

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
Advanced Television Systems)
and Their Impact Upon the)
Existing Television Broadcast)
Service)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
MM Docket # 87-268

**Request For Leave to Submit
a Late Filing of
Reply Comments
in MM Docket # 87-268**

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The Benton Foundation respectfully requests leave to file reply comments after the due date on the matter of Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service (MM Docket # 87-268).

The time for filing on this proceeding has passed, but the Benton Foundation seeks leave to file late because of a pressing family emergency involving the comments' main author. The emergency forced him to travel out of the area just as the filing was to be completed. As Benton has a small staff, there were no available resources to complete the filing without his presence. With his return, this reply to comments has been completed in the timeliest fashion possible.

We submit that this late filing will in no way prejudice this proceeding or the ability of other interested parties to make their views known to the Commission¹.

For the foregoing reasons, Benton requests leave to file late on this matter.

Respectfully submitted,

February 1, 1996



Andrew Blau
Director, Communications Policy Project
Benton Foundation



Larry Kirkman
Executive Director
Benton Foundation

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¹ Telecommunications reform legislation pending in the Congress, it seems, will delay any action the Commission may take in this matter. (Telecommunications Bill Faces a Vote Today. Wall Street Journal. pg. A3 2/1/96)

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**Reply Comments of
Benton Foundation**

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I Introduction

The Benton Foundation's Communications Policy Project is a nonpartisan initiative to strengthen public interest efforts in shaping the emerging National Information Infrastructure (NII). It is Benton's conviction that the vigorous participation of the nonprofit sector in policy debates and demonstration projects will help realize the public interest potential of the NII. The transition to digital television puts at risk a service available in nearly every home in the nation. The Benton Foundation views free, over-the-air broadcast television as an important information service and a vital part of the emerging wireless and wired NII.

In reviewing the comments in MM Docket No. 87-268, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, the Benton Foundation recognizes a number of competing visions for Advanced Television (ATV) and the use of spectrum. Many of the comments commend the Commission for its pursuit of better – meaning better pictures and sound – television. Although many commenters mention a technically better broadcast, few mention better television content. Programming quality, not picture and sound quality, may be the ultimate litmus test for a public that seems fairly uninterested in High Definition Television (HDTV). The question that the Benton Foundation returns to is, What public interest is being served by the transition to ATV? As the Commission guides us through this transition, what gains will the American public see in children's educational television, the revitalization of public debate, the control of violence on television, and community access?

The Commission seems on the verge of loaning, if not giving, a national resource to an affluent industry in return for abstract gains, among them more efficient use of spectrum and higher quality reception. Many Americans, including members of the United States Congress, may ask if that return on the public's investment is enough. The public has allowed broadcasters to build a business on rent-free public property in return for the broadcasters' promise that they will provide a service that will benefit the public. Now broadcasters want to build a new and improved business on more rent-free property while still holding their original allocation and not committing to the date they are going to give any of it back. This is a great deal for broadcasters. But is it a good deal for the public who will have to reinvest billions of dollars in television receivers in order to gain access to the new business, Advanced Television? The public should get the best deal when deciding who gets to use this public property, how they get to use it, and how it should improve the service that the Commission holds paramount in this proceeding: free, over-the-air

broadcasting.¹

II The Commission should allow for new entrants into broadcasting

The Benton Foundation recognizes and supports the longstanding national policy to encourage viewpoint diversity, and the commitment to diversity of ownership of media outlets as a key tool with which to pursue that goal (*Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 US 547, 1990). The Congress, the Commission, and the Courts have long worked to balance the needs for diversity versus the constraints of spectrum scarcity; better picture and sound quality do not appear to rise to the same policy priority. In granting digital licenses, the Congress and the Commission appear to have three options with a range of effects on the diversity of viewpoints in broadcasting.

Option 1 Preferential allotment of spectrum to incumbent broadcasters

At present, the Commission appears poised to ignore the mandate of *Ashbacker Radio Corp. v. FCC*, 326 U.S. (1945) and to allocate, without comparative hearings, additional spectrum to incumbent broadcasters to create a new service, ATV.² ATV empowers broadcasters to broadcast, at the very least, four channels of Standard Definition Television (SDTV) within the spectrum space needed for one analog channel. Benton supports the comments of the Media Access Project et al (MAP), Fairness and Accuracy in Reporting (FAIR), and others in this regard and asserts that this runs counter to half a century of communications policy. Far from ensuring an increase of diversity of viewpoints, this action quadruples a single viewpoint.

