

DOCKET FILE COPY ORIGINAL

RECEIVED

FEB 16 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
)  
Ancillary or Supplementary Use of )  
Digital Television Capacity by Noncommercial )  
Licensees )  
)

MM Docket No. 98-203

**COMMENTS OF UCC, et al.**

Gigi B. Sohn  
Andrew Jay Schwartzman  
Cheryl A. Leanza

Law Student Intern

Heather Mayer  
University of Pennsylvania  
Law School

February 16, 1999

**MEDIA ACCESS PROJECT**  
1707 L Street, NW  
Suite 400  
Washington, DC 20036

*Counsel for UCC, et al.*

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

**TABLE OF CONTENTS**

**INTRODUCTION AND SUMMARY . . . . . 1**

**I. THE COMMISSION MAY NOT PERMIT NONCOMMERCIAL TV LICENSEES TO PROVIDE ADVERTISER-SUPPORTED ANCILLARY OR SUPPLEMENTARY SERVICES . . . . . 4**

**A. Only Congress Can Permit Noncommercial Broadcasters to Carry Commercial Advertisements . . . . . 5**

    1. The Plain Language of Section 399B Prohibits Any Transmission of Commercial Advertisements by Noncommercial Licensees . . . . . 6

    2. Section 336(c) Does Not Repeal the Prohibition Against Advertising in Section 399B . . . . . 8

    3. While Giving Broadcasters Flexibility to Increase Their Revenues, Congress Has Drawn the Line at Carriage of Commercial Advertisements . . . . . 9

**B. Permitting Noncommercial TV Licensees to Provide Advertiser-Supported Ancillary or Supplementary Services Would Harm Noncommercial Television Licensees More Than it Would Help Them . . . . . 13**

**II. NONCOMMERCIAL TV LICENSEES SHOULD BE EXEMPT FROM FEES FOR ANCILLARY OR SUPPLEMENTARY SERVICES ONLY IF THEY ARE NOT PERMITTED TO PROVIDE ADVERTISER-SUPPORTED ANCILLARY OR SUPPLEMENTARY SERVICES . . . . . 15**

**CONCLUSION . . . . . 16**

RECEIVED

FEB 16 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Ancillary or Supplementary Use of ) MM Docket No. 98-203  
Digital Television Capacity by Noncommercial )  
Licensees )  
)

COMMENTS OF UCC, *et al.*

The Office of Communication of the United Church of Christ, Inc., the Alliance for Community Media, the Benton Foundation, the Center for Media Education, Independent Television Service, Libraries for the Future, Media Access Project, Native American Public Telecommunications, Inc., and the Screen Actors Guild (UCC, *et al.*) respectfully submit the following comments to the *Notice of Proposed Rulemaking*, FCC No. 98-304 (released November 19, 1998) (*NPRM*). The Notice asks, *inter alia*, whether noncommercial television licensees should be:

- permitted to provide advertiser-supported ancillary or supplementary services over their digital TV capacity,

and

- declared exempt from the Congressionally-mandated fee on ancillary or supplementary services.

UCC, *et al.* urge the Commission to answer the first question in the negative - it is bad law, and worse policy, to permit noncommercial television licensees to run commercial advertisements. As to the second question, public TV licensees cannot have it both ways. Noncommercial TV licensees should be exempted from ancillary or supplementary service fees if and only if they do not carry commercial advertisements.

## INTRODUCTION AND SUMMARY

UCC, *et al.* are, publicly and privately, long-time supporters of noncommercial television. Officers of five of the signatories to these comments were among the most vociferous advocates of continued and increased funding for noncommercial television in the deliberations of the recently concluded Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. There is no doubt that the American people need and want a strong, adequately funded system of noncommercial broadcasting to provide a refuge from the marketplace-driven, bottom line-focused, lowest common denominator-directed offerings of commercial broadcasting. The premise of public broadcasting is that it will ignore market pressures to meet otherwise unmet needs.

Author E.B. White described public broadcasting's role thus in a 1967 letter submitted to the Carnegie Commission on Educational Television, which laid the groundwork for our modern system of public television:<sup>1</sup>

Noncommercial television should address itself to the ideal of excellence, not the idea of acceptability - which is what keeps commercial television from climbing the staircase. I think television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events, present great drama and music, explore the sea and the sky and the woods and the hills. It should be our Lyceum, our Chautauqua, our Minsky's, and our Camelot. It should restate and clarify the social dilemma and the political pickle. Once in a while it does, and you get a quick glimpse of its potential.

