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MEDIA ACCESS PROJECT

TESTIMONY OF

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FEDERAL COMMUNICATIONS COMMISSION

Before the

Federal Communications Commission

En Banc Hearing

on

DIGITAL TELEVISION

(MM Docket No. 87-268)

Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service

December 12, 1995

No. of Copies rec'd 0+9
List ABCDE

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SUMMARY

Much has changed since the Commission determined three years ago that it was in the public interest to give broadcasters extra spectrum to provide HDTV. 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 have been placed in doubt. And the public is increasingly dissatisfied 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. However, it must reject one unequivocally. The Commission must not create the biggest corporate welfare giveaway of the decade by simply giving this spectrum to existing broadcasters while throwing the public the same tiny crumb of public service it receives today.

Pending legislative proposals and broadcasters' rhetoric indicate that broadcasters want to provide just one "Standard Definition" television service on the advanced television spectrum, while using the remainder of the spectrum for pay and non-broadcast services. This gives the public no more than what it currently has, while giving a windfall to broadcasters. MAP, *et al.* therefore urge the Commission to allocate only enough capacity for broadcasters to provide one digital channel. This system resembles what is currently under consideration in the United Kingdom. The Commission could achieve this goal in several different ways:

- allocate less than 6 MHz of spectrum, *i.e.*, 2-3 MHz
- allocate the spectrum (by hearing or auction if authorized) to other parties, but ensure broadcasters' conversion to digital through "must carry" rights
- allocate the spectrum to broadcasters, but require them to lease out their excess capacity to nonaffiliated programmers

As a threshold matter, the Commission may not, as a matter of law, limit eligibility for

the ATV spectrum to incumbent broadcasters. What the Commission proposes here is not a mere "reallocation" of spectrum - the Commission is creating a new service. Not only will broadcasters have use of two allocations of spectrum for 10, 15 or more years, but they will be able, for the first time, to provide multiple program feeds and ancillary services. Therefore, under *Ashbacker v. FCC*, 326 U.S. 327 (1945) and its progeny, the Commission must allow new entrants to apply for the spectrum. Permitting new entrants also promotes the twin goals of viewpoint diversity and competition.

Should the Commission nonetheless decide to award the full 6 MHz to incumbent broadcasters, MAP, *et al.* urge the Commission to require that the spectrum be "principally used" for the provision of free, over-the-air broadcasting. "Principal use" should require that 75% of a broadcaster's digital capacity be used for free broadcast service. There is, however, no good policy reason to mandate high definition television service.

It is a central tenet of broadcast spectrum allocation policy that broadcasters are required to provide public service in exchange for a grant of spectrum. Under the Commission's proposal, broadcasters will have the use of an extra allocation of spectrum for at least 10-15 years. The additional spectrum will permit them to provide multiple program services. Thus, core public interest duties (such as reasonable access, equal opportunities, community interest programming, children's educational and informational programming and equal employment opportunity programs) should apply to both free and subscription program services. Moreover, the Commission has the authority and the duty to require additional "enhanced" public interest obligations. These enhanced obligations should include:

- Free time/reservation of capacity for use by political candidates
- Reservation of capacity for noncommercial public use

- Reservation of capacity for children's educational and informational programming, at a minimum, equal to 20% of a broadcaster's total program time.

These public interest obligations will mean little, of course, unless the Commission ensures that all segments of the American public continue to have access to free, over-the-air television. Thus, the Commission should require that broadcasters simulcast their NTSC channel on a program service of the ATV channel. And, to ensure universal access ***and*** the return of valuable NTSC spectrum, the Commission should set a date certain for return of the spectrum (between 5 and 15 years) and create a fund, underwritten by broadcasters, to provide digital receivers or converters to those who cannot afford them.

To the extent that the Commission adopts "must carry" requirements for digital television, it should make clear that only those program services that comply with the core and enhanced public interest obligations are entitled to that benefit. The policy justification for "must carry" was the special role of broadcasting as a free, universal service that serves the public with local and electoral-related programming. To grant any other program service this advantage would run contrary to the expressed intent of Congress. *Turner Broadcasting v. FCC*, 114 S.Ct. 2445 (1994).

