casting and not made available to other claimants. Broadcasters claim to need this extra spectrum to convert to digital transmission so that they can continue to serve the American public with free over-the-air broadcasting. Providing just one free program service when digital transmission can accommodate five or six gives the public a very poor return on the use of its spectrum.

The "principally used" standard articulated above serves both the public and the broadcasters. It gives the public the services it expects and deserves over broadcast spectrum, and it permits broadcasters some latitude to provide subscription or other services to finance the transition to digital.

Just what ancillary and supplementary services the Commission permits broadcasters to provide is less important than whether the spectrum is principally used for free over-the-air broadcasting. Non-broadcast and subscription broadcast services would be acceptable, provided, however, that any subscription broadcast service is made subject to Title III public interest obligations. *See* discussion at Section V.C., *below*.[16]

V. PUBLIC INTEREST OBLIGATIONS

The Commission asks a variety of questions relating to the type of public interest obligations that broadcasters should have in the "digital broadcasting world." *FNOPR* at ¶34. It

---

[16]As the Commission notes, pending legislation in the House and Senate would authorize the Commission to collect fees should broadcasters engage in ancillary and supplementary services. *FNOPR* at ¶23 n.23. In the event that the telecommunications legislation does not become law, and the Commission does permit broadcasters to engage in non-broadcast services, it should strongly urge Congress to authorize the Commission to collect such fees, and to reserve 25% percent of those fees for public telecommunications uses such as public school and library access to advanced telecommunications, funding for public broadcasting, production of children's educational and informational programming and funding for a small business/minority ownership and development equity fund similar to the "Telecommunications Development Fund" included in H.R. 1555 Manager's Amendment to H.R. 1555, 104th Cong., 1st Sess. §111

asks whether public interest obligations should attach to each program service provided by a broadcaster, whether or not it is a subscription service. *Id.* at ¶35. In the alternative, it asks whether public interest obligations should attach not to services, but to licensees, who would be required to operate their facilities in the public interest. *Id.*

A. Broadcasters Have Always Been Required to Provide Public Service in Exchange for Allocation of Broadcast Spectrum.

The notion that broadcasters must compensate the public with service in exchange for exclusive use of the public airwaves underlies our entire system of broadcasting. The Commission must follow this same principle in allocating ATV spectrum, *i.e.*, an extra allocation of spectrum demands enhanced public service obligations.

Beginning with the 1927 Act, Congress codified this compensation theory.[17] The Act adopted the licensing method of spectrum allocation, but at least some members of Congress had been presented with an alternative method to distribute broadcast spectrum - property-style rights. For example, the Senate Committee on Interstate Commerce heard descriptions of the sale and

---

[17]Indeed, this theory was embraced by then-Secretary of Commerce Hoover prior to the 1927 Act. Between 1921 and 1925, radio had mushroomed from a handful to almost 600 stations, and competition for limited spectrum capacity had caused interference problems. *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 211 (1943). Hoover, who had previously been charged with licensing broadcasters to use electromagnetic frequencies, quickly realized that a method was needed for apportioning this scarce resource. In the keynote address to the first National Radio Conference in 1922, he stated his conviction that, because broadcasting used "a great national asset," *i.e.* the spectrum, it was "of primary public interest to say who is to do the broadcasting, under what circumstances, ***and with what type of material***." Herbert Hoover, *Speech to the First National Radio Conference*, February 27, 1922, Document No. 209 Hoover Collection, Stanford University, *quoted in* Krattenmaker, *Telecommunications Law and Policy* 11 (1994) (emphasis added). *See also* Herbert Hoover, *Opening Address to the Fourth National Radio Conference*, *reprinted in* Radio Control, Hearings Before the Senate Interstate Commerce Committee, 69th Cong., 1st Sess. 56 (1926) ("The use of a radio channel is justified only if there is public benefit").

resale of licenses and the private bargaining that went on between licensees assigned to the same frequency. Radio Control, Hearings Before the Senate Interstate Commerce Committee, 69th Cong., 1st Sess. 56 (1926)

But this view did not prevail: the "central feature" of what ultimately became the 1927 Act was that Congress "deliberate[ly]" chose to "preclude private ownership of spectrum rights while licensing these rights for brief periods to private users free of charge." Krattenmaker *Telecommunications Law and Policy* 11 (1994) *See* Radio Act §9, 44 Stat. 1162 (1927) (repealed 1934) ("1927 Radio Act") The Act's sponsor, Senator Dill, stated contemporaneously that, "the one principle regarding radio that must always be adhered to, as basic and fundamental, is that government must always retain complete and absolute control of the right to use the air." Clarence Dill, *A Traffic Cop for the Air*, 75 Review of Reviews 181, 184 (1927), *cited in* Krattenmaker at 11.

