centers," these stations literally are "all they have."²⁵

Some have suggested that those who want home shopping services should subscribe to cable. As noted by an official in a home health agency, however, local residents "are virtually at the mercy of their cable provider's whim" unless the service is available over-the-air.²⁶ In any event, it is important to bear in mind that not everyone wants — or can afford — cable TV. And I suspect that this is particularly true for those people who benefit most from the availability of home shopping service.²⁷

There are likely to be even more far-reaching implications if the Commission were to find that it disserves the public interest for broadcasters to provide such service. Would it mean that other video technologies should be granted a monopoly on the provision of interactive services to the extent there is some commercial element? What would such a ruling mean for the development of advanced television, particularly if broadcasters could use its digital capabilities for multiple channels? As I always ask, what are the ramifications for the future of free over-the-air television?

Conclusion

Based on the record in this proceeding and the criteria established in the Cable Act, I think that home shopping stations serve the public interest. But the Communications Act presumes that the Commission will reevaluate the general public interest mandate from time to time, and the issues

raised in this proceeding suggest that such a review may now be appropriate.

I believe that broadcasters must play an important role in this nation's electronic future. The public interest mandate of the Communications Act requires that we look to that future, rather than to Depression Era policy pronouncements.

¹In *Turner Broadcasting System, Inc. v. FCC*, No. 92-2247 (D.D.C., April 8, 1993) Slip op. at 18, the court emphasized that the must carry rules received a lower level of First Amendment scrutiny because they were not content-based. But if the Commission decided to deny must carry status to a class of stations because of their content, it would undermine the court's bedrock assumption supporting the constitutionality of must carry rules.

²The Radio Act directed the Federal Radio Commission to perform its various tasks, including classifying radio stations, describing the type of service to be provided, assigning frequencies, making rules to prevent interference, establishing the power and location of transmitters and establishing coverage areas in a way that maximized the public good. Of course, this begged the essential question of what constitutes "the public good." The FCC took the position that the Supreme Court eventually would define the public interest case by case. Nevertheless, it outlined the primary attributes of the public interest in its policy statements and licensing decisions.

³*Office of Communication of the United Church of Christ v. FCC*, No. 81-1032, slip op. at 27 (D.C. Cir., May 10, 1983) ("the [Communications] Act provides virtually no specifics as to the nature of those public obligations inherent in the public interest standard"). Despite the lack of a categorical definition of the public interest, various provisions of the Act operationally define at least part of what Congress intended. For example, the Act directs the FCC to provide, to the extent possible, rapid and efficient communication service, adequate facilities at reasonable charges, provision for national defense and safety of lives and property, and a fair, efficient and equitable distribution of radio service to each of the states and communities.

⁴*National Ass'n. of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976).

⁵309 U.S. 134, 138 (1940).