Finally, MAP, *et al.* support public broadcasters to the extent that they seek relief from any timetables the Commission may set for construction of ATV facilities, any financial showing it might require and any fees it might set for provision of ancillary and supplementary services. However, the public broadcasting-backed legislation that would create a "trust fund" from the proceeds of ATV auctions solely for public broadcast stations (as opposed to other important public telecommunications uses) is an unfortunate echo of the "spectrum grab" proposed by commercial broadcasters.

TESTIMONY OF GIGI B. SOHN
DEPUTY DIRECTOR, MEDIA ACCESS PROJECT*

Thank you. I appreciate the opportunity to speak before the Commission. Today I am representing the views of Media Access Project, the Center for Media Education, Consumer Federation of America, the Minority Media and Telecommunications Council and the National Federation of Community Broadcasters (collectively MAP, *et al.*).

This may well be the most important proceeding in forty years with regard to free over-the-air broadcast television. Existing television licensees have asked the Commission for a huge gift - enormous amounts of additional, valuable, publicly-owned spectrum. Access to this spectrum will permit broadcasters to provide not one, but multiple, broadcast and non-broadcast services. But broadcasters have offered nothing additional to compensate the public for the vastly valuable additional privileges. Instead, they merely propose to do nothing more than they presently provide in fulfillment of their public interest obligations.

I will be blunt, because this is important: many broadcasters have not been entirely candid about their changing intentions for the ATV spectrum. Here are some examples:

- 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. That is exactly what they do today.

- Many broadcasters now eschew High Definition Television ("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.

- Others broadcasters, realizing that the creation of new revenue streams via ATV has led to calls for auctions from policy makers, and public interest groups alike,

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*Media Access Project is a twenty-five year-old public interest telecommunications law firm that represents the rights of the public to speak and be heard over present and future telecommunications technologies.

> have repledged their allegiance to HDTV, yet urge the Commission not to set minimum requirements for the technology.

If broadcasters continue to be evasive about what they can or want to do with this spectrum, the Commission should stay 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 HDTV. 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 has been placed 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 create the biggest corporate welfare giveaway of the decade by simply giving 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 incumbent 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.

MAP, *et al.* would prefer that Congress auction the ATV spectrum and reserve a sub-

stantial percentage of the proceeds for "public service media" uses like school and library access to advanced telecommunications networks, public broadcasting, production of children's informational and educational programming and minority media development programs.

However, if the Commission does resolve the issue, then MAP, *et al.* urge the Commission to allocate only enough capacity for broadcasters to provide one digital channel.

In the event the Commission nonetheless decides to award all of the available spectrum - 6 MHz - to each incumbent broadcaster, this testimony addresses the amount of non-broadcast services broadcasters should be permitted to provide, the public interest requirements to which they should be subject, the mechanisms the Commission should adopt to ensure continuous, universal access to free over-the-air television and how "must carry" benefits should apply to digital services.

BROADCASTERS SHOULD RECEIVE NO MORE CAPACITY THAN IS NEEDED TO PROVIDE ONE DIGITAL PROGRAM SERVICE.

While the Commission favors giving broadcasters a 6 MHz allocation of spectrum for the transition to digital television (based largely upon the standards adopted for the so-called "Grand Alliance" ATV transmission system), it is by no means certain that the 6 MHz bandwidth choice will stand the tests of time and technology. Broadcasters actively considering digital transmission options have vastly differing perspectives on what kind of signal compression is feasible and likely: some are gearing up to provide multiple program feeds of traditional "free" Standard Definition Television ("SDTV") programming, others are planning one "free" SDTV or HDTV channel, with the remainder to be used for non-broadcast and subscription broadcast services. Indeed, "spectrum flexibility" language in the currently pending telecommunications legislation anticipates that broadcasters will provide just one "free" service, and use the rest for so-called

"ancillary and supplementary services" for which subscriber fees may be charged.*

It is clear that broadcasters benefit from being able to carry more and different services than they carry today. However, if broadcasters simply provide one "free" over-the-air feed, it is fair to ask how the ***public*** is better off. No one yet knows whether an SDTV service would actually provide significantly improved reception or whether it will require reduction in the service area -and the number of viewers reached - by a licensee. The public is entitled to share the dividends of service provided by means of publicly-held spectrum. And there is no reason why it is inherently necessary for incumbent broadcast licensees to be the ones to have exclusive access to this valuable resource This is especially true if the spectrum is to be used for subscription services.** If there is to be no dividend from vastly improved "free" program services, a strong case can be made that the privilege should be auctioned, and not merely given away.