Hand-in-hand with government ownership of spectrum went the power to parcel out spectrum, free of charge, among competing applicants. This required criteria for choosing among would-be licensees, and Congress adopted the "public interest, convenience, and necessity" standard. 1927 Radio Act at §9. As House sponsor Wallace White noted in floor debate

> [T]here must be a limitation upon the number of broadcasting stations and.. licenses should be issued only to those stations whose operations would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art....If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

67 Cong. Rec. 5479 (1926).[18]

---

[18]Perhaps with an eye toward inevitable technological progress, White added, "The same rule is asserted with respect to other forms of transmission." *Id.*

Moreover, broadcasters at the time clearly understood that the receipt of spectrum licenses was conditioned with explicit, inseparable public interest obligations. However, they "did not dissent" to this *quid pro quo*; "they embraced it." Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, *in* A Legislative History of the Communications Act of 1934 (Max Paglin ed., 1989) 3, 11.[19] Indeed, the National Association of Broadcasters passed a resolution at the fourth National Radio Conference declaring that "the test of the broadcasting privilege [must] be based upon the needs of the public served by the proposed station." Resolution of NAB presented at the fourth National Radio Conference, *reprinted in* Radio Control, Hearings Before the Senate Interstate Commerce Committee, 69th Cong., 1st Sess. 59 (1926).

It is widely recognized that the 1934 Communications Act ("1934 Act") largely adopted its predecessor's conception of the public interest in broadcasting, and this included the idea that use of spectrum is conditioned upon licensee adherence to public interest requirements. H.R. Conf. Rep. No. 1918, 73rd Cong., 2nd Sess. at 48 (1934).

As the Supreme Court has observed,

> The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. . .Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the

---

[19]Although scholars have offered differing views of broadcasters' motives for doing this, altruism does not seem to have been one of them. One opinion is that the broadcast industry accurately assumed that regulation would prefer its interests to those of the marginal stations and potential entrants. Krattenmaker at 12. Another is that the system was not incompatible with commercial profit and, significantly, did not subject them to public-utility type regulation. Robinson at 13. Whatever their reasons, they knowingly and willingly accepted and even encouraged this arrangement.

standard of "public interest, convenience, or necessity."

NBC v. United States, 319 U.S. at 216-17 [citations omitted].

Broadcasters have long claimed adherence to the principle of public service for exclusive use of spectrum to justify special benefits or stifle competition. Several of the most recent examples of this have been broadcasters' battle in the Supreme Court to justify compulsory carriage on cable systems,[20] their effort to avoid spectrum auctions,[21] and their attempt to prevent spectrum allocation for a new satellite-delivered radio service.[22] Indeed, the broadcasters' continuing campaign to get the ATV spectrum is premised on this very notion.

B. Broadcasters' Current Public Service Obligations Should be Applicable to All Program Services.

As the Commission notes, in exchange for the free and exclusive use of its current 6 MHz of spectrum, broadcasters have been required *inter alia*, to provide programming that meets the needs of their communities of license, offer "reasonable access," "equal opportunities" and the "lowest unit rate" to candidates for political office, provide programming that serves the educa-

---

[20]*See* Brief of National Association of Broadcasters in *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994) (No. 93-44).

[21]The President of the NAB urged Congress to exempt broadcasters from spectrum auctions because they were subject to FCC regulations for programming in the public interest, declaring that: "there is a contract, we feel, with the Government that we're allowed to use that spectrum for the betterment of the community ..." Hearings on H.R. 707 before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 103d Cong., 1st Sess. at 68 (Feb. 4, 1993)(statement of Edward O. Fritts).

[22]In a letter to FCC Chairman Hundt, the NAB's President stated that "U.S. broadcasters, have always had a 'special role' and borne 'special obligations' in providing service to the American public: 'Television licensees are required to provide educational and informational children's programming...provide equal opportunities to political candidates...may not broadcast obscene or indecent programming...[a]nd they are expected to serve their community.'" Edward O. Fritts, Letter to Chairman Hundt, in Gen. Docket No. 90-357 (May 3, 1995) at 4, *quoting* Satellite DARS Allocation Order, 10 FCC Rcd 2310 (1995).

tional and informational needs of children, and establish an equal employment opportunity (EEO) program to provide employment opportunities for minorities and women. *FNOPR* at ¶33. The Commission seeks comment on whether broadcasters should be subject to these obligations in a digital world. *Id.* at ¶34.