Option 2 Auctioning spectrum

If the primary use of spectrum is not for free, over-the-air broadcasting, it should be auctioned. These auctions would level the playing field, and they would serve as a bare minimum of the compensation that the public should expect for use of its property.³

¹ FCC Report No. DC-95-103, MM Docket No. 87-268. July 28, 1995

² Fourth Notice of Proposed Rule Making (FNPRM) at 25 and 26.

³ If current statute changes and the Congress directs for this broadcast spectrum to be allocated by auction, the Benton Foundation suggests that these monies should not be directed solely at the national deficit and that noncommercial licensees be exempt from these auctions. The reduction of the national debt, no doubt, is in the public interest, but not at the expense of the National Information Infrastructure (NII). There is no reduction in a deficit if an asset is sold off to pay for it. The best use of auction funds, we believe, is a reinvestment in the NII and

The subject of auctioning broadcast spectrum has gained increased publicity as an option that offers the public the greatest monetary return for use of public property and increases spectrum efficiency. Auctions could, potentially, result in new (albeit extremely well financed) broadcasters as well.

Any move to auction the airwaves for new entrants should distinguish commercial and noncommercial broadcasting. Public broadcasting is the public library of the information age. Like the library, it is available to all Americans regardless of ability to pay, it is based in and responsive to the cities and towns and villages that make up the fabric of this country, and, in countless ways, it is helping users better understand and appreciate the world around them. Benton supports an exemption for noncommercial licensees from any possible auction of spectrum. As nonprofits, public broadcasters have limited funding sources, none of which is sufficient to support its capital or operating costs. Also, public broadcasters embody substantial federal, state and local investment⁴ that is important to protect. Auctions put these public investments at risk and, by doing so, seem counter to the public interest. In a number of previous filings, public television has explained its complex funding process. The Benton Foundation supports the plan put forth by the American Public Television Stations. Their approach to resource sharing and gradual transition appears reasoned and creative. The funding mechanism included in the proposal is innovative and crucial to the ability of public broadcasters to 1) convert to digital ATV facilities, 2) raise operating funds, and 3) transition noncommercial radio stations to digital transmission as well.

Any move to auction spectrum should also be informed by an awareness of the policy limitations of this action. The Benton Foundation would like to outline some undesirable effects of spectrum auction as detailed in Prof. Eli Noam's *Beyond the Spectrum Auctions: Open Spectrum*

media in the public interest. The Benton Foundation suggests that a portion of the funds raised by an auction of broadcast spectrum be used to create a Public Interest Media Trust Fund. This Fund, as well as broadcast spectrum auctions, would have to be created by an act of Congress. The Fund would be used to support noncommercial production and distribution mechanisms serving media in the public interest.

⁴ In fiscal year 1993, for example, the Corporation for Public Broadcasting contributed \$186.2 million to public broadcasters. In that same year, State and local contributions were \$278 million.

Access.⁵

- Auctions serve as a potentially significant entry barrier (i.e., cost) for new users and therefore retard or slow competition and reduce, over time, efficiency gains.
- Auctions lead to oligopoly, as only the best funded organizations will be able to afford licenses.
- Auctions serve as a front-loaded tax that the public will end up paying in higher communication fees.
- Auctions without limits on the duration of licenses lock policy into a paradigm that may not be most effective and/or efficient in future.
- Auctions decrease tax revenues since license payments can be depreciated against corporate income (each \$1 of auction revenue tax is reduced by about 25 cents of reduced tax revenues in present value).
- Auctions sell future assets to solve today's budget crisis.

Option 3 Comparative hearings

On the question of eligibility for digital broadcasting licenses, the Benton Foundation supports the comments filed by MAP. Under the mandate of *Ashbacker Radio Corp. v. FCC, 326 U.S. (1945)*, the Commission should ensure that there is fair opportunity for all qualified parties to obtain use of spectrum during the creation of the Advanced Television System. If the digital channel is, in fact, to be used for free, over-the-air broadcasting, this spectrum should be allocated through the comparative hearing process. An existing broadcaster eligibility test for new licenses would be an unfair barrier to new entrants into broadcasting. The Commission should allow for new entrants into broadcasting and promote a diversity of voices in the industry. Comparative hearings should focus not only on the economic viability of a prospective licensee, but also on firm, enforceable commitments to the role of broadcaster as public trustee.

III Definition of services should reflect the Commission's commitment to free, over-the-broadcasting

1) Spectrum should be used principally for broadcast

As the intent of the FNPRM is to ensure the future of free, over-the-air broadcasting, the Benton Foundation agrees with those commenters who argue that additional spectrum should be used principally for broadcast. In particular, Benton agrees with the comments filed by the Media

⁵ Noam, Eli. "Beyond the Spectrum Auctions: Open Spectrum Access." Columbia Institute for Tele-Information, Graduate School of Business, Columbia University. Unpublished paper, 1995.