In light of numerous broadcasters' proposals to do no more than carry one "free" digital signal, the Commission should initially permit broadcasters to use only so much capacity as is necessary to provide such "free" digital service. The Commission could accomplish this goal in several different ways. First, it could allocate only enough spectrum to provide one digital channel, *i.e.*, between 2-3 MHz.***

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*For example, the Senate Bill states that if the Commission permits licensees to provide advanced television services, then "it shall adopt regulations that allow such licensees to make use of the advanced television spectrum for the transmission of ancillary and supplementary services if the licensees provide without charge to the public at least one advanced television program service as prescribed by the Commission." S. 652, 104th Cong., 1st Sess. §206 (1995). The House Bill has similar language. H.R. 1555, 104th Cong., 1st Sess. §301 (1995).

**Since subscription services are entirely driven by marketplace demand, and since there are at present no "trusteeship" obligations to provide "equal time," children's programming and other matter, there is no reason why one programmer is better suited than any other to be the vendor.

***MAP, *et al.* recognize that at this time it is a matter of some speculation as to how much capacity may be needed for this purpose, and that this amount will vary from moment to moment, since certain kinds of programming, *e.g.*, sporting events, live music, will need more capacity

Second, the Commission could consider several variations on the digital television model endorsed by the British government. Secretary of State for National Heritage (U.K.) White Paper, *Digital Terrestrial Broadcasting*, Cm. No. 2946 (Aug. 16, 1995)(The "*White Paper*" is provided as Attachment A hereto).* MAP, *et al.* call these variations the "condominium" options. A major advantage of this allocation scheme is that it is compatible with implementing the "Grand Alliance" transmission system.

Under one such variation, the Commission would grant the 6 MHz spectrum (either by hearing or auction, if authorized) to applicants, including new entrants. If an incumbent broadcaster obtains the spectrum set aside for its channel, then its conversion to digital is not in jeopardy. However, if another applicant obtains spectrum intended for the incumbent broadcaster's channel, the Commission could require the winning applicant, either for free or for payment, to carry the broadcaster's channel on its spectrum. The winning applicant would be subject to public interest obligations and fees for ancillary and supplementary services. This variation on "must carry" ensures broadcasters conversion to digital transmission, which they claim is essential to their survival, but forces them to bid against others for the right to use the

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than others. However, it is known that broadcasters will not need the entire 6 MHz bandwidth for Title III regulated activities at least much of the time, and perhaps at all times.

*The British government argues that allocating an entire block of more than 6 MHz of spectrum to only one broadcaster would limit opportunities for new broadcasters and for competition, and would constrain the variety of programming available to the viewer. *Id.* at 8. Under its plan, broadcasters would get only enough capacity to broadcast one program service and would pay negotiated carriage fees to "multiplex providers" for that privilege. *Id.* Broadcasters would be able to secure distribution of multiple program services, but presumably would pay proportionally greater amounts for the right to broadcast multiple signals and would be subject to audience reach caps. *Id.* at 21. While the plan provides for provision of ancillary services by both broadcasters and multiplex providers, these services may take up no more than ten percent of a channel's capacity. *Id.* at 14. Moreover, the plan (which also addresses digital radio) expressly provides that capacity be reserved for non-commercial uses by insuring that the British analog (the BBC) be provided with adequate spectrum to be used subject to the BBC's charter.

spectrum for subscription and non-broadcast services.

A second variation on the "condominium" option assumes that incumbent broadcasters will be gifted with the exclusive right to obtain the entire 6 MHz spectrum set-aside which has been established for ATV. Broadcasters would be permitted to provide one or two free over-the-air services, subject to public interest obligations, but would be required to lease the remainder to nonaffiliated programmers at a rate determined by the Commission that will promote, and not deter, access.* Should these nonaffiliated programmers also be licensees, use of another's spectrum should count against their ownership limits. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6400-02 (1992).**

NEW ENTRANTS SHOULD BE ELIGIBLE FOR ATV SPECTRUM

As a matter of law, the Commission is precluded from limiting eligibility for the ATV spectrum to incumbent broadcasters. In *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the Supreme Court found that Section 309(a) of the Communications Act required the FCC to conduct a comparative hearing when mutually exclusive applications are filed for a station license.