These enumerated public interest obligations are the minimal core duties required by the Communications Act for any broadcaster, and there should be no doubt that they should apply to each program service provided over ATV spectrum. Indeed, it is appears the Commission must apply the mandates of the political broadcasting and children's television laws to over-the-air program services.

However, MAP *et al.* believe that broadcasters should have latitude in meeting some of these public interest requirements, and that these public interest requirements should attach to the licensee, and not the service. *See FNOPR* at ¶35. The Commission might consider permitting broadcasters to consolidate their community programming duties and/or their children's television duties and place them on one program service. *See discussion* at Section V.D.3., *below*.

Such leeway is not possible for some obligations, however. For example, under the reasonable access requirements of Section 312(a)(7), a broadcaster could not deny all access to one or more program services if such access is requested by a federal candidate. *See CBS v. FCC*, 453 U.S. 367 (1981). Since candidates' needs are predominant, their choices as to placement on any of the various program offerings must be honored.[23] And if candidate access

---

[23]"Federal candidates are the intended beneficiary of §312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered...." *Commission Policy in Enforcing §312(a)(7) of the Communications Act*, 68 FCC2d 1079, 1089

is permitted on a particular program service, the equal time provision would mandate that the opposing candidate appear on the same program service. 47 USC §315(a).[24] Similarly, there can be no room for flexibility in the Commission's EEO enforcement.

C. Public Interest Obligations Should Apply to Subscription and Non-Subscription Broadcast Services.

MAP, *et al.* urge that the Commission attach these public interest obligations to subscription program services as well as free services. To achieve this goal, the Commission should expressly overrule its decision in *Subscription Video*, 2 FCC Rcd 1001 (1987) *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). The Commission has the statutory and regulatory authority to revisit its decision in *Subscription Video* and reclassify subscription services as broadcast entities, so long as a reasoned explanation is provided.

As Commenter Media Access Project has discussed in numerous other filings, *Subscription Video* was wrongly decided. *See, e.g.*, Comments of the Media Access Project in IB Docket No. 95-91 (DARS Rulemaking) at 15-18; Brief for Petitioner National Association for Better Broadcasting, No. 87-1198 (D.C. Cir. 1987). The Commission's decision was based on its finding that subscription services, like DBS, are not intended to be received by the "general public." In support of that finding, the Commission noted that reception of DBS programming requires "special equipment" and that DBS licensees do not "seek to maximize audience in the same way as conventional licensees. . . [S]ubscription services are interested in maximizing revenues which may not necessarily mean maximizing audience." *Subscription Video*, 2 FCC Rcd at 1004. But

---

n.14 (1978). "A federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible. . . ." *Id.* at 1090.

[24]MAP, *et al.* take the position that all provisions of Section 315 that are deemed mandatory for analog service apply equally to ATV service.

these are distinctions without a difference. The quintessential earmark of broadcasting is the use of public spectrum. Both subscription-based video providers and over-the-air broadcasters intend to reach the "general public." Both subscription service providers and terrestrial broadcasters simply want to increase profit margins, not limit audience size to "specific addresses." *Id.* Furthermore, whether equipment is "special" is a function of technological change over time and public familiarity with new technology. In an industry where rapid technological change is the norm, it is ludicrous to classify communications services based on the highly subjective determination that one technology is "special," while another is "common."

D. The Commission Must Require Broadcasters to Provide New and Different Public Service in Exchange for the Opportunity to Convert to Digital Television

As discussed above, the assumption underlying our entire system of broadcasting is that spectrum is allocated for the free and exclusive use of broadcasters only in exchange for a promise of public service. Incumbent broadcasters now have the free and exclusive use of 6 MHz of spectrum, and the Commission is proposing to double their reservation. Thus, it follows logically that new, enhanced public interest obligations should attach.