Access Project. "Principal use" should be defined as – at the very minimum – no less than 75% of a broadcaster's capacity. As digital capacity over any medium can be measured in bandwidth, Benton encourages the Commission to measure use as 75% of the 6 MHz allocated.

2) Spectrum flexibility affords incumbent broadcasters an unfair advantage over competitors

In the joint comments of broadcasters, they object to any limitations on the provision of ancillary and supplemental services. This "spectrum flexibility" would allow broadcasters to provide a wide range of services beyond free, over-the-air broadcasting, including Pay TV, subscription, paging, and data transmission. If, in fact, digital spectrum licensees are allowed this flexibility, there is no reason why incumbent broadcasters should receive a presumption of preferential access to the additional spectrum. Broadcasters have no "special" claim to this spectrum unless they are going to do what makes them special in the eyes of policymakers: free, over-the-air broadcasting with its attendant trustee duties in a community. If broadcasters are to merit this special consideration, they must offer public interest programming such as children's educational television, free time for candidates, and community access. Also, broadcasters have no proven expertise in supplying non-broadcast services. They can offer no guarantee that providing these services will quicken the transition to all-digital television.

A free spectrum allocation limited to incumbent broadcasters that allows for "spectrum flexibility" has serious policy defects:

- It successfully bars potential new entrants into broadcasting. As comments by *Ameritech New Media Enterprises* point out, any company that may wish to compete with existing broadcasters in providing ATV will have to buy available spectrum from some source while existing broadcasters will receive the spectrum for free.
- It hinders emerging industries dependent on spectrum as the resource becomes even scarcer while broadcasters use twice as much as they do now.
- It gives broadcasters providing non-broadcast services an unfair advantage when competing against spectrum-dependant industries that have paid for spectrum use.

The public should not be asked to relinquish additional resources unless the broadcasting industry makes firm commitments to become more responsive to the communities they serve in the form of increased public interest obligations.

3) Mandating HDTV minimums serves no public interest

As for High Definition Television (HDTV), again the Benton Foundation agrees with comments filed by MAP, "HDTV does not increase the number of voices in the marketplace of ideas, nor does it contribute to the civic discourse of democracy." Therefore, Benton sees no reason why the Commission should mandate HDTV minimums. The marketplace will best decide the public's interest in HDTV. Digital transmissions from both cable operators and satellite broadcasters will offer the competition that broadcasters will have to face. Their discretion should decide if technically better broadcasts, more television, or better programming is the best way to compete.

IV Increased public interest obligations in exchange for additional spectrum and revenue streams is the best bargain for the American public. These obligations are neither disruptive, burdensome, nor unreasonable.

By mandating a move to a digital advanced television system, the Commission is, in effect, mandating a sizeable investment for both incumbent broadcasters and the American public. The transition will require major capital investments by broadcasters, who will have to replace analog equipment with digital equipment in order to remain in business. The viewing public will have to invest in new and (at least initially) more expensive television receivers and video cassette recorders. In return, broadcasters will receive new revenue streams in the form of multiple SDTV broadcasts, and – if allowed spectrum flexibility – pay-per-view TV, subscription broadcasts, and ancillary services such as paging and data transmission. These additional revenue streams will help broadcasters raise needed capital as well as to pay for these investments. But after these investments are paid for, the revenue streams remain. The new services possible with digital technologies will provide additional sources of profits for broadcasters. The spectrum broadcasters have after the transition, therefore, is more valuable than the spectrum they have now because it will be used more efficiently.

In light of the increased revenue streams, not to mention their occupancy of a valuable public asset, that the transition to ATV will create, it is not unreasonable to ask broadcasters for additional public interest obligations⁶. These obligations should include:

⁶ per FNPRM at 34

1) enforceable guidelines for children's educational television

The transition to digital television is a perfect opportunity to strengthen the quality of children's programming. The transition could more than quadruple the number of channels available to young viewers. Broadcasters are receiving new revenue streams from their use of additional spectrum and can make the transition profitable for the public by sharing the community's commitment to educate children.

