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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Limitations On Commercial Time On)
Television Broadcast Stations)
)
)

MM Docket No. 93-254

To: The Commission

REPLY COMMENTS OF
Center for the Study of Commercialism,
Center for Media Education,
Consumer Federation of America, and
Office of Communication of the United Church of Christ

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SUMMARY

Although commentators representing the interests of broadcasters and advertisers assert that the market place is working to limit commercialism on over the air television, they provide little evidence to support this claim. Indeed, the very statistics cited by some commentators demonstrate that since the Commission eliminated the commercial limits in 1984, particular forms of advertising, notably infomercials and home shopping networks, have been steadily encroaching into more and more of the programming day.

In their initial comments, CSC et al. asked the Commission to conduct a study of commercialism on the air and its effects on the public. The lack of information provided by the industry commentators underscores the need for the Commission to gather the data requested.

Some commentators argue that it would be unfair to impose commercial limits on broadcasters since limits are not applied to cable. However, unlike cable operators, broadcasters are given free use of the public airwaves in return for accepting the obligation to act as a public trustee. Broadcasters have been exempted from bidding for spectrum because of their public interest obligations. In addition, broadcasters benefit from free carriage on cable systems, again because they alone have the obligation to provide programming that serves the public interest. Part of serving the public interest includes not devoting excessive time to commercial matter.

Finally, CSC et al. contend that the Commission may adopt commercial limits on broadcast television consistent with the First Amendment. Home shopping, infomercials and spot advertisements are forms of commercial speech subject to lesser protection under the

first amendment. The alleged entertainment "component" in home shopping does not remove it from the commercial speech category.

The constitutionality of restrictions on commercial speech is analyzed under the test established in Central Hudson and its progeny. Nothing in the Supreme Court's recent decision in Discovery Network changes that test. Under that test, the government may regulate truthful and nonmisleading commercial speech if there is a substantial governmental interest and that the means of regulation "reasonably fits" the asserted interest.

The FCC can clearly adopt limits on commercial matter that meet this test. The government has a substantial and long interest in preventing excessive commercialism on the public airwaves. Failure to limit excess commercialism results in a number of harms, including precluding other more valuable and beneficial types of programming and increasing advertiser involvement with program content, thus compromising the integrity of news, public affairs and even entertainment programming.

A regulation limiting the amount of commercialism would clearly advance the substantial governmental interest in limiting excessive commercialism on the public airwaves. Contrary to many commentors' assertions, the Commission is not required to adopt the least restrictive means. Moreover, the alternative suggested by some commentors is neither viable nor less burdensome.

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REPLY COMMENTS

The Center for the Study of Commercialism, the Center for Media Education, the Consumer Federation of America, and the Office of Communication of the United Church of Christ (CSC et al.) by their attorneys, Citizens Communications Project and Media Access Project, respectfully submit these reply comments in response to various comments filed regarding the Notice of Inquiry, MM Docket No. 93-254 (NOI), issued in the above captioned proceedings. The NOI sought comment on whether the public interest would be served by the Commission reimposing limits on the amount of commercial matter broadcast on the television airwaves.

The NOI generated a deluge of comments from broadcasters, networks, producers of home shopping and infomercials, advertisers, and their lobbying groups and trade associations. In summary, these comments assert that there is no need for reregulation of commercial limits on television, it would be unfair to impose commercial limits on broadcasters but not other providers of video programming, and commercial limits would impinge on broadcasters' first amendment rights.

On the other hand, CSC et al. and the U.S. Catholic Conference (USCC) filed comments urging that the public interest would best be served by limiting the amount of

commercialism on the airwaves. Collectively, these organizations represent the views of a large number of television viewers all around the country. After twelve years of overt hostility to viewers' interests, general public participation in FCC proceedings has greatly diminished. In light of this history, and the diffuse nature of each viewer's interest in commercial limits vis-a-vis the direct financial interest of the broadcast and advertising commentators, the views of CSC et al. and USCC should be taken to reflect the views of the majority of average Americans and should be afforded substantial weight.