As discussed in Section II.A., *above*, those who would argue that new obligations are not warranted because what is being proposed here is a mere "reallocation" of spectrum oversimplify the transaction. This is not the mere movement of broadcasters to another part of the spectrum. Broadcasters will have full use of 12 MHz of spectrum for a time period that may be indefinite. Even if the "original" TV channel ultimately reverts to the public, the Commission's proposal will permit broadcasters access to "double dip" for an extended period of time. Should broadcasters receive the spectrum which has been set aside for ATV, they will

have the capability to convert their one NTSC channel to multiple ATV channels. The mere *opportunity* that broadcasters will be given to provide five or more services alone justifies the imposition of enhanced public interest obligations.

The following is a list of appropriate public interest requirements for broadcasters in exchange for the right to use extra spectrum to convert to digital transmission. They are not intended to be mutually exclusive.

1. Free Time/Reservation of Capacity for Use by Political Candidates

There is widespread and bipartisan agreement that the cost of political campaigns has impeded political discourse. *See, e.g.*, Michael Oreskes, "A Swamp of Political Abuses Spurs Constituents of Change," *NY Times*, March 21, 1990 at A1; Eric Pooley, "Attack of the Killer D'Amato; the Senator Takes Fund Raising to New Heights - or Depths. But the Rules of His Game May Be Changing," *Time Magazine*, September 11, 1995 at 44. Proposals to legislate free time for candidates have emerged from the left and the right, but the Commission has ample authority to make such provision under current law. Even assuming, *arguendo*, that broadcasters have in the past correctly characterized such a requirement as overly burdensome and expensive in an analog world, the capability to provide multiple services makes the provision of free time for political advertisements far less difficult and far less costly.

Thus, the Commission should require broadcasters to reserve a portion of their capacity for free use by federal and local political candidates for at least one month before an election or primary.[25] The Commission could require, for example, that one program service be devoted

---

[25]Indeed, Fox Chairman Rupert Murdoch has called for a reservation, in prime time, for free political discussion by candidates eight weeks before an election. Don West, "Murdoch puts his network where his mouth was on political advertising," *Broadcasting and Cable*, April 17 at 12.

to free candidate speech for one hour a day for one month before an election. But broadcasters should not be able exercise their discretion so selectively in the hope that the time will not be used by candidates. Thus, any time remaining in the reserved hour should not be returned to broadcasters for their use.[26]

2. Reservation of Capacity for Noncommercial Public Use

The public's First Amendment right to speak and to be heard on broadcast facilities has always been premised on the fact that scarcity of spectrum did not permit all members of the public to have use of broadcast facilities. Instead, broadcasters are tasked as fiduciaries for the public, with laws like the fairness doctrine ensuring that various points of view be heard on controversial issues. *Red Lion Broadcasting v. FCC*, 367 U.S. 390 (1969).

The conversion to digital transmission will permit broadcasters to become multichannel providers, like cable television operators, with adequate capacity to provide for public access to the airwaves. Thus, it is reasonable to require broadcasters to provide for public access, much like cable operators are required under the 1984 and 1992 Cable Acts.

Congress has declared its belief that ensuring public access to all forms of electronic communication is an important government goal, and determined that it is reasonable to reserve space for public uses on multichannel media. As the House Report to the 1984 Cable Act stated:

> One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide...access that, up until now, has been difficult to obtain. A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public - the fundamental goal of the First Amendment - without the need

---

[26]MAP, *et al.* urge the Commission to require free time for political candidates even if it chooses to grant broadcasters only enough spectrum for one digital channel.

to regulate the content of programming provided over cable.

H. Rep. No. 934, 98th Cong., 2d Sess. at 30 (1984) *reprinted in* 1984 USCCAN 4655, 4667 ("H. Rep.").[27]

One technological feature of cable television was central to the House Committee's conclusions: multiple channels. It found that, "[b]ecause cable had many channels available, a relative few devoted to access uses would not unduly impinge on the cable operator's journalistic or editorial function." H. Rep. at 36. This is because cable operators are not "prevented or chilled in any way from presenting their own views and programming on the vast majority of channels otherwise available to them." *Id.* at 35. *See also*, S. Rep. at 52-53 (because cable has "much greater channel capacity," the number of channels devoted to access in 1992 Cable Act is "reasonable").