Historically, children have been awarded special status in broadcast regulation. Children are particularly vulnerable to commercial exploitation. Three surgeons general have presented Congress with evidence that violence on television has negative effects on children. Even though the Congress passed the Children's Television Act in 1990, current FCC rules do not define what constitutes educational programming, or how much broadcasters should air. Under current guidelines, commercial programs like *Mighty Morphin Power Rangers* and *Beverly Hills 90210* are allowed to satisfy broadcasters' programming requirements for children. "By the age of 18, the average child will have watched 22,000 hours of TV – more time in front of the tube than in the classroom."⁷ Research has made clear what a powerful educational medium television can be when used thoughtfully. Children who regularly see *Sesame Street* and *Mister Roger's Neighborhood* "got along better with other children than those who didn't."⁸ With television as such a strong influence, it is clear that what is on television for our young people needs to be based on programming quality not just on revenues gained from advertising.

Thus, the Benton Foundation suggests that the Commission define clear, concrete guidelines for children's programming, guidelines that could include:

- minimum hours of programming per day. With ATV, broadcasters will be able to air at least 96 hours of programming per day. Benton argues that at least six hours per day of programming should be devoted to noncommercial, educational television for children. This minimum attaches to the assignment as a whole and not to each SDTV channel broadcasted.
- hours during which programming should be shown. Benton suggests that broadcasters be mandated to air the programming when children are most likely to

⁷ Children, Values and the Entertainment Media. Children Now, 1995

⁸ Ibid.

see it – between 7:00 am and 9:00 pm.

- exclusion of all commercial programming (i.e., *Beverly Hills 90210*, *Inside Stuff* and *Mighty Morphin Power Rangers*) to count as children's educational TV.

2) free time for candidates

The Benton Foundation reaffirms its commitment to free broadcast time for candidates. In 1993, the Benton Foundation, in collaboration with Common Cause, the Center for Responsive Politics, Henry Geller, and others, filed a petition⁹ asking the Commission to commence a proceeding that would result in a policy on requiring broadcast licensees to devote a reasonable amount of free time during the broadcast day to appearances where the candidate uses the station facilities as an "electronic soapbox." To date, this petition has not been acted upon, and the Benton Foundation reasserts the special obligation public trustees have to present political broadcasts. Benton's proposal affords great discretion to the licensee and is not burdensome or disruptive – especially when broadcasters will soon be able to broadcast multiple Standard Definition Television channels simultaneously.

3) carriage privileges for programming content ratings

The comments of the A.C. Nielsen Company urge the Commission to "refrain from making any substantive change to the currently-applicable requirement that cable systems carry (Nielsen codes)." These codes, Nielsen argues, are crucial to free, over-the-air broadcasting as they empower advertisers in decisions about which programs and broadcasters to sponsor. The needs of the public rate at least as high as those of advertisers in the Commission's rule making. The Benton Foundation proposes that similar codes gain "must carry"-type rights in the age of digital television. These codes are a necessary compliment to the so called "V-chip" technology that is included in the pending telecommunications legislation in the Congress. Digital technologies offer distributed control over what programming reaches the home. For years there has been spirited debate about the amounts of violent and sexual programming on television. A rating system along with V-chip technology would empower parents and other viewers to choose what types of programming enter their homes.

Of course, there will also be spirited debate over who rates the programming. Should the government set standards? Should broadcasters be allowed to create their own rating system,

⁹ see Appendix A

perhaps based on that of the motion picture industry? The Benton Foundation proposes that there be any number of standard-setting bodies from the PTA to developmental psychology experts to academics and that the ratings from all these groups be encoded into the programming. This rejection of a single, official rater lessens the chances for charges of censorship and further empowers viewers to choose what types of shows they want to watch and want their children to watch.

As a model for this new rating system, the Benton Foundation suggests the Platform for Internet Content Selection (PICS). PICS is a cross-industry working group whose goal is to facilitate the development of technologies to give users of interactive media, such as the Internet, control over the kinds of material to which they and their children have access. PICS members believe that individuals, groups, and businesses should have easy access to the widest possible range of content selection products, and a diversity of voluntary rating systems. PICS allows for both voluntary self-ratings by content providers and independent, third-party labeling services. As TV moves into the digital age, it too can empower end-users with content control.

4) community access television

At the very least, with the same amount of spectrum as they use today, broadcasters will be able to provide four SDTV channels with ATV. As ATV will make broadcasters into multiple-channel operators, they should be encouraged to provide public access options to communities as cable operators have. Broadcasters have long claimed that their services are crucial to an informed democracy. Supporting public access opportunities will strengthen broadcasters' argument that they provide a democratic service by enabling those who have traditionally been excluded from the media to speak on television.

To truly build a connection between access and democracy, public access guidelines should encourage stations to teach groups how to communicate and distribute their message in a video medium. Community access television offers programming that is most responsive to the community because it comes from the community itself.