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- ⁶47 U.S.C. § 157.
- ⁷*CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973).
- ⁸Compare *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1941) with *Opinion on Editorializing by Broadcasters*, 13 F.C.C. 1246 (1949). See also *Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990) (Fairness Doctrine does not serve the public interest); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (ban on editorials by public broadcast stations is unconstitutional).
- ⁹E.g., *United Broadcasting Co.*, 10 F.C.C. 515 (1945).
- ¹⁰*CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (broadcasters may not be compelled to provide a generalized right of access to discuss controversial issues).
- ¹¹See "FCC Issues Rebuke for Mae West Skit," *Broadcasting*, January 15, 1938 at 13.
- ¹²See "Closed Circuit," *Broadcasting*, March 31, 1958 at 5; "Closed Circuit," *Broadcasting*, July 7, 1958 at 10.
- ¹³See generally *Public Service Responsibility of Broadcast Licensees* (March 7, 1946) (the "Blue Book").
- ¹⁴*Radio Broadcasting Corp.*, 4 F.C.C. 125 (1937).
- ¹⁵*Don Lee Broadcasting System*, 2 F.C.C. 642 (1936).
- ¹⁶Senate Committee on Interstate Commerce, Hearings on S. 6, 71st Cong., 2d Sess. (1930). William S. Paley of CBS similarly testified that seven-tenths of one percent of the network's air time was devoted to advertising. *Id.*
- ¹⁷*The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076, 1101-05 (1984), *aff'd in relevant part sub nom. Action for Childrens Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).
- ¹⁸FRC Decision on Stations WRAX, WABF, WBRE and WMBS, discussed in the *Blue Book* at p. 41.
- ¹⁹See *Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, FCC 92-209 (released June 12, 1992).
- ²⁰*Evaluation of the Syndication and Financial Interest Rules*, 58 Fed. Reg. 28927 (May 18, 1993).
- ²¹It is important to acknowledge that "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 122. Additionally, many of the Commission's prior policies on commercialism predated the extension of First Amendment protection to commercial speech. And most recently, the Supreme Court has cautioned that government regulations should not "place too much importance on the distinction between commercial and noncommercial speech." *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, Slip op. at 14 (U.S. March 24, 1993). Any evaluation of the constitutional "worth" of speech that is based on the percentage of editorial content compared to advertising material is a very suspect proposition. Newspapers, which receive full First Amendment protection, generally strive for a ratio of about 70 percent advertising to 30 percent editorial content. See C. Fink, *Strategic Newspaper Management* 43 (1988).
- ²²I personally received far too many letters to list. However, some of the organizations that provided testimonials as to the public service of home shopping stations included the Miami Rescue Mission, Inc.; the American Association of Retired Persons; Find the Children; Opportunities and Services for Seniors, Inc.; U.S. Department of Housing and Urban Development, Tampa Office; National Oceanic and Atmospheric Administration, U.S. Department of Commerce; The Salvation Army, Salem, Oregon Corps.; Parents Anonymous of Maryland; Sen. James S. Cafiero, New Jersey Senate; Departments of Medicine and Ophthalmology, New Jersey Medical School; Concerned Relatives Alliance for the Mentally Ill, Inc.; Sheridan House Family Ministries; YWCA of Salem, Oregon; Superintendent of Schools, San Bernardino County; Oregon Department of Insurance and Finance; South Brevard Women's Center, Inc.; City of Lakeland Department of Police; Hospice Care of Broward County, Inc.; Mayor James Sharpe, Newark, NJ; City of Ontario Fire Department; Cuyahoga Heights Public Schools; All Children's Hospital, St. Petersburg, FL; Long Island Coalition for Fair

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Broadcasting, Inc.; Broward Economic Development Council, Inc.; King Center for the Performing Arts, Melbourne, FL; Chemeketa Community College; Resource Center for Women, Largo, FL; Southern California Association of Governments; Chief of Police, Salem, Oregon; Human Development Center, Tampa, FL; Sen. Caesar Trunzo, New York Senate; Crime Prevention Resource Center, Salem, Oregon; The Gilbert House Children's Museum, Inc.; North Santiam Canyon Tourism Coalition; The Epilepsy Foundation of Brevard County; Medical Group Services, Inc.; Department of Solid Waste Management, Marion County, Oregon; Newspaper in Education; Salem Oregon Public Library; YMCA, Salem Oregon; Salem Area Chamber of Commerce; Brevard Cultural Alliance; The Women's Record; Supervisor of Elections, Pinellas County, FL; Junior Achievement of the Suncoast; Humane Society of North Pinellas, Inc.; The First Occupation Center of New Jersey, Inc.; Illinois Department of Rehabilitation Services; Foster Parent Association of Brevard County; Brevard Community College; Children With Attention Deficit Disorders; Holmes Regional Medical Center, Melbourne, FL; United Negro College Fund, Brevard County Campaign; Carl Stokes, Baltimore City Council; DuPage County (Illinois) Health Department; National Safety Council, Pinellas County Chapter, Inc.; Salem Art Association; Youth Shelter Network, Chicago; Inland Empire Small Business Development Center; Director, Ontario (California) International Airport; Melvin L. Stukes, Baltimore City Council; Oregon Economic Development Department; Supervisor, Town of East Hampton (NY); Retirement Resources, Inc.; Boys & Girls Club of Salem; Marion County (Oregon) Board of Commissioners; Marion Polk Food Share, Inc.; Humane Society of the Willamette Valley; Crisis Services of Brevard, Inc.; American Heart Association of Metropolitan Chicago; Retired Senior Volunteer Program; Florida Blood Services; Long Island Women's Coalition, Inc.; Long Island Blood Services; Newark Emergency Services for Families, Inc.; National Marrow Donor Program; Kathy's Cable Kids, Inc. (a drug prevention program); Oregon Donor Program; American Cancer Society, Oregon Division, Inc.; Women's Educational and Industrial Union; Florida Sheriffs Youth Ranches, Inc.; Office of the District Attorney, Riverside (California); Rowan College of New Jersey; State Highway Administration, Maryland Department of Transportation; Greater Baltimore Community Housing Resource Board, Inc.; Cumberland County (NJ) Sheriff's Department; New Jersey Crime Prevention Officers Association; Division of AIDS Education, University of Medicine and Dentistry of New Jersey; City Manager, City of Alvin (Texas); Hudson (Massachusetts) Youth Center; International Society of Athletes; Maryland Department of Juvenile Services; Community Nursing Service of Vineland (NJ); The Centre for