In these reply comments, CSC et al. show that there is little or no empirical evidence supporting broadcasters' claims that marketplace forces effectively limit the amount of commercial matter shown on over-the-air stations. Indeed, the limited data provided by commentators supports our view that commercialism has increased dramatically since the 1984 repeal of commercial limits. Thus, we renew our request that the Commission conduct a serious and objective study of the amount of commercialism and its effects on the public. We further show that it is not unfair to limit excessive commercialism on over-the-air television and that the Commission may do so in a way that is consistent with the First Amendment.

I. SELF-SERVING ASSERTIONS BY COMMENTORS THAT THE MARKETPLACE IS WORKING TO LIMIT EXCESS COMMERCIALISM ARE UNSUPPORTED BY OBJECTIVE EMPIRICAL DATA

The Commission's 1984 decision to deregulate commercial television was based on the broad assumption that the marketplace would effectively control increases in commercial

limits.¹ The Commission initiated this Notice of Inquiry in response to its concern, as well as those expressed by members of Congress, about the increasing amount and changing nature of commercialism in broadcasting.² Comments submitted by broadcasters, networks, advertisers, and producers of home shopping and infomercials assert that the marketplace adequately limits excessive commercial programming. Some commentators go so far as to urge the Commission to immediately "terminate" this proceeding without revising current policy. FBC Television Affiliates (FBC) Comments at 2; National Infomercial Marketing Association (NIMA) Comments at 5.

But the FCC cannot and should not solely rely on self-serving comments from those with a financial stake in the maintenance or increase of commercial limits on broadcast television. It is certainly advantageous for broadcasters to conclude that Commission intervention is unnecessary to curb unwanted commercial growth. To determine the validity of their assertions, the FCC must gather and analyze objective data. A careful reading of the comments shows there is a lack of substantial data to advance the position that the marketplace is effectively regulating commercialism. Very few studies were included in the comments, especially studies addressing critical questions.³ Moreover,

¹ Report and Order in MM Docket No. 83-670 (Television Deregulation), 98 FCC 2d 1076, at 1102 (1984), recon. denied, 104 FCC 2d 357 (1986), aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1981).

² The Commission itself noted that "congressional debates on the 1992 Cable Act also reflected a more generalized concern with the issue of commercialism in broadcasting." Notice of Inquiry (NOI), FCC 93-459 at 1, 2 (released Oct. 7, 1993).

³ Only Meredith Corporation (MC Comments at 10), SCI Television (SCI Comments at 6), and Home Shopping Network, Inc. (HSN Comments, Exhibit 1) submitted results from specific studies. The MC and SCI studies were informal surveys of their own stations. HSN presented a solicited study by Louis Harris and Associates, Inc. based on a limited sample of

the limited data submitted in the comments actually indicates that the quantity of commercial matter has substantially increased since deregulation.⁴

The Commission bears responsibility for determining whether commercialization has been effectively controlled. Before deregulation, the Commission recognized that marketplace forces might not work effectively in all cases. It noted that "one potentially troublesome situation" would be that stations "which have a unique format or audience in a larger community" would be able to commercialize at levels so excessive as to be contrary to the public interest.⁵ The Commission promised that "[i]f prolonged and blatant excesses

home shopping viewers. Notably, no studies were cited which examined such fundamental questions as how much total time on broadcast television is devoted to home shopping programming, program-length infomercials, and spot commercials. Nor did commentors provide data indicating how many or what percentage of the general viewing public watch home shopping or infomercials.

⁴ While the comments do not cite and CSC et al. could not locate any studies of the amount of commercial time on broadcast television in general, studies of commercials aired during children's programming show that advertising increased after the limitations were removed in 1984. A report prepared by Dale Kunkel (University of California-Santa Barbara) stated that "the level of non-program material...[had] increased measurably since the FCC's repeal of commercial guidelines." H.R. Rep. No. 100-675, 100th Cong., 2nd Sess., at 9 (1988) (Children's Television Practices Act of 1988).