With ATV multicasting, broadcasters could provide one channel exclusively for public interest programming. These public interest channels could be the home for children's educational programs, free time for politicians, other political broadcasts, and community access. Even with these commitments to children, political debate, and diversity of viewpoint, broadcasters gain, at

minimum, three channels on which to offer commercial, entertainment television.

V Conclusion

The final matter that the Benton Foundation would like to address is the amount of public input in this proceeding. In selecting members for the Advisory Committee for Advanced Television (ACATS), the Commission chose individuals "so as to obtain diverse and representative viewpoints from parties associated with the television industry."¹⁰ Although meetings of the committee were open to the public, public input was not encouraged. As one meeting notice stated, "there will not be an opportunity for public participation in the discussion unless specifically requested by the Chairman."¹¹ Reviewing the comments in this docket, we find that the discussion is dominated by commercial interests. Perhaps because of the vested interests broadcasters have in this proceeding, coverage of this issue has been scarce in the electronic media. However, a growing awareness appears to be dawning of what is at stake. Now that the industry has had its say on the transition, the Benton Foundation calls upon the Commission to turn its attention to the needs of viewers and the rights of the public. However the Congress and the Commission decide to allocate the spectrum in question, the proceedings in this docket should allow for further public comment on the public interest obligations that should be attached to new licenses. There is still time to engage the public in defining what "in the public interest" means in the age of digital television.

February 1, 1996

Respectfully submitted,

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¹⁰ FCC. Advisory Committee on Advanced Television Service. 56 FR 58375. November 19, 1991.

¹¹ FCC. Advisory Committee on Advanced Television Service special panel meeting. 58 FR 6412. January 23, 1993.

Appendix A

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

PETITION OF COMMON CAUSE, HENRY GELLER, THE BENTON FOUNDATION, CENTER FOR RESPONSIVE POLITICS , ET AL., FOR INQUIRY OR RULEMAKING TO REQUIRE FREE TIME FOR POLITICAL BROADCASTS

1. Introduction. This petition is submitted by a group of non-profit, disinterested organizations described briefly in Appendix A attached hereto. The groups request that the Commission commence a proceeding, either of an inquiry or rulemaking nature, to adopt a policy requiring broadcast licensees, during a short specified period before a general election, to devote a reasonable amount of free time during the broadcast day to appearances where the candidate uses the station facilities as an "electronic soapbox." The licensee could consult with other stations in the area in determining the races in which such free time is to be afforded, but the selection would be one solely within the licensee's discretion, as we believe is required under the statutory scheme. The details of the proposal and the grounds therefor are discussed below.

2. The broadcast licensee, as a public trustee, has a special obligation to present political broadcasts. It is undisputed that broadcasters are public trustees, "...given the privilege of using scarce radio frequencies as proxies for the entire community..." (Red Lion Broadcasting Co. v. FCC, 396 U.S. 367, 397 (1969)).¹ Two

¹ See also CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981). Significantly, the United States relied heavily on Red Lion in urging the constitutionality of the "must carry" provisions of the 1992 Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460. See Memorandum of Federal Respondents, Turner Broadcasting System, Inc. v. FCC, Case No. A-798, Oct. Term, 1992, at 3, 16, 18, 23, 25-26. Red Lion also

recent laws, the 1992 Cable Act (see n.1) and the 1990 Children's Television Act² establish Congress' continuing recognition and stress of this concept: "... America's system of broadcasting ... is a unique scheme that emphasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use."³ This is the peg on which the "must carry" requirement rests. Further, the broadcasters themselves, acting through their associations, have vigorously opposed spectrum usage fees or spectrum auctions specifically on the ground that they have a public service obligation and therefore cannot act like the usual business simply to maximize profits.⁴ Significantly, the recent budget bill does exempt broadcasters from its auction provisions because of this public trustee responsibility.

The licensee necessarily has great discretion in fulfilling that public trustee role. But the Act makes clear that there are two public service areas upon which the broadcaster must focus: educational and informational programs for children (television licensees; see n. 2) and political broadcasts. As the Supreme Court made clear in Farmers Educational and Cooperative

established the constitutionality of the fairness doctrine and its rules and that the Commission does not exceed its authority "in interesting itself in ... the kinds of programs broadcast by licensees" (id. at 395).

² See Children's Television Act of 1990, Pub. L. 101-437, 101st Cong., 1st Sess., 47 U.S.C. Secs. 303a-b.

³ S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991).

⁴ See, e.g., Broadcasting Magazine, April 19, 1993, at 64.