Women; Operation PAR (Parental Awareness and Responsibility), Inc.; Pearland (Texas) Police Department; Maryland Department of Public Safety and Correctional Services; Grandparent's Rights Advocacy Movement, Inc.; American Diabetes Association, Inc., Massachusetts Affiliate; Fay School, Southborough (Massachusetts); Long Island Association; Literacy Instruction for Texas; San Bernardino County Medical Society; North Jersey Blood Center; The Council on Compulsive Gambling of New Jersey, Inc.; Office of the Mayor, Tampa (Florida); Parents' and Children's Services, Boston; National Council on Alcoholism and Drug Abuse, St. Louis Area; National Multiple Sclerosis Society; Big Brothers and Big Sisters of Greater St. Louis; Housing Options Provided for the Elderly, Inc.; The Cooper Institute for Aerobics Research; Chicago Christian Industrial League; March of Dimes, Massachusetts Chapter; Consumer Credit Counseling Service of Greater Dallas, Inc.; Maryland Energy Administration; Judge David Carter, Orange County Superior Court; New York Council on Adoptable Children; San Bernardino County District Attorney; Project Sister; Easter Seal Society of Southwest Florida, Inc.; U.S. Department of Veterans Affairs; Associated Public Safety Communications Officers, Inc.; Maryland Department of Natural Resources; American Red Cross, Tampa Bay Suncoast Chapter; National Kidney Foundation of Massachusetts and Rhode Island.

²³Letter from Bruce G. Blower to James H. Quello (June 30, 1993).

²⁴Letter from Cindy Getchell, Bay Path Senior Citizens Services, Inc., to James H. Quello (June 25, 1993).

²⁵Letter from G. Neal Varney, CEO, Sudbury Pines Extended Care Facility, to James H. Quello (June 25, 1993) (emphasis in original).

²⁶Letter from Barbara Patterson, Visiting Home Health Service, to James H. Quello (June 29, 1993).

²⁷I recognize that home shopping stations will appear on cable systems as a result of this decision, and that subscribers therefore pay a basic service fee to receive them. However, the must carry rules presume broadcasters' basic need for carriage, and thereby support the economic health of local service. As a consequence, local service — regardless of format — will continue to be available to those who cannot afford cable television.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Home Shopping Stations

This Report and Order finds that broadcast stations that are predominantly utilized for the transmission of sales presentations or program length commercials serve the public interest, based on factors enumerated in the 1992 Cable Act, including: (a) evidence of significant public viewership and the lack of quantifiable data demonstrating otherwise; (b) competing demands of other television broadcasters; and (c) competition with nonbroadcast home shopping services. As a result of the public interest finding on these statutory factors, as well as other considerations, such stations will qualify as "local commercial television stations" for the purposes of cable carriage.

I write separately to emphasize that factors other than those explicitly stated in the 1992 Cable Act must be considered in most directly determining the public interest standing of any broadcast station, including home shopping stations. These public interest considerations broadly include a broadcast station's compliance with the Commission's standards on political and emergency broadcasting, children's programming, and indecency standards, as well as the extent of the station's public affairs programming responsive to issues confronting the local community. In this regard, despite the concerns regarding "commercialism" raised in this proceeding, I believe that the record indicates that home shopping stations have met the Commission's general public interest standards, and that the chosen format for home shopping stations does not preclude them from adequately addressing the needs and interests of their communities of license.

