

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

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NOV 16 1998

In the Matter of:)
)
Application of Section 73.606(b),)
Table of Allotments, Television)
Broadcast Stations and Section 73.622(b),)
Table of Allotments, Digital Television)
Broadcast Stations (Buffalo, New York))

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 98-175
RM-9364

98-175

TO THE COMMISSION

**COMMENTS, COUNTERPROPOSAL,
AND PROPOSAL TO RESERVE ALL
CHANNELS USED BY NONCOMMERCIAL
TELEVISION STATIONS**

David Earl Honig
3636 16th Street N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005

Counsel for the Coalition
for Noncommercial Media

November 16, 1998

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Introduction

The Coalition for Noncommercial Media ("CNM"), by counsel and pursuant to 47 CFR §1.415(a), respectfully submits these Comments in response to the Notice of Proposed Rulemaking, DA 98-1941 (released September 25, 1998) ("NPRM").

Summary

The core issue raised by the NPRM -- whether to delete a noncommercial reservation to allow the sale of a public television station to a commercial operator -- is of profound public importance to the future of public broadcasting in Greater Buffalo and across the nation. If Channel 23 is dereserved, we may expect a flood of requests by other public broadcasters seeking to sell off the public's birthright -- second channel public television service.

The Commission should decline absolutely to dereserve any public television channel in Buffalo or anywhere else, if the dereservation would result in the loss of a public television station.

As ownership concentration accelerates in the wake of the 1996 Telecommunications Act, viewpoint diversity is more threatened than ever. One unfortunate result of commercial concentration is that public television has become an endangered species. That is why this is not the time to reduce the availability of the one solid, secure opportunity for the presentation of diverse viewpoints: local public television stations. This is especially not the time to kill off the "second service" channels, which typically cater to smaller audiences underserved both by commercial broadcasting and by traditional, first-service public broadcasting.

Pursuant to 47 CFR §1.420(d), CNM also advances a counterproposal which will endow the people of Buffalo with a permanent legacy of two-channel public television service. CNM's counterproposal is to permanently change Channel 17 from unreserved to noncommercial reserved service by inserting an asterisk next to "17" in the Television Table of Allotments, 47 CFR §73.606(b), with respect to Buffalo.

Never in recent memory has the Commission approved the dereservation of a noncommercial channel for the purpose of killing an operating public television station. Thus, this NPRM raises a profound question of national policy, calling directly into question the Commission's commitment to public broadcasting and to diversity of voices. Channel swaps such as that proposed here by the Western New York Public Broadcasting Association ("WNYPBA") could be repeated in many other cities, depriving millions of Americans of two-channel public television service.

Consequently, CNM also proposes that the Commission open an omnibus rulemaking proceeding. In that proceeding, the Commission could consider permanently reserving, for noncommercial use, all channels throughout the United States on which public television stations presently operate.^{1/}

I. Statement of Interest

CNM is an unincorporated association of citizens of Greater Buffalo. Its members and their children are regular viewers of WNED-TV, Channel 17, and WNEQ-TV, Channel 23.

^{1/} CNM and others will file a notice of proposed rulemaking along these lines.

CNM's members are teachers, scholars, grassroots community organizers and representatives of civic organizations. They are participating in this proceeding only in their capacity as television viewers.^{2/} They do not desire to operate television stations themselves. They express no opinion about the qualifications of the company^{3/} which reportedly would purchase WNEQ-TV if Channel 23 is dereserved.^{4/}

CNM's members rely on WNED-TV and WNEQ-TV for commercial-free television service. CNM members consider these stations essential to their participation in a democratic and pluralistic society.

CNM members depend on the availability of two-channel noncommercial television service for the wholesome development of their children. They recognize that much of what is available on commercial television has great value. Nonetheless, while their children have many opportunities to watch television programming whose ultimate goal is to sell them products, they have only two

2/ See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I").

3/ That company is reported to be Sinclair Broadcast Group. See "Sinclair Agrees to Buy WNEQ-TV in Buffalo for \$33 Million", <<http://nt.excite.com:80/pr/98021/md-sinclair-acquires>> (August 21, 1998). Sinclair presently owns Buffalo's Fox affiliate, WUTV-TV, as well as Rochester's Fox/UPN affiliate, WUHF-TV, which is significantly viewed throughout much of Greater Buffalo. While some of CNM's members have been critical of Sinclair's radio programming in Buffalo, CNM would be fighting just as hard to preserve two-channel public television service in Buffalo even if the proposed purchaser of Channel 23 were the most distinguished of commercial broadcasters.