Union v. WDAY, 360 U.S. 525, 534-5 (1959), that is the essential message of Section 315 of the Act:

...the thrust of section 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests...⁵

The legislative history of Section 312(a)(7) affirms this licensee duty to present political broadcasts. In 1971, in connection with campaign reform legislation, Congress added the "lowest unit rate" requirement of Section 315(b), and, fearful that broadcasters would then avoid political broadcasts, especially campaign commercials, it also inserted the requirement of Section 312(a)(7) that broadcasters afford reasonable access for candidates for Federal office. The Senate Report (No. 92-96, 92d Cong., 1st Sess. 28 (1971) states:

The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest, and the FCC should

⁵ The Commission and its predecessor agency, the Federal Radio Commission (FRC), from the earliest days, have taken into account whether a licensee has met its responsibilities in the field of political broadcasts. See Memorandum of the FCC Concerning Interpretation of Second Sentence of Section 315(a), FCC 63-412, Mimeo No. 34812, at 10. Thus, in the 1929 Great Lakes case, the FRC stated:

In a sense a broadcasting station may be regarded as a sort of mouthpiece on the air for the community it serves over which ...its political campaigns... may be broadcast. FRC 3rd Annual Report, at 32-36.

See, also, Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 P & F, R. R. 180 (1960).

continue to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license. Certainly no diminution in the extent of such programming should result from enactment of this legislation.

In order to emphasize the public interest obligation inherent in making broadcast time available to candidates covered by [this law - i.e., candidates for Federal office], S.382 contains an express provision [312(a)(7)] to this effect. (Emphasis added).⁶

There is one further background point before turning to the thrust of our petition. While the term "political broadcasts" largely connotes presentations by the candidate (usually in short commercials), there is another important facet -- the licensee's coverage of a campaign as part of broadcast journalism. Congress has soundly sought to promote this important contribution to an

⁶ See also the Senate Report, supra, at 34:

The duty of broadcast licensees generally to permit the use of their facilities by legally qualified candidates for these public offices is inherent in the requirement that licensees serve the needs and interests of the community of licensees. The Federal Communications Commission has recognized this obligation in its Report and Statement of Policy Re: Commission En Banc Programming Inquiry (1960).

As a "conforming amendment" needed in light of the new Section 312(a)(7), the legislation also added the underlined phrase to the second sentence of Section 315(a): "No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate." See S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess. 22. The purpose of this sentence is to make clear that the broadcaster is not a common carrier and that it can exercise discretion in selecting the races to be covered (but now with the exception specified in 312(a)(7) for Federal candidates). See Memorandum, cited in n.5, supra. We agree with this point concerning the broadcaster's wide discretion. See pp. 14-15, infra.

informed electorate by exempting such journalistic efforts as bona fide newscasts, news interview programs, documentaries, and on the spot coverage of news events, from the equal time requirement of Section 315(a). See 47 U.S.C. 315(a)(1)-(4). Such programming, which includes coverage of major party conventions or debates or the several interview shows and the extensive coverage in newscasts, has made a vital contribution. There is certainly room for criticism (such as the inordinate focus on the "horse race") but that is beyond the authority of the Commission (or any governmental body).

Our petition does not concern this facet. It focuses on the uncensored use of the station's facilities by the candidate themselves -- in their own language or presentations rather than through the editorial filter or selectivity of the broadcast journalist. In short, it is the candidate's use of broadcasting as an electronic speaking platform or soapbox.

3. Broadcasters should devote a reasonable amount of free programming time for candidates to use as an electronic soapbox.

The thrust of this petition is that the Commission, in an appropriate proceeding, should adopt a new policy that requires broadcasters, during a specified period before a general election, to afford a reasonable amount of free programming time for candidates to use as their electronic soapbox. First, we stress that in advancing this proposal, the groups are in no way seeking

to effect campaign finance reform. Such reform is clearly needed⁷, but the proposal here not a solution to campaign finance reform, and, equally important, such reform is a matter beyond the expertise of the Commission.⁸ Rather, the petition is based squarely on fleshing out a core responsibility of broadcasters as public trustees.

Significantly, there has been a seachange in this respect from the last decade when the watchword was deregulation and reliance upon the marketplace. As stated, Congress enacted the 1990 Children's Television Act, requiring licensee and Commission focus (at renewal) on whether the educational and informational needs of children have been served, including by programming specifically designed to do so. The Commission recently issued a Notice, proposing, inter alia, that there be a "core" programming definition of such public service programming for children and that a quantitative processing guideline be adopted for use at renewal time.⁹

⁷ Several of the organizations filing this petition have been long engaged in such reform efforts, and indeed, are now engaged in the pending legislative process in the Congress. See, e.g., Cong. Rec. S7448-7462, June 17, 1993. In their view, as stated above, adoption of this proposal is definitely not the answer to campaign finance reform and does not in any way obviate the need for such reform measures.