As discussed in Section I.B., *above*, the British government has recognized the importance of such a reservation, and the Commission should do so as well. In recognition of broadcasters' new role as multichannel providers, the Commission should require broadcasters to reserve capacity, from 10 AM to 10 PM, for use by nonprofit organizations and members of the public. Public access would increase the diversity of voices, and would be an excellent outlet for community-based programming. It would also empower this country's nonprofit sector by giving them access to new sources of funding and thereby reducing their reliance on government aid. Moreover,

---

[27]The House report stated that access channels "contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work." *Id.* It noted they are "available to all, poor and wealthy alike, thereby minimizing the [Supreme] Court's fear in [*CBS v. DNC*, 412 U.S. 126 (1973)] of domination of the media by the wealthy." *Id.* at 36. *See* S. Rep. No. 92, 102d Cong., 2d Sess. (1992) 29-32, *reprinted in* 1992 USCCAN 1133, 1162-65 ("S. Rep.")(adopting rationale of 1984 House Report).

public access decreases the need for some of the content regulation that is intended to serve as a substitute for public use of the airwaves, such as the fairness doctrine, the personal attack rule and the political editorial rule.

3. Reservation of Capacity for Children's Educational and Informational Programming to Fulfill Children's Television Act Obligations.

With respect to broadcasters' duties under the Children's Television Act, the Commission must clarify and specify its expectations in terms of the quantity of educational and informational programming. The Commission is presently considering the use of a quantitative guideline for existing television stations.[28] For the same reasons set forth in a number of the comments in that proceeding,[29] it is important that the Commission establish specific quantitative requirements for the new spectrum as well.

Because the increased capacity permitted by "spectrum flexibility" enables a broadcaster to do far more for children than was possible with just one channel, the Commission should increase the requirements for children's educational and informational programming accordingly. Thus, MAP, *et al.* urge the Commission to establish a guideline using a percentage of total program time that should be devoted to children's educational and informational programming. Given that children under 18 currently make up 25.6% of the population, MAP, *et al.* believe

---

[28]*Policies and Rules Concerning Children's Television Programming*, 10 FCC Rcd 6608 (1995).

[29]*See, e.g.*, Comments of the Center for Media Education, *et al.*, in Docket No. 93-48 filed (October 16, 1995) (proposing standard of one hour per day of core programming). The proceeding also seeks to define "core" educational programming. Part of the definition of core programming is that it is aired at times when children are watching.

that 20% total program time would be reasonable.[30]

However, MAP, *et al.* believe that broadcasters should have latitude in meeting this 20% standard. *See FNOPR* at ¶35. For example, if a broadcaster programs multiple channels, the Commission might permit broadcasters to fulfill its 20% obligation on a single "children's channel"[31] or to spread it unevenly across different program services during hours when children are most likely to be in the audience. However the Commission must ensure that a majority of the children's educational and informational programming is on free program services, and is thus available to all children regardless of family income

VI. TRANSITION TO DIGITAL

The Commission requests comment on a number of issues pertaining to broadcasters' actual transition to digital transmission. It asks, *inter alia*, what requirements should be imposed upon broadcasters to simulcast either its analog or ATV signal. *FNOPR* at ¶¶41-42. The Commission also asks for comment on how it should determine when broadcasters should cease NTSC transmission and surrender one of the two channels. *FNOPR* at ¶¶50-54.

A. Simulcasting

The Commission tentatively concludes that broadcasters simulcast "all material being broadcast on the licensee's NTSC station on a program service of the ATV channel." *FNOPR* at ¶41. The Commission asks for comment, *inter alia*, on whether "a licensee should be permit-

---

[30]Of course, broadcasters would continue to be subject to the limitations on advertising during children's programming for all of their program services. 47 USC §303a(b).

[31]Thus, a broadcaster might provide children's programming from 9AM-12PM and 3PM-6PM on weekdays, and from 7AM-12PM on weekends. Reserving capacity in this way would permit broadcasters to program to age-specific groups. For example, younger than school age children could be served in the 10AM-12PM weekday reservation, while older children would be served during the after-school hours.

ted to purchase time on a competitor's ATV station on which to broadcast its analog programming?" *FNOPR* at ¶42.

MAP, *et al.* agree with the Commission that a broadcaster's NTSC service should be simulcast on the ATV channel, provided that the NTSC channel complies with a broadcaster's public interest obligations. It is critical that until such time as there is widespread access to ATV, those members of the public with access to just one channel are served with community programming, access to candidate speech, children's educational and informational television programming and noncommercial educational television programming.