4/ However, CNM does observe that the proposed transaction would only shift the WB or UPN network affiliation from an independent owner to the owner of the Buffalo and Rochester Fox affiliates, thereby adding no new full power commercial network service even as it reduces the number of commercial voices. See p. 15 infra.

opportunities -- Channels 17 and 23 -- to watch television whose only purpose is to educate, inform, challenge and enlighten them.

If the proposal in the NPRM is granted, one of those two opportunities will disappear forever. Children expecting a visit from Mr. Rogers and Lamb Chop will be surprised when Mr. Ed and Ronald McDonald knock on their electronic doors.

CNM members are friends of public television. They applaud and appreciate WNYPBA's 40-year commitment to public television. Although they do not agree that this channel swap is wise, they are not unsympathetic to WNYPBA's desire to seek additional sources of revenue.

II. Noncommercial Channels Are A Sacred Trust Which Must Be Held Inviolata

No resource held in trust by the FCC is more precious than its noncommercial television reservations. In Section 396(a) of the Communications Act, Congress made these findings about the importance of public broadcasting:

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

...

(4) the encouragement and support for public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the federal government;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsible to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation;

(6) it is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities;

(7) it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States;

(8) public television and radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems through community programs and outreach programs;

(9) it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies

47 U.S.C. §396(a).

A dead public television station stays dead forever: no commercial television broadcaster relinquishes its channel to a noncommercial user. Thus, the question presented by this case is whether the FCC, as the trustee of public broadcasting spectrum space, make take an action guaranteed to euthanize a public television station.

Throughout our history, governments have been expected to act on behalf of the general public when they administer property held in public trusteeship. See Susan D. Baer, "The Public Trust Doctrine -- A Tool to make Federal Administrative Agencies Increase Protection of Public Land and its Resources," 15 B.C. Envir. Aff. L. Rev. 385 (1988). This principle has enjoyed a secure berth in American law since 1821, when the New Jersey Supreme Court, holding that a state legislature could not alienate public access and use rights in water resources, declared that "[t]he sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting

all the citizens of their common right." Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

The radiofrequency spectrum belongs to the American people: it is held in trust for the public's benefit. UCC I at 1004. As the trustee, the FCC has an affirmative duty to protect the trust property. That is why the Commission has not allowed a channel dereservation to facilitate the conversion of a noncommercial station to commercial operation. In 1996, Pittsburgh public broadcaster WQED proposed just that. The Commission unanimously said no, even in the face of special legislation requiring it to consider such a proposal on an expedited basis. Deletion of Noncommercial Reservation of Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania (MQ&O), 11 FCC Rcd 11700 (1996) ("Pittsburgh"), discussed infra. The Commission's support for two-channel public broadcasting was emphatic and resounding:

[T]he deletion of the reservation of an operating noncommercial educational television station so that it may be sold to a commercial operator [] is not only unprecedented, but is also inconsistent with the Commission's stated goal over the past four decades, of promoting the growth of public television and the broadcast of educational programming.

Id. at 11707 ¶16.

Here, WNYPBA proposes to do indirectly exactly what WQED attempted to do directly. WNYPBA proposes to "swap" a noncommercial for a commercial reservation, for the purpose of killing one of the noncommercial stations. In evaluating whether to allow this, the Commission should ask this question: could the Department of the Interior create a new national park adjacent to an existing one, on pristine but heretofore unprotected land -- and then sell off the existing national park for use as a shopping mall?

The answer is obviously no, and here is why. Federal public lands "are held in trust for the people of the whole country," Light v. U.S., 220 U.S. 523, 537 (1911) (quoting U.S. v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890), and upholding Forest Service regulations regarding grazing in national forests). The National Park Service Organic Act, 16 U.S.C. §§1-460 (1982 and Supp. IV 1986) imposes a duty on the Secretary of the Interior to "conserve the scenery and the national and historic objects and the wild life [in national parks, monuments, and resevations]...and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." See 16 U.S.C. ¶1 (1982). As America's population grows, so do its recreational needs. As urban sprawl imposes greater pressure on species diversity, America needs greater protection of scarce environmentally sensitive land and the preservation of additional, unpreserved land now used as pristine, wild space. The Interior Department would not think of leaving the public, presently blessed with a national park as well as adjacent unprotected but pristine land, with a different national park adjacent to a shopping mall. If pressured to allow a shopping mall adjacent to the original national park, the Interior Department would surely respond by expanding the boundaries of the existing national park to include the commercially threatened adjacent land.