To avoid this mandate, however, the Commission and others have asserted that what is being proposed in this proceeding is a mere "reallocation" spectrum, and that the Commission

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*The rates the Commission has set for cable commercial leased access are instructive in this regard. *See Rate Regulation Report and Order*, 8 FCC Rcd 5631, 5945-54 (1993). Because the Commission has placed an extremely high burden on programmers to demonstrate that leased access rates are unreasonable, and because it has failed to adopt a non-profit rate, very few programmers are able to afford leased access. *See Denver Area Educational Telecommunications Consortium, Inc.*, DA 95-2261 (CSB Oct. 31, 1995) (Non-profit leased access programmer seeking emergency relief from huge rate increase imposed by Telecommunications, Inc.)

**To the extent that HDTV would not be possible on this amount of spectrum, for the reasons discussed in *below*, MAP, *et al.* believe that the public's interest in being adequately compensated (in service, or in money) outweighs its interest in receiving HDTV. In any event, the rapid pace at which digital compression technology is developing could well permit HDTV to be transmitted on less capacity than 6 MHz in the not too distant future.

is not creating a new service requiring comparative hearings.

But to call the proposed grant of the ATV spectrum a mere "reallocation" grievously mischaracterizes the transaction the Commission proposes here. In previous reallocation orders, the Commission has mandated an ***immediate*** exchange of one spectrum block for another. *See, e.g.*, *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954); *Peoples Broadcasting Co. v. United States*, 209 F.2d 286 (D.C. Cir. 1953). But the grant of this spectrum ***is not*** a simple one-for-one exchange. At the very least, broadcasters will have the use of twice as much valuable spectrum at two separate locations for a minimum of ten to fifteen years. And, although the Commission and the broadcasters contemplate that broadcasters will ***eventually*** return one of the channels after the transition to digital is completed, neither firmly commits to such a plan. Indeed, several broadcasters in this proceeding have asked the Commission to postpone a decision on a spectrum giveback. Moreover, the Commission is here creating a new, separate service - digital television -which will permit broadcasters to provide multiple program, non-program and subscription services for the first time.

As a matter of policy, permitting new entrants to apply for the ATV spectrum promotes perhaps the most critical goal of the Communications Act and the First Amendment - viewpoint diversity. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990). Permitting new entrants also promotes competition - a core goal of the Communications Act, and of this Commission. Indeed, "[t]he basic teaching of the *Ashbacker* case is that comparative consideration by the Commission and competition between applicants is the process most likely to serve the public." *Community Broadcasting Co. v. FCC*, 274 F.2d 753, 759.

In addition, permitting new entrants to apply for ATV spectrum provides a race-neutral and gender-neutral means of promoting minority and female ownership. *Cf. Adarand v. Pena*,

63 USLW 4523, 4529-31 (1995). Because courts now subject race-based affirmative action programs to strict scrutiny, and because other programs designed to increase minority ownership have been abolished or have very limited impact,* the Commission now must find a race-neutral and gender-neutral method of rectifying the underrepresentation of minorities and females in television ownership. Allowing new entrants here would provide minorities and women with an opportunity they would not have otherwise to increase their ownership of television stations.

THE COMMISSION SHOULD MANDATE THAT THE ATV SPECTRUM BE "PRINCIPALLY USED" FOR FREE OVER-THE-AIR BROADCASTING

In the event the Commission chooses to give incumbent broadcasters full use of 6 MHz of spectrum, the Commission should mandate that the ATV spectrum be "principally used" for free over-the-air broadcasting. "Principal use" should be defined as no less than 75% of a broadcaster's capacity. Assuming that the "Grand Alliance" system of digital transmission uses approximately 19 megabits per second in a 6 MHz allocation, a broadcaster would have to ensure that at least 14.25 megabits per second are used for free over-the-air service.**

The policy justification for this standard is simple - broadcasters will be receiving free and exclusive use of publicly-owned spectrum that has been reserved for free over-the-air broadcasting 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

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*The tax certificate program was abolished in April 1995. *The Self-Employed Persons Health Care Extension Act of 1995*, Pub. L. No. 104-7 (Apr. 11, 1995). Because revocations and denial of renewal are so rare, the Commission's distress sale policy is not a significant source of new minority licensees.