⁸ We thus agree with the main ruling in the Memorandum Opinion and Order in the Matter of Petitions for Rule Making to Require Free or Lower Cost Time by Candidates for Public Office..., 37 P & F, R.R. 2d 489, 491 (par.6). We recognize that, especially at this time, the Commission is not going to act to effect campaign reform, but as shown, it clearly has authority to act to insure programming operation consistent with the public interest.

⁹ In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 93-48.

Essentially we propose the same approach for this area. Congress has similarly singled it out as a matter of special focus at renewal time. See 2-4, supra. There is, we believe, a similar need for specific focus on one aspect -- the provision of free programming time for the candidates -- and for a reasonable quantitative approach, whether by rule or policy or processing guideline. Even the most cursory examination of broadcast operations during campaign periods establishes that there is a considerable amount of journalistic efforts (including debates, interviews, news excerpts, etc.) and of commercials purchased by candidates, and very little programming time afforded for longer presentations by the candidates.¹⁰ Our proposal is designed to remedy that deficiency.

As a practical matter, the present campaign structure runs to very heavy emphasis on the spot announcement. It may be argued

¹⁰ For example, we looked to the last political broadcast survey conducted by the FCC, Report on Political Broadcasting and Cablecasting, Primary and General Election Campaigns of 1972, March, 1973, and to the races which would be expected to be most in need of additional longer presentations (see 14, infra). Examination of Tables 3 (Senatorial Candidates; General Election); 5 (Congressional Candidates; General Election); 7 (Gubernatorial Candidates; General Election) and 9 (Lt. Governor Candidates; General Election) establishes that in the very great majority of states, the charges for spot announcements amounted to over 90% of the political charges by broadcast stations and often was 100%. Similarly, in the 1968 FCC political broadcast survey showed that in 1968, of the \$49.3 million political charges by broadcast stations, 91% was for spot announcements and only 9% was for program time. More than 5 million political commercials were broadcast in that year. FCC Release, 36689, Aug. 27, 1969. This facet, the small amount of programming time for uncensored ("soapbox") political presentations, is clearly a matter to be thoroughly explored in the proposed proceeding.

that this is not the fault of the broadcast industry but of the candidates themselves, who could purchase programming time but, for by far the most part, much prefer spot announcements; that the Communications Act, practically speaking, reflects this preference since, in the course of campaign reform legislation, it provides preferentially low rates (the lowest unit charge requirement of 315(b)) used very largely for these spot announcements; and indeed, the proposed reform legislation now pending would further reduce the charges for such commercial time.¹¹ There is no question but that this large preference for spot announcements is the reality, and that the Congressional scheme for campaign finance reform, especially the proposal now under consideration, therefore focuses on that reality.

But so also must the broadcaster and the Commission take into account that reality and the crucial fact that it results in a dearth of programming presentations by the candidates. There is an obvious difference between the short commercial and the longer programming presentation in contributing to an informed electorate on the campaign issues. No useful purpose would be served by going into the question of whether the political spot announcement -- some of only eight seconds duration -- well serves the democratic process. Unlike in the United Kingdom and many other countries, the political spot is a fixture in the U.S., does contribute to the political debate, and is entitled to full First Amendment protection. The question for the broadcaster and the Commission is

¹¹ See Section 131 of S. 3, 103rd Cong, 1st Sess.

whether the public trustee scheme calls for some significant contribution by the broadcast industry to more in-depth information on campaign issues as presented by the candidates. We believe that it clearly does.

As a further matter, we point out that not all races receive broadcast exposure, either in journalistic programs or commercials. There are many Congressional or local races of considerable importance where the purchase of commercial time or coverage in news-type shows is minimal or lacking. So here again, acting as a public trustee, the broadcaster can fill a gap in contributing to the informed electorate, so crucial to the proper functioning of our democracy.

Again, we must stress how much has been given the broadcaster -- the free use of valuable spectrum in exchange for public service, "must carry" on cable systems "...because television broadcasting plays a vital role in serving the public interest ...[including] public affairs offerings..."¹² It is the heart of our petition that it is therefore reasonable to require the broadcaster to make a substantial contribution in the core public service area of longer duration political programming.