This explains why the FCC should not authorize the dereservation of any noncommercial channel whose purpose is to reduce the number of public broadcasting stations. The radiofrequency spectrum is held in trust for all of the American people. As America's population grows, so do its communications needs. As commercial concentration imposes greater pressure on

viewpoint diversity, America needs greater protection of scarce noncommercial spectrum space and the reservation of additional, nonreserved spectrum presently used for public broadcasting.^{5/}

No one doubts the value of a multiplicity of commercial channels. Certainly their primary purpose is a reasonable one: to enable advertisers to sell their products to viewers. Nonetheless, it is astonishing that so many Americans doubt the value of a multiplicity of noncommercial channels, whose primary purpose is to educate, inform, challenge and enlighten us.

Noncommercial media serves interests commercial media cannot serve, no matter how many commercial channels might compete for advertiser support and viewership. As suggested above, public television occupies the electronic space which our national parks occupy in physical space. Certainly, Disneyland serves a valuable purpose in physical space, and it is admirable that Disneyland has been joined by Disney World, Six Flags, Waterworld, Sea World, Universal Studios Park, and others. But that is no argument to stop building our system of national parks. Waterworld is no substitute for the Everglades.

Indeed, the proliferation of commercial attractions means we need our national parks more than ever. Similarly, the proliferation of commercial broadcasting means we need public broadcasting stations more than ever.

^{5/} The growth of commercial television concentration since the Telecommunications Act of 1996 was well documented and analyzed critically by University of Wisconsin media historian Robert McChesney in Corporate Media and the Threat to Democracy (Seven Stories Press, 1997) at 17-22. This new phenomenon changes the equities substantially in favor of the defense of noncommercial spectrum. The answer to greater commercial concentration is more noncommercial protection.

That is why the Commission's longstanding goal has been to ensure that public television does not get buried in a landslide of commercial broadcasting. Its policy has been to reserve approximately 25% of television channels for noncommercial use. Sixth Report and Order in Docket Nos. 8736, et al., 41 FCC 148, 160 (1952) (discussed in Pittsburgh at 11708 ¶17 and n. 14). Greater Buffalo can only attain this 25% goal if two channels are reserved.

Not all tastes and interests addressable through advertiser supported broadcasting can be served with only one channel. Similarly, not all tastes and interests best addressed through noncommercial media can be served with only one channel. For example, second channels are often used to meet needs which are not met by the "primary" channels -- e.g., the needs of children, minorities and the elderly, the need for local public access and, public affairs programs, and the need for experimental and student productions.^{6/}

Children whose families cannot afford cable television have the greatest need for more than a single noncommercial voice. There simply isn't enough airtime on one channel to contain all of the programming children need. Dereservation would rob Buffalo's children of the benefits of public television -- flying in the face of Congress' recognition that children need far more in the way of

^{6/} One of the uses of WNEQ-TV has been service to non-mass audiences with high demand intensity. Indeed, WNYPBA states, with unintended irony, that WNEQ-TV "has been utilized primarily for certain programming which would not normally appeal to most of the viewing audience for Station WNED-TV." Petition for Rulemaking (filed May 29, 1998) at 5-6. Although offered as a reason to kill WNEQ-TV, this is actually the best reason for saving WNEQ-TV.