One NAB survey found that after deregulation one out of every five children's programs broadcast in the top 50 markets contained more than 12 minutes of commercial matter. Id. This level exceeded the guidelines set forth in the FCC's 1974 Policy Statement of 9.5 minutes per hour on weekends. Twelve minutes per hour equalled the maximum guidelines established by the FCC in 1974 for weekday programming. Id. at 7. These surveys are objective evidence that deregulation of commercial limits led to a significant increase in the quantity of advertising for children's programming.

Although children's programming and children's advertising are distinguishable from other programming, the evidence nonetheless suggests that overall commercialism has also increased. A thorough study of commercial limits by the Commission would confirm or refute any parallel increases.

⁵ Report and Order, in B.C. Docket No. 79-219 (Radio Deregulation), 84 FCC 2d 968 at 1005 (1981).

occur in defiance of the best interests of the public, then...we [will]...revisit the area and take appropriate action in another rulemaking proceeding." Radio Deregulation at 1007-1008. It is well within the Commission's authority to regulate the amount of programming time devoted to commercials, as it has done in the past.⁶ The D.C. Circuit, in a 1983 opinion written by Judge Skelly Wright, deferred to the Commission's decision regarding deregulation of commercial limits for radio, cautioning however, that

[T]his court has expressed its concern about excessive commercialization - a concern mirrored in the Commission's own long-standing policies against domination of scarce broadcast time by private advertiser interests. The Commission may well find that market forces alone will not sufficiently limit over-commercialization. In that event, we trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding.⁷

Thus, there is no question that the Commission has the authority and, indeed, the responsibility to reexamine the extent of commercialism on broadcast television and to reimpose commercial limits if it finds that to do so would best serve the public interest.

⁶ Prior to deregulation, the Commission dealt with excessive levels of commercialism on a case by case basis. Rush Broadcasting Corp., 42 FCC 2d 483 (1973); Channel Seventeen, Inc., 42 FCC 2d 529 (1973). In 1973, the Commission promulgated guidelines based on the number of minutes of commercials per hour. Order (Amendments to Delegations of Authority), 43 FCC 2d 638, 640 (1973). In 1974, the Commission issued a policy statement clarifying its view that program-length commercials contravened the public interest. Notice Concerning Applicability of Commission Policies on Program-Length Commercials, 44 FCC 2d 985 (1974). Recently, the FCC adopted quantitative limits on commercialism during children's programs as required by the Children's Television Act of 1990, 47 U.S.C. § 303a(b).

⁷ Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413, 1438 (D.C. Cir. 1983)[citation omitted].

A. **Marketplace Forces Do Not Provide an Effective Constraint on the Quantity of Program-Length Commercials**

The market is not effectively limiting program-length commercials, or "infomercials."

Comments confirm that since television deregulation, there has been an exponential growth in the production of infomercials. From a \$10 million business in 1984, it is estimated that 1993 expenditures will reach \$900 million for direct sales programming alone. NIMA Comments at 3. More than ninety percent of broadcast stations currently air infomercials. Id. More than half of these stations air more infomercials now than in 1990.⁸ Twenty-five percent of stations run infomercials in the daytime; 14 percent show them during prime time. NIMA Comments at 3.

NIMA postulates that "the program-length commercial has developed to satisfy a previously unanticipated consumer desire for longer commercial segments that provide in-depth knowledge about specific products and issues." Id. at 8 (emphasis added). NIMA, however, provides no evidence in support of this contention.

CSC et al. submit that viewers are not the force behind increases in infomercial programming. First, infomercial viewers frequently do not know they are watching a commercial. It is often difficult to differentiate between regular station programming and infomercials since many infomercials mimic popular programming formats such as news or talk shows to make their sales presentations. Thus, it is difficult to claim that viewers want to watch program-length commercials.