But MAP, *et al.* can see no policy or other reason to permit licensees to purchase time on a ***competitor's*** ATV service for the purpose of simulcasting its NTSC service. However, in the event a licensee is unable to simulcast because its digital transmission system is not operative, it should be able to simulcast on a competitor's system on a temporary basis, provided that the competitor agrees, in writing, to exercise no editorial control over the simulcast, or engage in any joint marketing with the licensee.[32]

In all likelihood, however, persons with ATV receivers will be able to receive NTSC telecasts. *See FNOPR* at ¶41. Thus, there is little fear that there will be a loss of audience. Using extra ATV capacity to provide what is already available to the public reduces diversity by eliminating an outlet for different sources of information.

B. Benchmark for Cessation of NTSC Transmissions.

Having tentatively concluded that broadcasters should return one of the two channels at

---

[32]Should the Commission permit a licensee to simulcast on another's ATV spectrum, such a simulcast should be counted against the licensee's ownership limits, much like is done in the case of LMAs. *See* Section I.B., *above*.

some point after they convert to digital transmission, the Commission suggests either a date certain on which the broadcasters must return the spectrum, or an "objective benchmark" for returning the spectrum. *FNOPR* at ¶ 53. An "objective benchmark" could be, for example, when "the number of households that rely on NTSC has fallen to a given percentage." *Id.*

The issue of cessation of NTSC service raises two concerns. The first is that significant segments of the population are not deprived of free over-the-air television service simply because the broadcasters have converted to digital. The second is that broadcasters return the spectrum as quickly as possible so that the public can benefit from auctions or other uses of the spectrum. A date certain may jeopardize universal access to free television, but a so-called "objective benchmark," by fate or by design, may never come to pass, leaving the broadcasters with two cumulative 6 MHz allocations.

To resolve these conflicts, MAP, *et al.* urge the Commission to adopt a date certain for return of the extra spectrum (between 5 and 15 years, depending on whether the Commission's assessment of the transition time has changed over the past three years) along with a mechanism to ensure universal access to digital television. For example, the Commission could create a universal digital television service fund for the purpose of ensuring that those members of the public that cannot afford a digital receiver after the date certain can purchase one. The fund can be endowed with either a general fee imposed on broadcasters, or whatever fee the Commission might be authorized to impose to permit broadcasters to engage in ancillary and supplementary services.

MAP, *et al.* believe that broadcasters will have an incentive to ensure that as much of the population as possible has access to digital converters and/or ATV receivers. Indeed, it is

the ability to reach 100% of the population that makes over-the-air broadcasting far more attractive to advertisers than cable or digital broadcast satellite services. But the Commission should do whatever it can to ensure that the number of households currently receiving free over-the-air service does not decline. A universal service fund, and Commission actions to require broadcasters to make equipment available to the public at low cost would both be appropriate mechanisms.

VII. MUST-CARRY AND RETRANSMISSION CONSENT

The Commission asks whether the must-carry and retransmission consent provisions of the 1992 Cable Act should apply to all the potential ATV channels. *FNOPR* at ¶¶82-83. As the Commission itself points out, "[i]f carriage of all material broadcast by the station were required, the dedication of, for instance, five cable channels (one for the NTSC programming and, for example, four multicast programs being offered on the conversion channel) might be required." *Id.* at ¶82.

One thing is clear - incumbent local broadcasters should not enjoy the benefit of mandatory carriage on cable systems to the extent they offer subscription-based programming or other communications services which do not comply with the public interest obligations of Title III. The must-carry and retransmission consent provisions of the 1992 Cable Act are premised on the "intrinsic value" of broadcast television, *i.e.*, it is free, universal, and statutorily bound to serve the public with local and electoral-related programming. *See Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2462 (1994).

As the *Turner* Court noted in deflecting a constitutional challenge to must-carry:

> Congress sought to avoid [by mandating carriage of broadcast television on cable systems] the elimination of broadcast television because, in its words, "[s]uch programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast television signals," and because "[t]here is a sub-

> stantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."...Congress noted that broadcast television is "an important source of local news[,] public affairs programming and other local broadcast services critical to an informed electorate," and that noncommercial television "provides educational and informational programming to the Nation's citizens."