healthy alternatives to standard commercial fare.^{1/}

Fortunately, the Commission has recently recognized that noncommercial broadcasting on nonreserved channels might need additional protection. Traditionally, the Commission has imposed commercial comparative criteria upon noncommercial entities seeking construction permits on nonreserved channels. See Comparative Selection, MM Docket No. 97-234, FCC 98-194 (released August 18, 1998) at ¶2, citing Policy Statement on Comparative Broadcast Hearings, 1 FCC2d 393 (1965); see also, e.g., Central Michigan University, 7 FCC Rcd 7636, 7637 (1992) (observing that the purpose of subjecting noncommercial applicants for unreserved channels to the same filing and processing requirements as commercial applicants "was to ensure comparable treatment of similarly situated applicants.") Recently, however, in Reexamination of the Comparative Standards for Noncommercial Educational Applicants (Further NPRM), MM Docket No. 95-31, FCC 98-269 (released October 21, 1998) ("Noncommercial Comparative Standards") at 20 ¶35, the Commission recognized that the commercial or noncommercial nature of the broadcasts, not the characterization of the channel in the Television Table of Allotments, might better drive Commission's consideration of a noncommercial applicant's

^{1/} See National Endowment for Children's Educational Television Act of 1990, title II of Public Law 101-437, 104 Stat. 997, approved Oct. 18, 1990, codified at 47 U.S.C. §394 (1990).

proposal.^{8/} Under this approach, noncommercial applicants for facilities on nonreserved channels would not be subjected to auctions, in which they would have to compete at a disadvantage against financially better endowed commercial applicants.^{2/}

If a compelling case can be made for protecting noncommercial applicants on nonreserved channels, an even more compelling case can be made for protecting noncommercial stations on nonreserved channels. Not in recent memory has the Commission authorized a swap for the purpose of reducing the number of public broadcasting stations. An unprecedented election to switch public TV reservations -- knowing that it is being done only to reduce by half the number of public television stations in Buffalo -- could mark the end of multiple channel public television. The Commission should continue to refuse all such requests.

^{8/} The Commission was not sure how to construe Section 309(j)(2)(C) of the Act, which provides that competitive bidding "shall not apply to licenses or construction permits issued by the Commission...for stations described in section 397(6)" of the Act. Section 397(6) defines the terms "noncommercial educational broadcast station" and "public broadcast station". The Commission sought comment on whether the statute is meant to apply only to proceedings involving unreserved channels (on which a noncommercial applicant is guaranteed to be the winner in a comparative proceeding) or also to proceedings involving reserved channels in which one of the applicants is a noncommercial broadcaster. Noncommercial Comparative Standards at 20 ¶35. Writing separately, Commissioners Harold Furchtgott-Roth and Gloria Tristani read Section 397(6) as precluding auctions where noncommercial applicants seek facilities on nonreserved channels, because the statute's definition of "noncommercial educational broadcast station" and "public broadcast station" says nothing about operation on reserved channels. Id. at 38-39 (Separate Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani). CNM agrees with their reading of the statute.

^{2/} The Association of America's Public Television Stations has put forward the excellent suggestion that once a noncommercial entity applies and is deemed technically qualified to operate on a commercial channel, that channel should be reserved for noncommercial use. Id. at 22 ¶40.

III. The Petition For Rulemaking Does Not Present A Strong Case For A Channel Swap

The proponent of dereservation has an exceedingly high burden of persuasion. Dereservation is almost unprecedented, because our system of broadcasting is premised upon the inviolateness of the reserved channels.

It is self-evident that reduction by half in the number of noncommercial voices cannot possibly be offset by the growth in the number of full power commercial voices from seven to eight.^{10/} While there are many commercial voices, there is a profound shortage of noncommercial voices. As the Commission observed in Pittsburgh, the second station's programming "cannot be fully replaced simply by extending the hours of operation" of the primary station. Id. at 11710 ¶21. No matter how WNYPBA might slice it, elimination of WNEQ-TV would reduce the amount of noncommercial programming available in Greater Buffalo, and relegate other WNEQ-TV programming, if shifted to WNED-TV, to graveyard hours.

That is why the Commission has been steadfast in refusing to entertain proposals analogous to WNYPBA's in this case. In Amendments to the Television Table of Assignments to Change Noncommercial Education Reservation, 59 RR2d 1445 (1986), recon. denied, 3 FCC Rcd 2517 (1988), the Commission stated that one aspect of the Commission's public interest analysis of intraband channel exchanges under Section 1.420(h) of the Rules is a demonstration that the audience will receive substantially

^{10/} Moreover, see p. 15 infra (discussing the anticompetitive consequences of the proposed WNEQ-TV transaction for Buffalo's commercial television market.)

comparable service under the proposed channel exchange. 59 RR2d at 1464-1464a. Thus, under no circumstances would the Commission eliminate a noncommercial reservation using the channel exchange procedure. Id. at 1462.