As an additional important consideration, I support this Report and Order because the record demonstrates a public interest value of home shopping stations due to their role in generating financing for small and marginal stations. To the extent that these home shopping stations have demonstrated an ability to meet the Commission's standards for all broadcasters, I believe that the public interest finding and the resulting must carry status are warranted.

**DISSENTING STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN**

**In the Matter of Implementation of Section 4(g) of the Cable
Television Consumer Protection and Competition Act of 1992:
Home Shopping Station Issues**

Today, unfortunately, the Commission deliberately and explicitly puts forward a minimalist definition of the public interest standard. It does so at precisely the moment when we should be mending and refurbishing that tattered banner and lifting it high over a broadcast culture that is, to borrow Gerard Manley Hopkins's poignant phrase, "all... seared with trade."

I sympathize with the difficulties my colleagues face, given the implications of this vote for the must-carry provisions of the 1992 Cable Act. I sympathize also with those home shopping licensees who, as minority members, have made this format their entry path into the broadcast industry; I know several of them and admire their entrepreneurial efforts. This question, nevertheless, presents deep questions of principle that, in the end, prevent me from voting with my colleagues. My quarrel is not with home shopping licensees, who after all have been operating under the Commission's rules since home shopping was introduced nearly a decade ago; it is with a regulatory philosophy that seems no longer to care about quality.

I am not unmindful of the role that these stations play in their communities. Friends and supporters of home shopping stations have inundated the Commission with letters by fax and mail in recent days; a stack of perhaps 1,000 pages of correspondence supporting individual home shopping stations was delivered to my office after I deferred the Report and Order from our regular agenda. Their message? That local home shopping stations support blood drives, voter registration campaigns, efforts to locate missing children, environmental clean-up drives and a host of other projects.

I do not for a minute underestimate the value of having home shopping stations involved in these efforts, and no Commissioner would want to silence their voices. Reaching a different outcome in today's proceeding would not silence them. Home shopping is thriving financially, and I have seen nothing

in the record proving that home shopping broadcast stations would cease to do well in the future.

The overriding question to me is one of fundamental policy: Do television stations that fill 23 hours a day with satellite-delivered, non-stop sales pitches serve the public interest by salting each hour of commercials with four minutes an hour of public service announcements? The answer seems obvious to me: They do not. No matter how well-intentioned and effective their sound bites for blood drives and voter registration campaigns may be, the Commission cannot gainsay that those announcements are tiny islands in a sea of commercial content. Home shopping stations devote substantially all their time, practically every day, to distributing one long, remotely prepared commercial message--- and they use the public's scarce and precious spectrum to do it.

The Commission's decision today says simply: That kind of broadcasting does not offend the public interest. Yet we cannot sidestep the ominous implications of such a statement. If home shopping stations serve the public interest, then this Commission is saying, by extension, that it would be content to have every television station in every market become a home shopping affiliate. My colleagues may protest that that is an unlikely situation, and one that they would never accept. And surely wall-to-wall home shopping over the public airwaves is a condition that Congress and the public at large would not tolerate. Yet today's action points in that direction. It raises the possibility that other broadcast stations, given the nod by the federal government, will decide to boost their revenues by devoting program time to home shopping. I am unwilling, therefore, to give this decision my approval.

The view being pressed upon us is that a home shopping presentation is not a commercial. In support of that view, we are told that home shopping is simply the sort of broadcast programming that the Commission has long blessed. We are told that it is educational. that home shopping informs consumers about complicated products--- what it means to have a certain kind of microprocessor in a home computer or the advantages of polyester over cotton. We are told, moreover, that home shopping is entertaining: the hosts are celebrities, the products are organized into "program segments" with clear themes, and viewers enjoy it.

In fact, the Supreme Court some time ago was presented with this sort of casuistry and soundly rejected it. Students at the State University of New York attempted to defeat the college's regulation of Tupperware parties on similar grounds. They argued that the Tupperware demonstrations included discussions of how to be financially responsible, and how to run an efficient home. The Court responded skeptically, as I believe the Commission should

respond today: "Including these. . . elements no more converted [the Tupperware] presentations into educational speech than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474 (1989).