Second, product sales, not viewer preferences, influence decisions to schedule

⁸ Steve McClellan, Broadcasters, Cable: The Airing of the Green, Broadcasting & Cable, Oct. 25, 1993, at 24.

additional infomercials. The fact that people buy a particular product, however, does not mean that viewers prefer infomercial programming, or that this programming best serves the public interest. Rather, decisions to air program-length commercials reflect the broadcasters' and advertisers' desires to increase revenue. Substituting an excessive amount of program-length commercial messages in place of local, children's, news, public affairs, or entertainment programming runs contrary to the public interest, convenience and necessity.

B. Marketplace Forces Are Not Effective in Limiting Excessive Amounts of Home Shopping Programming

Valuevision International, Inc. (Valuevision), a home shopping network, contends that viewer preferences restrict the amount of commercial speech by television stations and networks. Valuevision Comments at 4. Valuevision asserts that "the [home shopping] format's continued success and expansion would not likely occur without significant viewer support." Id. at 4-5. HSN suggests that viewers watch its programming primarily for entertainment and information. HSN Comments at iii. Both commentors, however, fail to provide evidence to support their contention that viewer preferences restrain the amount of commercial matter.

While there may be enough people watching home shopping channels and infomercials and buying products to make these types of commercials viable,⁹ this does not prove that viewers would affirmatively choose these commercial formats over other types of programming. Advertisers - not viewers - decide whether to market a particular product.

⁹ We note that neither Valuevision, HSN, nor Silver King Communications, Inc. (SKC) provide data as to the number of viewers of their programs.

Advertisers - not viewers - decide how, when, and which format best attracts consumers (e.g. home shopping, program-length infomercials, or spots). This process is completely antithetical to Valuevision's contention that viewer preferences effectively restrict commercial limits. Thus, there is no evidence that the excessive amounts of home shopping found on some stations reflect viewer preferences, even assuming arguendo that viewer preferences were the only component of the public interest standard.

Furthermore, because home shopping revenue is generated directly, the home shopping format survives and prospers with a minuscule number of viewers. Ratings on home shopping programs are very low but home shopping channels do not seek viewer preference. They target a small niche within a small minority viewership rather than the broader needs or preferences of the community.

C. Traditional Spot Commercials Are Not Contained by "The Tyranny of the Remote Control."

Several commentators cite the statement of Commission Chairman James H. Quello that "the tyranny of the remote control provides an adequate check on broadcast stations that must increasingly compete for viewers."¹⁰ MC Comments at 3; Eagle Comments at 3. This argument is flawed, however, because it assumes that programming is fungible and therefore viewers will switch from channel to channel merely because of a commercial interruption. But since programming is not fungible, faithful viewers of particular shows may simply endure an increased amount of commercials.

Moreover, most commercial station schedules are parallel, airing commercials of

¹⁰ Separate Statement of James H. Quello, Notice of Inquiry, FCC 93-459, at 4.

largely the same length in the same time slots. Under these circumstances, "channel surfing" with the remote control offers the viewer no relief and has little or no impact on the commercial advertiser.

II. IT IS FAIR TO REQUIRE BROADCASTERS TO ADHERE TO COMMERCIAL LIMITATIONS NOT APPLICABLE TO CABLE AND OTHER VIDEO PROVIDERS

Many broadcasters assert that it is unfair to impose commercial limits on over-the-air broadcasters but not on other providers of video programming. See e.g., National Association of Broadcasters (NAB) Comments at 4-5; Association of Independent Television Stations, Inc. (INTV) Comments at 9-11. Broadcasters, however, are different from other providers of programming. First, unlike cable operators or videocassette distributors, broadcasters are held accountable as public trustees because they alone have exclusive use of the public airwaves. Second, only broadcasters benefit from the "must carry" requirement imposed upon cable operators. And third, broadcasters have a unique incentive to increase commercial programming because commercial advertising is their sole source of revenue.

A. Only Broadcast Licensees Are Given Free Usage of the Spectrum, in Exchange for Serving the Public Interest.

From its earliest days, the Commission has granted qualified broadcasters exclusive use of specific allocations of the public airwaves in exchange for honoring certain corresponding responsibilities. Broadcasters must serve the public interest by providing news, information and educational programming to all segments of the population by way of free over-the-air television. See CSC et al. Comments at 5. Serving the public interest has traditionally included the duty to not broadcast excessive commercial matter, see e.g., 1960

En Banc Programming Statement, 44 FCC 2303, 2313 (1960), or to permit advertisers to exert undue influence over programming.