The Commission does not approve modifications to the Television Table of Allotments which would result in a diminution of protected noncommercial service. For example, in Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida), 4 FCC Rcd 8320 (1989), Brevard Community College ("BCC") licensee of WRES-TV, Channel *18, Cocoa, FL, proposed to exchange channels with station WKCF-TV, Channel 68, Clermont, Florida. The Commission approved the transaction because it would have allowed BCC to improve its service area. Id. at 8322 ¶16. However, the Commission stated that it would be reluctant to approve exchanges if the noncommercial allotment is vacant because no party is present to protect the interest in noncommercial educational television. Id. at 8322 ¶18.

Indeed, the Commission

has repeatedly denied requests to delete reserved channels, citing as a principal reason for doing so the need to preserve the future availability of the channels. The Commission has maintained this view even where dereservation was sought by an incumbent noncommercial licensee which represented that it would go dark absent grant of its dereservation request.

Pittsburgh at 11708 ¶18 (citing Amendment of Section 73.606, Table of Assignments, Television Broadcast Stations (Ogden, Utah), 26 FCC2d 142 (1970), recon. denied, 28 FCC2d 705 (1971)). Even where the request involved a vacant channel and thus would not have resulted in the withdrawal of existing noncommercial service, and despite a history of failed attempts to provide noncommercial

service on the reserved channel, the Commission has refused to delete a channel reservation. See Amendment of Section 73.606, Table of Assignments, Television Broadcast Stations (Ogden, Utah), 45 RR2d 768, 774 (Broadcast Bureau, 1979) ("the Commission's commitment to noncommercial broadcasting has remained intact, and there is a heavy burden of persuasion on petitioners who seek to remove such frequencies from the reserved list.")^{11/}

Thus, the Commission has without exception resisted the temptation to sacrifice noncommercial reservations on the altar of temporary financial exigencies, choosing instead to preserve every opportunity for future noncommercial service. Even more compelling is the need to preserve current noncommercial service of proven value, such as that offered on WNEQ-TV.

In Pittsburgh, the Commission refused WOED's request for dereservation of a channel to accommodate the sale of WOED's "second station" to a commercial broadcaster. The Commission noted that a less extreme solution -- sale to another noncommercial broadcaster -- was also available. Id. at 11710 ¶22. Here, WNYPBA has not even taken the initial step of ascertaining whether it

^{11/} See also Amendment of Section 73.606(b) (Columbus and Royston, Georgia), RM-4894, released July 12, 1985 (1985 FCC Lexis 2959) (reaffirming that "it is established Commission policy to refrain from deleting a noncommercial educational channel to accommodate a commercial interest", and holding that it could not find that Columbus had a need for a fifth commercial channel greater than the need for retaining the reserved, vacant channel at Royston.) See also Pittsburgh at 11708 n. 16 (citing additional authorities).

could generate or save revenue by assigning WNEQ-TV to another noncommercial entity.^{12/}

Indeed, the equities in Pittsburgh were much stronger than those here. WQED was technically bankrupt; see Pittsburgh, 11 FCC Rcd at 17703 ¶6. Fortunately, WNYPBA is solvent.^{13/} For eleven years, the people of Greater Buffalo have supported two noncommercial television stations, and there is no reason why they cannot do so in the future. Furthermore, while Pittsburgh did not have the full complement of commercial stations available for network affiliations, Buffalo does. See BIA's Television Yearbook 1998, p. 27 (showing that the Buffalo television market has full power NBC, CBS, ABC, Fox, WB and UPN affiliates, as well as a commercial Christian station.) Thus, the sale of WNEQ-TV is not even necessary to bring in a fifth or sixth commercial network; instead, it would only shift one of the network affiliations from an independent owner to another company^{14/} that already owns the Fox affiliates in Buffalo and Rochester. Not only would the sale

^{12/} WNYPBA may try to distinguish Pittsburgh by pointing out that in that case, WQED sought to reduce the number of reserved channels from two to one, while in this case, WNYPBA proposes only to swap a reserved for a nonreserved channel. But to the viewing public in both cities, this technical distinction is irrelevant. The bottom line result is no different: in each scenario, tinkering with the TV Table would leave the public with only one noncommercial station. The only difference between the Buffalo and Pittsburgh scenarios is that in Pittsburgh, WQED tried to sell its second station by removing its channel protection, while in Buffalo, WNYPBA seeks to sell its second station by exploiting the fact that Buffalo already has only one protected channel. The answer should be the same in each case: preserve, for the viewing public, two reserved channels.