Id. at 2461-62 [citations omitted]

Given the Court's - and Congress' - rationale for the must-carry and retransmission consent obligations, broadcasters should only be permitted to invoke these benefits for free program services that comply with public interest obligations

CONCLUSION

As it seeks comment on how to best serve the public, the Commission must ask broadcasters to be candid about their intentions for the ATV spectrum. Broadcasters say they need to be multichannel video providers to compete with cable and DBS, yet their rhetoric and legislative proposals indicate that many broadcasters want to provide just ***one*** program service of standard quality, exactly what they do today. Many broadcasters now eschew HDTV, and confidently predict that they can engage in multicasting, yet when asked if they would consider reserving capacity for public or other non-commercial uses, they respond that they are unable to anticipate what developing technology will ultimately permit them to do. If broadcasters remain uncertain of what they can or want to do with this spectrum, perhaps the Commission should consider staying these proceedings until such time as the broadcasters solidify their proposal.

Much has changed since the Commission determined three years ago that it was in the public interest to give broadcasters extra spectrum to provide high definition television. Broadcasters decided that they would rather use the spectrum to provide subscription and other

revenue-increasing services. The future of public broadcasting and social welfare programs such as Medicare and Medicaid is in doubt. And members of the public increasingly have raised their voices to express dissatisfaction both with the effect of money on the political process and quantity and quality of children's educational and informational programming.

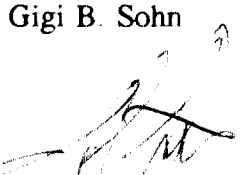
In light of these changed circumstances, the Commission has several choices. It can engage in the biggest corporate welfare giveaway of the decade and simply give this spectrum to existing broadcasters while throwing the public the same tiny crumb of public service it receives today. It can permit new entrants to apply for the spectrum, thereby increasing diversity and giving minorities and women a new opportunity to supplement their paltry broadcast holdings. It can give the spectrum to the broadcasters and impose serious public interest obligations that include public access, free time for political candidates and increased children's informational and educational programming. It can give broadcasters only enough capacity to provide one digital channel, leaving the remainder of the spectrum for public uses, including an auction. Or it can choose to let Congress decide the matter.

While MAP, *et al.* would urge the Commission to adopt any of the last four options, one thing is plain - the first choice is unacceptable. The Commission must not permit broadcasters

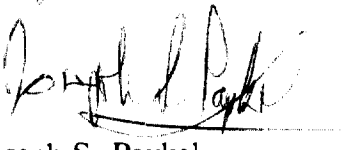
to feast on "Cyberpork"[33] while the public starves.

Respectfully submitted,

Gigi B. Sohn



Andrew Jay Schwartzman



Joseph S. Paykel

MEDIA ACCESS PROJECT
2000 M Street, NW
Suite 400
Washington, DC 20036

Counsel for MAP, et al.

Of Counsel:

Angela J. Campbell
Ilene R. Penn
CITIZENS COMMUNICATION
CENTER PROJECT
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

David Honig
Selena Y. Khan
MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL
3636 16th Street, NW
Suite AG-58
Washington, DC 20010

Law Student Interns:

Lise Ström
UCLA School of Law

Mike Dashefsky
Georgetown University Law Center

November 20, 1995

---

[33]Jeffrey Chester, Executive Director of Commenter Center for Media Education coined the term. *See, e.g.* Jube Shiver, "Congress Urged to Make Broadcasters Pay License Fees for New Technology," *L.A. Times*, Nov. 6, 1995 at D1.

ATTACHMENT A

DIGITAL TERRESTRIAL BROADCASTING

The Government's Proposals

Presented to Parliament by the
Secretary of State for National Heritage
by Command of Her Majesty, August 1995

Cm 2946 LONDON: HMSO £5.60 Net

Contents

		Page
	Summary	1
1	Introduction	3
2	Digital Terrestrial Television	6
3	Digital Terrestrial Radio	15
4	Competition and Ownership	20
5	Conclusion	24
	Annexe A:	
	Technical Annexe: Digital Broadcasting	25
	Annexe B:	
	Chart of relationships under the proposed framework	29
	Glossary	30

Summary

1. Digital broadcasting could mean many more television channels and radio stations. For many people, it will provide their first experience of the full potential of the information superhighways. It will provide significant opportunities for the British manufacturing and programme production industries. In the longer term it may be possible to switch off analogue transmissions of terrestrial broadcast services, releasing significant amounts of valuable spectrum for further broadcasting or other use.