**If broadcasters do not commit to principally using the spectrum for free, over-the-air broadcasting, the Commission should auction the spectrum. 47 USC §309(j) permits auctions where "the principal use of such spectrum will involve, or is reasonably likely to involve, the licensee receiving compensation from subscribers...."

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 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.

Which 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 subscription broadcast services are made subject to Title III public interest obligations.*

THE COMMISSION SHOULD NOT MANDATE HDTV

There appears to be little reason for the Commission to mandate HDTV service. As is plainly evidenced by the broadcasting industry's massive legislative campaign to attain "spectrum flexibility," it is apparent that few broadcasters seek to provide HDTV soon, if ever, and many are not interested in providing it at all. Moreover, there is little evidence that the American public wants or needs it. *See, e.g.*, Edmund L. Andrews, "Quest for Sharper TV Likely to Bring More TV Instead," *NY Times*, July 9, 1995 at D8; Paul Farhi, "Coalition Plans to Build Model HDTV Station; Facility to Test, Refine New Technology," *Washington Post*, Nov. 9, 1995 at

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*To this end, 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). As MAP has discussed in numerous other filings, *Subscription Video* was wrongly decided. *See, e.g.,* Comments of Media Access Project in IB Docket No. 95-91 (DARS Rulemaking) at 15-18. 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.

B11.* HDTV would provide an extraordinarily clear picture with compact disk quality sound - but it would take an extraordinarily large and expensive television set to receive the technology's full benefits.

MAP, *et al.* believe that the Commission should let the marketplace decide whether broadcasters should provide HDTV. There is no compelling, or even substantial, public interest reason for government action here. HDTV does not increase the number of voices in the marketplace of ideas, nor does it contribute to the civic discourse that is essential in a democracy. There is no indication that HDTV is important to the vitality of free over-the-air television. If the public demands terrestrial HDTV, broadcasters will certainly provide it. Indeed, NBC, CBS and ABC all pledge in their comments filed in this proceeding to broadcast HDTV programming. This mitigates the fear expressed by others that HDTV will not have a fair trial in the marketplace without government intervention.**

THE COMMISSION MUST REQUIRE BROADCASTERS TO PROVIDE NEW AND DIFFERENT PUBLIC SERVICE IN EXCHANGE FOR THE OPPORTUNITY TO CONVERT TO DIGITAL TELEVISION

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

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*Indeed, in Japan, analog HDTV has been a terrific failure. Although HDTV has been available there since 1991, Japanese manufacturers have sold but 30,000 receivers at $6000 each. Farhi, "HDTV: High Definition, Low Priority ?"

**To the extent that the Commission is concerned that its actions may penalize those who have invested in HDTV research and development, it is well to point out that there are numerous defense, medical and other uses for HDTV, and that non-terrestrial transmission technologies and recorded media may prove to be more appropriate means of distributing high definition program matter. *See* William J. Broad, "US Counts on Computer Edge in the Race for Advanced TV," *NY Times*, November 28, 1989 at C1. In any event, the Commission must make the public's interest paramount in this proceeding.

demands enhanced public service obligations.

In the first instance, there appears to be universal agreement that the core public interest obligations that now attach to broadcasters' analog transmissions should also attach to their ATV transmissions. These include, *inter alia*, providing programming that meets the needs of their communities of license, offering "reasonable access," "equal opportunities" and the "lowest unit rate" to candidates for political office, providing programming that serves the educational and informational needs of children, and establishing an equal employment opportunity (EEO) program to provide employment opportunities for minorities and women.*

However, MAP *et al.* diverge with broadcasters on the question of whether the public is entitled to additional and enhanced public interest obligations should broadcasters current allocation be doubled. Not one of the broadcasters filing comments with the Commission has proposed doing anything more for the public than what is being done already. Given the enormity of the benefit broadcasters would receive, such an outcome is unacceptable.