When commercialization on broadcast television becomes excessive, it precludes other more beneficial programming and runs contrary to the public interest. See CSC et al Comments at 6, 8. If broadcasters are no longer serving the public interest, they should not be entitled to free use of the public airwaves. Pursuant to a new law, the Commission has recently initiated a licensing procedure which utilizes an auction process for some users of the spectrum: the highest bidder is awarded the spectrum license. 47 U.S.C. § 309(j). In essence, the auction bid represents more than a licensing fee: the cost is directly related to the spectrum's value on the open market.

Thus far, Congress has expressly exempted the broadcast spectrum from auctions. This exemption proves a tremendous benefit to broadcasters because not only are they exempt from any license payment requirements, they also are exempt from competition by bidders who might be willing to outbid them for their spectrum assignment. Broadcasters have been accorded this privilege because of their fiduciary responsibilities. In exchange, it is fair to impose commercial limitations on broadcasters not applicable to cable and other video providers.

B. Only Broadcasters are Entitled to "Must Carry."

In addition to use of the public airwaves for free, television stations are the only program providers that Congress has required cable operators to carry at no charge. Section 614 of the 1992 Cable Act ensures that most local commercial broadcast stations will be

carried by the cable system within their community of license.¹¹ This provision protects the government's compelling interest that the public continue to receive service from local, free, over-the-air broadcast stations.

Because the must carry requirement confers a substantial financial benefit on commercial broadcasters¹² it is fair to impose commercial limitations on them alone. Also, if the Commission were to continue to allow excessive commercialization on broadcast television, the Commission's public service mandate would be seriously compromised. As fiduciaries of the public interest, broadcasters are occasionally required to provide programming contrary to their own economic interests. Cable operators lack this fiduciary duty, but the must carry requirement effectively imposes a comparable duty on them as well. Must carry thus furthers the Commission's public service mandate under Title III by assuring that cable systems act as a conduit of free over-the-air television for viewers. Finally, permitting over-the-air broadcast stations to air excessive amounts of commercial matter diminishes the substantiality of the government's interest in assuring public access to these stations, and creates the risk that must carry as applied would be found unconstitutional.

C. Unlike Cable Operators, Only Broadcasters Have a Single Revenue Stream - Advertising - and Thus Have a Unique Incentive to Increase the Commercial Content of Their Programming.

Some comments point out that cable television has two sources of revenue, subscribers and advertisers, whereas over-the-air television only has one -- advertising.

¹¹ See Turner Broadcasting System, Inc. v. FCC, 819 F.Supp. 32 (D.D.C. 1993).

¹² Other video programmers are limited to obtaining leased access, where available.

Thus, commentators argue that to limit broadcast advertising would disadvantage broadcasters vis-a-vis cable. See e.g. INTV Comments at 9. On the contrary, this difference between broadcast and cable television instead suggests why commercial limits on broadcast television are necessary.

Broadcasters have profit-based incentives to increase commercial programming to the maximum amount possible without repelling viewers. Unless the Commission reestablishes commercial limits, there is no way to effectively prevent commercial increases if broadcasters and advertisers jointly determine such increases to be in their private interest. While cable operators are also driven by profit incentives, the availability of an alternative source of revenue may result in less pressure to increase the time devoted to advertising.

One commentator suggests that reregulation of commercial limits will cause a defection of advertising revenue from broadcast stations to cable channels. See FBC Comments at 9. This argument is overstated, however. Even though the number of channels and viewing options have rapidly increased, forty percent of viewers do not even subscribe to cable, and those that do continue to watch over-the-air television delivered by cable. Advertisers are aware of the larger number of viewers reached by over-the-air television, and therefore place the bulk of their most expensive campaigns on commercial television. This distinct marketing advantage of broadcast television is another fact which makes it appropriate to place commercial limits on broadcasters not applicable to cable and other video providers.