This is not a comparative matter between the broadcasting and cable industries; as stated, our position rests on the public trustee scheme applicable to broadcasting. But the comparison is nevertheless instructive: Cable presents informational programming such as CNN and local or regional newscasts, and subsidizes a

¹² See S. Rep. 102-92, 102d Cong., 1st Sess., 41-42.

marvelous public affairs channel, C-SPAN 1 and 2; in addition it provides public, educational and governmental channels, and can be assessed franchise fees up to 5% of gross revenues (now totalling roughly \$800 million a year). Broadcasting of course does render very substantial public service in its news and informational endeavors. As noted, however, it resists any assessment of a spectrum usage fee on the ground that it is obligated to render public service at the expense of profits. Surely it is then not unreasonable to require a significant contribution in this crucial area of political programming.

4. The proposal is reasonable, affords great discretion to the licensee, and is not burdensome or disruptive.

We believe that there should be quantitative guidelines as to the amount of free programming time for candidates and the general times for broadcast. The Commission clearly has the authority to so proceed.¹³ We urge that it should do so for two reasons. First, as shown by past experience (including the recent situation

¹³ See Sections 303(b), 303(r), 4(i), 307, 309, 312(a)(7) and 315. If, as Red Lion holds (395 U.S. at 393), the Commission can properly require licensees "to give adequate and fair attention to public issues...", it follows, under U.S. v. Storer Bctg. Co., 351 U.S. 192 (1956) and FCC v. ABC, 347 U.S. 284, 289 n.7 (1954), and the above cited sections, that the Commission can prescribe by rule or policy what constitutes "adequate" attention to this category of public issues (free programming presentations by the candidates), to obtain a renewal. Indeed, prior to the deregulatory actions of the 1980's, with their reliance on the marketplace, the Commission used processing guidelines to assess whether licensees had met their public interest responsibilities in presenting news, public affairs and other non-entertainment programming. Whether the Commission proceeds by rule or processing guideline, the applicant is entitled to make a showing as to why its renewal should be granted in the particular circumstances.

as to implementation of the 1990 Children's Television Act, without such quantitative guidelines, the policy is simply too "mushy" and runs the clear danger of being ineffective. Second, in this sensitive First Amendment area, we urge that it is wrong not to let the licensee and the public know what the ground rules are. The renewal applicant is going to be assessed on this score; to hold that its renewal must be denied because of inadequate performance in this respect, without any prior guidance, contravenes the First Amendment.¹⁴ Further, by meeting the guideline, the incumbent will not suddenly find itself at a disadvantage in a comparative renewal proceeding.

The approach should be one that constitutes a significant contribution -- yet does not unfairly burden the broadcaster, is not unduly disruptive of its schedule, and leaves the licensee with the greatest possible discretion as to the actual programming decision, as is required by the statutory scheme in the broadcast field. See CBS v. DNC, supra.

Accordingly, we suggest as the point of departure for study and comment the following proposal: that the period in which these broadcasts must be made available be confined to 30 days before the general election in even-numbered years and 15 days in odd-numbered years when there are fewer offices being the subject of campaigns; that for television, the amount of time to be devoted be 20 minutes

¹⁴ See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.D.C.1970), cert. denied, 403 U.S. 923 (1971) ("... a question would arise whether administrative discretion to deny renewal expectancies, which must arise under any standard, must be reasonably confined by ground rules and standards...").

each day, 6 a.m. to midnight, at least five minutes of which must be in prime time (with the other three five minutes segments occurring in other day parts)¹⁵; and that in radio with its generally very short talk formats, the figures would be six minutes, with at least one minute segments, including one in "drive time."

We believe that the daily amount is not burdensome, is confined to a narrow window each year, and can be accommodated without disrupting the program schedule. In television, for example, the five-minute segments could be inserted at the end of some half-hour program, with no disruption of the schedule. A number of programs were produced in past elections tailored to such insertion, and could be again so designed, if this approach were adopted.¹⁶

While we propose this approach in order not to be burdensome

¹⁷ or disruptive, we point out that it does accomplish a great

¹⁵ Alternatively, two of the five-minute segments could be required to be broadcast in prime time.

¹⁶ See also WGN Continental Broadcasting Co., 58 FCC2d 1142 (1976), where in the 1976 campaign WGN had refused to sell short spot announcements to candidates, on the ground that political issues should not be "hawked" like a commercial product; it had numerous five minute segments and some 15 and 30 minute segments available. The Commission ruled against the licensee. But see dissenting opinion of Commissioner Robinson, at 1145; Rosenbush Advertising Agency, Inc., 31 FCC2d 782 (1971) (permitting a policy of political spots being at least five minutes duration).

¹⁷ The amount of time in these narrowly confined annual windows could readily be sustained, particularly with the adjustment in program length described above. It may be argued that many broadcasters, especially in AM radio and UHF independent operations, are losing money. That is true, but it also means that there is ample room for these five-minute (or indeed longer)