But broadcasters that argue that new obligations are not warranted because what is being proposed here is a mere "reallocation" of spectrum oversimplify the transaction. As discussed *above*, what is proposed here is not the mere movement of broadcasters to another part of the spectrum. Broadcasters will have full use of 12 MHz of spectrum (6 MHz of existing spectrum

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*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. 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. 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). And if candidate access 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). Similarly, there can be no room for flexibility in the Commission's EEO enforcement.

plus 6 MHz of additional spectrum for transition to digital) 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:

- **Free Time/Reservation of Capacity for Use by Political Candidates**

  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.* The Commission could require, for example, that one program service be devoted 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.**

- **Reservation of Capacity for Noncommercial Public Use**

  The conversion to digital transmission will permit broadcasters to become multi-

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*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, 1995 at 12.

**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.

channel 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.

As discussed *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, 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.

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

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, 20% total program time would be reasonable.**

However, broadcasters should have latitude in meeting this standard. For example, if a broadcaster programs multiple channels, the Commission might per-

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*Or, the Commission could condition "must carry" rights upon the provision of such capacity.

**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).

mit broadcasters to fulfill its 20% obligation on a single "children's channel"* or to spread it unevenly across different program services during hours when children are most likely to be in the audience. 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.

NTSC SERVICE SHOULD BE SIMULCAST ON THE ATV CHANNEL

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 there is 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. In all likelihood, persons with ATV receivers will be able to receive NTSC telecasts. Thus, there is little fear of audience loss. However, if this is not the case, and if 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.

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*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.

THE COMMISSION SHOULD ADOPT A DATE CERTAIN FOR THE CESSATION OF NTSC SERVICE ALONG WITH A MECHANISM TO ENSURE UNIVERSAL ACCESS TO DIGITAL TELEVISION

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 time) 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 broadcast-

ers to make equipment available to the public at low cost would both be appropriate mechanisms.

"MUST CARRY" RIGHTS SHOULD ATTACH ONLY TO THOSE PROGRAM SERVICES THAT COMPLY WITH PUBLIC INTEREST OBLIGATIONS

With respect to the question of whether "must carry" rights should apply to all potential ATV channels, MAP, *et al.* preliminarily notes the irony of broadcasters requesting government intervention to require compulsory carriage for all of their digital program services while at the same time advocating marketplace solutions for determining what services and public interest obligations should be provided over the ATV spectrum.

MAP, *et al.*'s position on "must carry" for digital transmissions is simple - since "must carry" is premised on broadcasters' special role as public trustees and their provision of local programming, electoral matter and children's informational and educational programming, this benefit should not attach to any program service that does not comply with these obligations and any enhanced public interest obligations the Commission may adopt here.* *See Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct 2445, 2462 (1995).

PUBLIC BROADCASTING

In this and other proceedings, MAP, *et al.* have urged policy makers to ensure that non-commercial, educational speech can flourish as technology changes. *See, e.g.* Testimony of People for the American Way Action Fund and Media Access Project in Support of S. 2195 (July 15, 1994). MAP, *et al.* therefore has advocated legislation and other policies that would permit local government institutions, libraries, schools, public broadcasters and other nonprofit organizations to have low-cost access to advanced telecommunications networks, and, as discussed

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*This would include subscription-based programming or other services which do not comply with the public interest obligations of Title III.

above, digital television. MAP, *et al.* believe that only with such access will the much-touted "information superhighway" provide the means through which democracy, civic discourse, education and artistic expression can flourish.

Public broadcasting, of course, is a vital component of this noncommercial, nonprofit sector, and MAP has long supported its continuing vitality. Therefore, should the Commission grant part or all of the 6 MHz of spectrum to broadcasters, MAP would support relaxation of the construction and transition timetables and financial qualifications for these stations, and would also urge the Commission to waive any fees for ancillary and supplementary services these stations may provide.

However, MAP, *et al.*'s support should not be counted as a blessing for public broadcasting's larger legislative initiative - the creation of a "trust fund" solely for public broadcast ***stations*** through auctions noncommercial ATV allotments. While MAP, *et al.* do support auctions of spectrum provided that money is reserved for public telecommunications uses ***including*** public broadcasting, they believe that this funding should be made available for other important noncommercial uses, such as school and library access to advanced telecommunications networks, production of children's informational and educational programming and minority media development programs. In its current form, public broadcasting's "trust fund" proposal is an unfortunate echo of the spectrum "grab" proposed by commercial broadcasters.

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 £6.60 Net

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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;