Finally, and most disturbing to me, we are told that the several minutes an hour that home shopping stations devote to local news, information, and public service messages constitutes more in the way of public service than many "regular" commercial broadcast stations provide in their markets; it is, in fact, more than any television station was required to provide in the good old days of rigorous regulation. I see no reason why the Commission should accept such an argument: It merely proves that the minimally adequate is the enemy of something more. Even worse, this argument fails to deal with the central question of this entire debate: What is the level of service--- not yesterday, but today--- that this Commission, and the American public, ought to expect from a local broadcaster in exchange for free use of the public airwaves?

For me, therefore, the implications of the Commission's home shopping decision are disturbing. The public interest standard, after a decade of deregulatory erosion, cannot withstand much more pounding--- yet this decision sweeps over the public interest beachhead like a tidal wave. Today's action fails to make crucial distinctions about over-commercialization that the Supreme Court entitles us to make and that the statute asks us to make. And so we drastically diminish our own ability, for the long term, to devise a coherent definition of the public interest and to make the judgments that Congress has been pressing us to make: How much commercial content is too much? If an anything-goes approach to program-length commercials works for the average viewer, then how can the Commission (and Congress) defend the restrictions on program-length commercials directed at all but the youngest children? When are broadcast stations providing so little worthwhile programming to their communities that their licenses are in jeopardy? These questions will stay with us--- but answering them in the future will be much more difficult in light of today's decision.

I want to emphasize that, as a legal matter, I view the obligation that Congress has assigned to the Commission quite narrowly. Under Section 4(g) of the 1992 Cable Act, Congress directed the Commission to take a fresh look at the public-interest aspects of home shopping stations occupying broadcast spectrum. Any ambiguity about the scope of our task under Section 4(g) was removed on the House floor in a colloquy between Congressman Dennis Eckart

and Congressman John Dingell.¹ The public interest examination that we are required to make under the Act is self-contained. It stands entirely apart from judgments about these stations' must-carry rights.

I believe that the Commission, in the context of Section 4(g), could have reasonably concluded that home shopping stations ought to provide some level of service beyond 23 hours of commercial programming per day. And I believe that such a finding would not contaminate the current litigation about must-carry rights of commercial stations generally. My colleague Chairman Quello has fought the must-carry battle valiantly throughout his career at the Commission; I know that he cares deeply about it, and I share his concern that we not damage must-carry's ultimate defense. Nonetheless, I believe we could have reached a different outcome in this proceeding without harming the overall must-carry scheme. I regret that we have not done so.

I have one final regret. When the Commission launched this proceeding months ago, I warned from the bench that our actions here could create a two-tier system of commercial broadcasting. The first tier would be stations that clearly operate in the public interest. The second tier would consist of stations, perhaps like many of these home shopping affiliates, who could not be said to be serving the public interest for purposes of the Cable Act, but who nevertheless did not deserve the death penalty of losing their licenses. I saw danger in such an outcome then, and because this dissent pushes me toward that position, I am not entirely comfortable with it. Ultimately, however, if the Commission ever revisits this question, perhaps it should more closely examine whether creating such a regime might better accomplish what Congress intended.

In 1929, the old Radio Commission, predecessor of today's FCC, set forth its definition of the public interest standard in words that required broadcasters to present diverse programming including "entertainment, music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and...news." Are Congress and the Commission ready now to abandon

¹ Mr. Eckart: "First, let me ask my colleague if I am correct that the proceeding mandated under Section 614(g)(2) of the bill reported by the conference requires the Federal Communications Commission to conduct a *de novo* review of the overall regulatory treatment of stations that are predominantly used for sales presentations or program-length commercials, notwithstanding prior proceedings the FCC has conducted which may have permitted or had the effect of encouraging such stations' practices." 138 Cong. Rec. E2908 (October 2, 1992) (Statement of Mr. Eckart). Mr. Dingell answered in the affirmative. *Id.* (Statement of Mr. Dingell).

this ideal? I hope not, and I cast my dissent in the hope that some day Congress and the Commission will find it possible to visit this question again.

Until we do, I will think of the public interest standard as a sort of once-handsome thoroughbred, so abused and neglected that it has finally broken down in the middle of the track. Perhaps we can take it back to the paddock in the hope that, with care and love, it can recover— or at least produce offspring that recall the beauty of the original. If not, let us simply put the poor beast out of its misery once and for all.

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