III. THE COMMISSION'S BROAD AUTHORITY TO REGULATE EXCESS COMMERCIALISM IS WHOLLY CONSISTENT WITH THE FIRST AMENDMENT

Numerous commentators argue that any limitation on commercialism would violate the

First Amendment. See e.g., SKC Comments at 26; HSN Comments at 28; INTV Comments at 11. Some commentators go so far as to argue that home shopping and infomercials are not commercial speech and thus not subject to the commercial speech doctrine. NAB Comments at n.9; SKC Comments at 29-30; HSN Comments at 18. Other commentators argue that while home shopping, infomercials and spot advertisements are commercial speech, they do not pass constitutional muster under the commercial speech doctrine. NIMA Comments at 10; INTV Comments at 11. CSC et al. disagree. As set out below, CSC et al. contend that home shopping, infomercials and spot advertisements are commercial speech and the FCC may adopt limits consistent with the First Amendment.

A. Home Shopping, Infomercials and Spot Advertisements Constitute Commercial Speech.

The commentators who claim that home shopping and infomercials are not pure commercial speech misconstrue the test for determining whether speech can be classified as commercial.¹³ NAB Comments at n.9; HSN Comments at 18; SKC Comments at 29-30. Speech is deemed commercial if it "proposes a commercial transaction." Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976). Home shopping and infomercials fit squarely within this definition.

Home shopping is programming in which viewers are offered consumer goods for immediate purchase and thus clearly "proposes a commercial transaction." Similarly, an

¹³ Commentors do not dispute that spot advertisements are commercial speech. See e.g., United States v. Edge Broadcasting Co., 113 S.Ct. 2696 (1993) (Court analyzed the constitutional validity of a federal statute banning radio broadcast of lottery advertisements under the commercial speech doctrine).

infomercial is "programming" intended to sell a product and therefore constitutes commercial speech.¹⁴ The main purpose of home shopping and infomercials is to help licensees make money from the sale of the product.

A number of commentators erroneously contend that the alleged entertainment "component" in home shopping elevates it to the level of noncommercial speech, thus precluding its regulation as commercial speech. HSN Comments at 30; SKC Comments at 33. It is well established, however, that the inclusion of noncommercial speech in otherwise commercial speech does not remove such speech from the commercial speech category.

In Bd. of Trustees of State University of New York v. Fox, for example, sellers of housewares who held "Tupperware parties" in college dormitories challenged a university regulation prohibiting any private commercial enterprise from operating on campus. Fox, 492 U.S. 469, 472 (1988). The sellers argued that their speech was not commercial speech because during the parties the sellers discussed such subjects as how to be financially responsible and how to run an efficient home. Id. The Court rejected this argument, holding that:

Including these home economics elements no more converted [the seller's] presentations into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech. As we said in Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68 (1983), communications can "constitute commercial speech notwithstanding the fact that they contain discussions of important public issues."

Id. at 474. Whether home shopping and infomercials contain some entertainment value does

¹⁴ Indeed, NIMA states that "[t]here can be little doubt that an infomercial, proposing a commercial transaction between the sponsor and the viewer about the proposed transaction, qualifies as 'core' commercial speech." NIMA Comments at 10.

not change the fact that they are essentially sales presentations and thus subject to the commercial speech doctrine.

Similarly, any limitation proposed by the Commission that would regulate excess commercialism would not suffer constitutional infirmity as a content-based regulation. Certain commentators erroneously assert that any regulation of commercialism is content-based and therefore per se unconstitutional.¹⁵ Were the regulation of commercial speech itself to constitute content-based regulation, the commercial speech doctrine would not exist. Since Virginia Pharmacy Board where the Supreme Court first granted protection to commercial speech, the Court has carefully delineated the amount of protection that commercial speech will receive. The Court, however, has never abandoned the commercial speech doctrine. The fundamental premise that commercial speech may be regulated differently than noncommercial speech remains.¹⁶

For example, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), the city of San Diego enacted an ordinance that imposed significant restrictions on outdoor advertising signs. The ordinance permitted onsite commercial advertising but prohibited other commercial advertising and noncommercial advertising using fixed-structure signs. The Court held that the city could ban commercial billboards without banning noncommercial billboards and that it could ban off-site commercial billboards without banning on-site

¹⁵ See e.g., Valuevision Comments at 4, Statement of Professor Smolla in support of SKC Comments (Smolla Statement) at 18; HSN at Comments 29; NIMA at Comments 9; NAB Comments at 9.