2. The introduction of digital terrestrial broadcasting requires a new legislative framework for allocating use of the spectrum and for licensing and regulating transmission and broadcasting. In drawing up its proposals for that framework, the Government is seeking to:

- ensure that viewers and listeners are able to choose from a wide variety of terrestrial television channels and national and local radio stations;
- give existing national broadcasters the opportunity to develop digital services and so safeguard public service broadcasting into the digital age;
- give terrestrial broadcasters the opportunity to compete with those on satellite and cable;
- help a fair and effective market to develop;
- help UK manufacturers and producers compete at home and overseas; and
- make best use of the available spectrum.

3. For digital terrestrial television, it is likely that six frequency channels will be available initially, with potential coverage in the medium term ranging from 60–70 per cent to over 90 per cent of the UK population. Each frequency channel will be able to carry at least three television channels, and at times possibly many more. These will need to be 'multiplexed' into a single digital signal before transmission.

4. There will be seven radio frequency channels, each with capacity to offer at least six digital stereo programme services. One of these will be allocated to the BBC for its national services and another will be allocated for independent national radio. Four frequency channels have been reserved for local radio services. The use for the remaining channel is still under consideration.

5. The Government proposes that the Independent Television Commission (ITC) will be responsible for licensing and regulating digital terrestrial television, and the Radio Authority for digital terrestrial radio. They will organise competitions for multiplex providers, who will be assessed on the basis of:

- their proposals for infrastructure investment to provide digital services as widely as possible across the UK;

- their proposals for investment to promote the early take up of digital services; and
- the variety of television channels or radio stations they propose to provide.

The Government is considering and would welcome views on whether multiplex providers should make payments to the Exchequer during the initial licence period.

6. The ITC and the Radio Authority will licence multiplex providers, broadcasters and any providers of additional data services. Providers of conditional access systems for digital terrestrial pay-TV channels will require licences under the Telecommunications Act, which will be regulated by OFTEL.

7. Existing national television and radio broadcasters, including the Channel 3 and Channel 5 licence holders, will be offered a guaranteed place on a multiplex. The Government will require that the great majority of the programmes broadcast on their existing analogue channels should also be broadcast on their digital services. Should existing broadcasters wish to develop extensive new services they will be free to contract with multiplex providers for other channels on the same basis as other prospective broadcasters.

8. Ownership regulations for digital terrestrial television and radio will be broadly in line with those for analogue, as set out in the Government's policy document *Media Ownership: The Government's Proposals* (Cm 2872, May 1995). In recognition of the potentially larger number of television channels available, however, companies, including newspaper companies, Channel 3 and 5 licence holders and satellite and cable broadcasters, will be able to control any number of digital terrestrial television licences, in addition to any analogue licences, subject to a ceiling of 25 per cent of the available digital terrestrial capacity (excluding guaranteed places) and provided they remain within a limit of 15 per cent share of total television audience.

1 Introduction

1.1 This document addresses the opportunities and implications of digital technology, which may soon change the face of broadcasting in this country. It follows two other policy documents which addressed key issues for the future of broadcasting: *The Future of the BBC* (Cm 2621, July 1994) and *Media Ownership: The Government's Proposals* (Cm 2872, May 1995). Between them, these three documents set out the Government's policies for broadcasting into the twenty-first century.

What is digital broadcasting?

1.2 Digital technology provides a new and more effective way of transmitting radio and television programmes. It allows much more information than before to be transmitted, more accurately, on a single frequency or through a cable. For the viewer and listener, it offers the potential of more channels, extra services and higher picture and sound quality. Annexe A gives a fuller explanation of the technology's capabilities.

1.3 Digital broadcasting has enormous potential. If broadcasters decide to start using digital technology, they will be able to provide:

- many more channels, nationally and locally;
- a much better television picture or radio signal;
- new services (such as 'widescreen' television and advanced teletext services); and
- much better reception, particularly for car radios and portable televisions.

It will provide many people with their first experience of the full potential of the information superhighway. Using a telephone return link, it will allow home shopping and other interactive news, education and information services. And viewers will be able to browse through the channels available to plan their evening's entertainment.

1.4 The technology is being developed now. To exploit it to the full will require vision, imagination, and significant investment in new equipment, to transmit digital signals and to produce new programmes. And it is the programmes which will be crucial in persuading viewers and listeners to buy the new receivers they will need for digital television and radio.

1.5 There is a strong consensus in the industry that the costs of digital broadcasting have fallen to the point where it is commercially viable. The Government is not in a position to second guess this judgement, which is a matter for commercial decision. But the Government proposes to introduce the necessary legislation which will allow digital television and radio to develop and encourage their success.