^{13/} WNYPBA is better managed than WQED had been.

^{14/} Sinclair Broadcast Group.

of WNEQ-TV reduce noncommercial diversity, it would actually also reduce commercial service diversity.

Any potential benefits of the WNEQ-TV sale are extremely speculative. WNYPBA states that it will use the money from the sale to produce more educational programming -- but WNYPBA would not be legally bound to use it for any particular purpose. Indeed, WNYPBA could simply choose to produce programming for national syndication.

WNYPBA also wishes to secure additional funds for digital TV, as did WOED in the Pittsburgh case. See Petition for Rulemaking at 4-5. But WNYPBA hasn't proposed to pioneer this technology. Nor has it shown how its need for digital conversion funds is distinguishable from that facing about 150 other public television licensees who have no assets to sell.^{14/}

The prospect of digital television is speculative, and may become limited by law or custom to one wide-screen channel. If WNYPBA later finds it preferable or possible only to program only one wide-screen channel, there would be no way for the Commission to unscramble the sale of WNEQ-TV and return it to noncommercial use.

^{14/} The cost of digital conversion was estimated by WNYPBA at \$7-10 million. Petition for Rulemaking at 4. Some of this cost will be subsidized by government. The remaining amount is far less than the reported \$33 million WNYPBA would receive from the sale of WNEQ-TV to a commercial operator. See n. 3 supra. Thus, the sale of WNEQ-TV to another noncommercial operator could well fully subsidize WNED-TV's digital conversion costs. That is how Pittsburgh was decided.

Nor is the prospect of digital television helpful to the low income audience of WNEQ-TV, who would find it especially difficult to afford digital sets and converter boxes.^{15/} Indeed, there are tens of thousands of households in Greater Buffalo that cannot afford cable or any other available multichannel video service provider today. These households include a large percentage of lower income persons, minorities, senior citizens, and others who have reduced market power to influence commercial broadcasting. It is precisely the needs of such underrepresented and underserved groups that noncommercial broadcasting is intended to serve.

Finally, WNYPBA has made no showing that it has considered whether more creative uses of WNEQ-TV might make the station more popular and improve its financial viability. As the Commission recently pointed out, "there are many programming choices on [noncommercial educational] stations, such as instructional programs, programming selected by students, [B]ible study, cultural programming, in-depth news coverage, and children's programs such as Sesame Street that entertain as they teach." Noncommercial Comparative Standards at 2 n. 2. WNYPBA should be encouraged to consider less extreme alternatives than selling WNEQ-TV -- such as reformatting the station's programming, sharing time with another

^{15/} WNYPBA cannot understand why the public would need eight digital channels rather than four. See Petition for Rulemaking at 4. If so, WNYPBA should sell or donate WNEQ-TV to another public spirited entity which understands why the public would consider it a wonderful gift to their children to have a multiplicity of opportunities to watch commercial-free television. In Washington, D.C., Howard University owns the "second" television channel, WHUT-TV, Channel 32. Consider how unappealing it would be for Howard University to propose to sell WHUT-TV in reliance on the fact that GWETA, licensee of Channel 26, would ultimately have four digital channels to use for public broadcasting.

noncommercial entity, or selling the station to another noncommercial entity.

IV. CNM Counterproposes The Reservation Of Channel 17 And Channel 23

CNM proposes to amend the Television Table of Allotments, 47 CFR §73.606(b), with respect to Buffalo, as follows:

Community	Channel No.	
	Present	Proposed
Buffalo, New York	2, 4, 7, 17, *23, 29, 49	2, 4, 7, *17 *23, 29, 49

CNM also proposes to amend the DTV Table of Allotments, 47 CFR §73.622(b), with respect to Buffalo, as follows:

Community	Channel No.	
	Present	Proposed
Buffalo, New York	14, *32, 33 34, 38, 39, *43	14, *32, 33, 34, 38, 39, *43

V. The Commission Should Preserve The Legacy Of Noncommercial Television Throughout The United States

The potential consequences of a dereservation decision in this case are staggering. Several other cities could lose their second noncommercial stations if the Commission adopts WNYPBA's proposal for a channel reservation swap to permit the sale of WNEQ-TV to a commercial operator.