¹⁶ Indeed, a decision by the Commission that a limitation on commercialism is unconstitutional would necessarily call into question the constitutional validity of the Children's Television Act and the entire Public Broadcasting System.

commercial billboards. As Professor Smolla states, "the City of San Diego sought to eliminate commercial billboard advertising not because of the content of what the advertisements said, but because of the 'visual clutter' and safety hazards caused by the physical presence of billboards on landscapes." Smolla Statement at 16-17. Here, any limitation imposed by the Commission on commercialism likewise would not be because of the content of any particular spot advertisement, infomercial or home shopping programming. Rather, the limitation would be imposed because of the substantial governmental interest in regulating the excess of commercialism. A limitation on such excess would have an equal effect on all commercialism.

B. Commercial Limits Would Be Constitutional As a Permissible Restriction on Commercial Speech.

Commercial speech has never been afforded full First Amendment protection. Board of Trustees v. Fox, 492 U.S. 469, 477 (1988), citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978). While in recent years there has been some increasing recognition of the value of truthful commercial speech, the fundamental premise remains -- the First Amendment imposes less rigorous restrictions on the government's power to regulate commercial speech than it does for other forms of traditional "high value" speech. Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) and its progeny Fox and Posadas de Puerto Rico v. Tourism Co., 478 U.S. 326 (1986), set out a four-part test for determining whether a regulation of commercial speech is constitutional.

First, the advertising must be lawful and not misleading to merit any First

Amendment protection at all.¹⁷ Central Hudson, 447 U.S. at 566. Second, the governmental interest at stake must be substantial. Id. The third and fourth prongs require that the regulation directly advance the governmental interest and that it be no more extensive than necessary. Id. Since Fox, all that is required to meet the third and fourth prongs is a "reasonable fit" between the interest and the regulation. Numerous commentors contend that commercial limits could not meet the elements of this test. See e.g., SCI comments at 15; NIMA Comments at 9. CSC et al. disagree.

1. The Government Has a Substantial Interest in Limiting Excessive Commercialism on Over-the-Air Television.

Some commentors claim that there is no substantial governmental interest in limiting commercialism on the air because there is no identifiable harm.¹⁸ Smolla Statement at 17-18; NAB Comments at 8-9; NIMA Comments at n.3. CSC et al. submit that there is a clear and long standing governmental interest in preventing an excess of commercialism. The Commission's primary mandate under the First Amendment is to promote the "paramount" First Amendment right of the public "to receive suitable access to social, political, esthetics, [and] moral" information over the broadcast medium. Red Lion Broadcasting Co. v. FCC,

¹⁷ The analysis that follows is based on the assumption that the commercial speech at issue is not unlawful or misleading. CSC et al. argued in its earlier comments that many new forms of advertising are indeed deceptive. Comments of CSC et al. at 8-13. For example, many long form infomercials can easily be mistaken for regular programming and often companies use undisclosed product placements without warning viewers that they are watching paid advertisements. Id. As CSC et al. recommended, the remedy for such deception would be to require continuous disclosure. Id.

¹⁸ Other commentors argue that no substantial governmental interest exists because the marketplace has worked to limit excess commercialism. See e.g., MC Comments at 14; Valuevision Comments at 4; SCI Comments at 16. CSC et al. contend that the marketplace has not operated to constrain excessive commercialism. See supra at 2-9.

395 U.S. 367, 390 (1969). This fundamental right remains "paramount" despite commentators' assertion that spectrum scarcity is irrelevant in today's marketplace. See e.g., Miller at 4.

The limited number of channels on over-the-air television is not affected by the increase in channels on other media. Broadcast channels, which have been set aside by the Government, belong to the public and should be operated in the public interest. Since the Government has defined what type of programming fulfills a licensee's public interest obligation, the Government has a substantial interest in making sure that those channels are used primarily for providing that service to the public, rather than advancing the private interest of the licensees.¹⁹

As we detailed in our initial comments, the failure to limit excess commercialism on over-the-air television results in at least three types of harms. First, excessive commercialism precludes other more valuable and beneficial types of programming. In some cases, advertising has reached a point where it does not support, but rather supplants programming. The result of this excessive amount of commercial material is that less air time is available for public interest programming as well as artistic or entertainment programming that is free from commercials. See CSC et al. Comments at 5-8.

Second, excessive commercialism has a cumulative impact on the way viewers think and behave. While any amount of advertising could affect viewers, the more advertising there is, the greater would be any effect. When carried to excessive levels, commercialism

¹⁹ Indeed, the increased number of channels has resulted in an overall increase in commercialism. It is thus particularly important to assure that the public airwaves are operated in the public interest.

can result in an emphasis upon materialism to the detriment of the society at large. See also CSC et al. Comments at 13-15.

Third, excessive commercialism increases advertiser involvement with program content, thus compromising the integrity of news, public affairs and even entertainment programming. Many examples exist of TV stations being forced to censor stories critical of major advertisers. See CSC et al. Comments at 15-17.

These three harms demonstrate the substantiality of the governmental interest in limiting excessive commercialism on over-the-air television. As demonstrated below, there is a "reasonable fit" between this interest and a limitation on commercialism.

2. There is a "Reasonable Fit" Between the Government's Interest in Preventing Excessive Commercialism and the Imposition of Commercial Limits.

Several commentators argue that limits would not advance the governmental interest and are not the most effective means of regulating the amount of commercial matter on broadcast television. SKC Comments at 16; MC Comments at 14; NIMA Comments at 9. These commentators, however, fail to understand that to pass constitutional muster, the regulation need not be the most effective or the least restrictive. Under Fox, all that is now required to sustain governmental regulation of commercial speech is a "reasonable fit," that is:

a "fit" between the legislature's ends and the means chosen to accomplish those ends. . . a fit that is not necessarily perfect, but reasonable, that represents not necessarily the single best disposition, but one whose scope is "in proportion to the interest served," [citation omitted] that employs not necessarily the least restrictive means, but. . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 429 U.S. at 480 quoting Posadas, 478 U.S. at 341.

While it is difficult to assess the "fit" before the Commission has proposed any actual limits, it is clear that the Commission can establish a regulation that reasonably fits the governmental purpose. CSC et al. also note that a ban has not been proposed and thus the constitutional analysis should be conducted assuming a limit on commercialism, not a ban.

A regulation limiting the amount of commercialism would clearly advance the governmental interest. A limitation on the amount of commercialism would by definition prevent excess commercialism and would help alleviate the harms associated with such excess.

NIMA and DMA argue that a limitation on the amount of commercialism would be unconstitutional because it is not "narrowly tailored," NIMA Comments at 12, and would regulate broadcasters more extensively than necessary. MC Comments at 14; DMA Comments at 11. As an alternative, DMA and NIMA suggest that excessive commercial programming should be addressed at the time of license renewal. DMA Comments at 11; NIMA Comments at 11. However, as discussed above, the Commission is not required to adopt the least restrictive means. Fox, 492 U.S. at 477-81.

Moreover, the alternative suggested by NIMA and DMA is neither viable nor less burdensome. If the amount of commercial matter aired on a broadcast station was reviewed only every five years at license renewal time, the harms associated with excessive commercialism would have already occurred. In addition, to hold broadcast licensees accountable for excessive commercialism the Commission would need to establish a standard by which to assess a broadcaster's performance. That is, to be fair to broadcasters, the