CNM therefore proposes that the FCC reserve all presently unreserved channels on which public television stations are operating as of today's date.

Now is the time for the FCC to do what Presidents Ford, Carter, Reagan and Bush did to preserve unique and previous national resources: they each created new national parks. This was the only way to forever preserve pristine and threatened land that was unique in value -- land used and treasured by the public

as noncommercial physical space. The FCC should act decisively to protect forever the public's last remaining electronic unprotected space -- the nonreserved channels used for public broadcasting.

VI. If It Reserves All Channels Used For Public Broadcasting, The Commission Will Have Greater Flexibility To Consider Deregulating Commercial Broadcasting

Commercial broadcasters should embrace NCM's proposal. It would provide the Commission greater flexibility in considering whether to further deregulate commercial television. A robust public television system, whose channels enjoy the fullest protection available from commercial encroachment, would provide a critical comfort zone -- assuring that if the Commission elects to further deregulate commercial television, the public will not be left unprotected and children will receive the maximum available choices of wholesome, commercial-free television.

When it deregulated commercial television programming, the Commission relied on the existence of a robust system of local public television stations.^{16/} Likewise, if it chose to consider additional structural deregulation of commercial television, the Commission could draw comfort from the existence of a robust, fully vested public television system.

^{16/} Deregulation of Television, 98 FCC2d 1076, 1139, Appx. C (1984) (in its "Analysis of Video Marketplace", the Commission stated that "[c]onsideration must also be given to the rapid rise of non-commercial television. A majority of the nation's families now watch public television...At least one estimate has placed non-commercial television's potential growth at approximately 10 percent of the overall audience share." (fns. omitted)).

Conclusion

Commissioner Ness' Separate Statement in Pittsburgh sums up exactly how the Commission should handle this case:

I decline to disturb long standing Commission precedent, especially with a decision that could ripple through the country, putting undue pressure on other public television stations to sell what essentially is their birthright. The strength of our noncommercial system flows from the combination of quality programming for underserved audiences and distribution over a system of reserved television stations in each market that blankets the country.

Separate Statement of Commissioner Susan Ness, 11 FCC Rcd at 11714. For the same reason, the Commission should deny WNYPBA's proposal to kill WNEQ-TV. Instead, the Commission should grant CNM's counterproposal to preserve, forever, the two-channel birthright of Buffalo's public television viewers.^{17/}

Respectfully submitted,



David Earl Honig
3636 16th Street N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005

Counsel for the Coalition
for Noncommercial Media

November 16, 1998

^{17/} CNM thanks Moushumi Khan, Esq. and Nicolaine Lazzarre, a student at Georgetown University Law Center, for their generous assistance in researching and editing these Comments

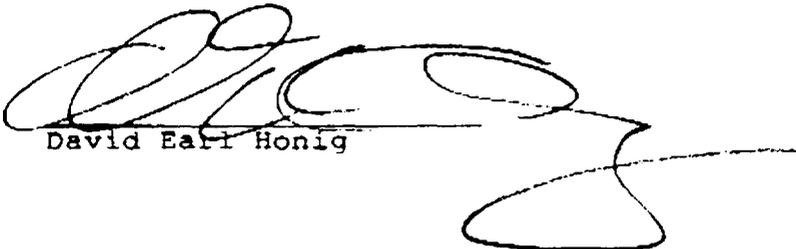
CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 16th day of November, 1998 caused the foregoing "COMMENTS, COUNTERPROPOSAL, AND PROPOSAL TO RESERVE ALL CHANNELS USED BY NONCOMMERCIAL TELEVISION STATIONS" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

Robert A. Woods, Esq.
Schwartz Woods & Miller
1350 Connecticut Ave. N.W. #300
Washington, D.C. 20036.

with a courtesy copy to:

Martin Leader, Esq.
Fisher Wayland Cooper Leader & Zaragoza
2001 Pennsylvania Ave. N.W. #400
Washington, D.C. 20006


David Earl Honig