---

<sup>1</sup>The Carnegie Commission, with backing from the Johnson White House "laid the foundations for modern public broadcasting." John Witherspoon and Roselle Kovitz, "The History of Public Broadcasting," *Current* (1989) at 13. The Commission deliberated for over a year and made twelve recommendations designed to aid noncommercial television. The recommendations included, *inter alia*, the creation of the Corporation for Public Television (later renamed the Corporation for Public Broadcasting by Congress), permanent financial support for the corporation through a manufacturer's excise tax on television sets and the establishment of national production centers. *Id.* at 14-15.

"Public Television: A Program for Action," *The Report and Recommendations of the Carnegie Commission on Educational Television* (1967) ("*Carnegie Commission Report*") at 13.

Congress codified this vision a short time later when it adopted many of the Carnegie Commission's recommendations in the Public Broadcasting Act of 1967. Fourteen years later, Congress added Section 399B to permit noncommercial broadcasters to generate increased outside revenues. Significantly, it explicitly prohibited the transmission of commercial advertisements. The Commission's proposal desperately seeks to create a loophole in an attempt to permit non-commercial TV licensees to provide advertiser-supported subscription services, by extending to noncommercial stations a decision that finds that subscription TV services are not "broadcasting." But Section 399B permits no such evasion. That law plainly prohibits promotional messages that are "broadcast" or "otherwise transmitted."

The only occasion in which advertising was ever permitted on noncommercial television stations was under a specific and time delimited experiment mandated by Congress in the early 1980s. Both before and after that experiment, Congress has been invited to permit advertising on noncommercial stations, but has declined to do so. Without explicit permission from Congress, the Commission is without authority to grant AAPTS and PBS the relief they seek.

Legal impediments aside, the AAPTS/PBS request that the Commission permit noncommercial TV licensees to carry advertisements threatens White's vision and, indeed, the mission of public television to serve as an alternative to market-driven commercial television. While it is certainly true that noncommercial TV is underfunded, the prospect of introducing advertiser influence threatens the institution more than the diatribes of the most hostile legislators and other critics of public broadcasting. A public broadcasting system rife with commercials is both an

invitation for its critics to argue for reduced or no funding, and a disincentive for its friends and viewing audiences to sustain a system which no longer serves its intended purpose. The Commission should not allow noncommercial broadcasters to ruin public broadcasting in the name of saving it. There are other ways, short of advertising, that can provide increased revenues for noncommercial stations.

With one caveat, UCC, *et al.* support giving noncommercial television stations an exemption from the ancillary or supplementary services fees: if the Commission permits advertiser supported ancillary or supplementary services, it cannot also exempt those services from fees. To do so would be contrary to the plain language of Section 336(e) of the Communications Act, which requires a fee on any "commercial" subscription service.

**I. THE COMMISSION MAY NOT PERMIT NONCOMMERCIAL TV LICENSEES TO PROVIDE ADVERTISER-SUPPORTED ANCILLARY OR SUPPLEMENTARY SERVICES.**

The Commission seeks comment on whether noncommercial television licensees can use their digital TV capacity for revenue enhancing ancillary or supplementary services, including subscription services. *NPRM* at ¶¶25-31. If it were to permit noncommercial licensees to provide such services, the Commission then asks whether those services can be advertiser-supported. *NPRM* ¶¶36-37.

UCC, *et al.* support the continuation of a strong system of noncommercial educational broadcasting. They are sympathetic to the reality that the system has been perpetually underfunded. Therefore, UCC, *et al.* generally support the Commission's conclusion that noncommercial licensees be permitted to offer remunerative ancillary or supplementary services - but only as long as those services "adhere to their fundamental mission of providing a *noncommercial*,

educational broadcast service, as required by Section 73.621(a) of the Commission's rules." *NPRM* at ¶34. (emphasis added) However, as discussed below, the Commission is without power to go further and permit those services to be advertiser-supported.

UCC, *et al.* believe that the AAPTS/PBS strategy is both risky and counterproductive. The American viewing public and Congress have supported public TV precisely because it is different from its commercial counterpart. Were advertising to blur the line between the two, it seems at best a gamble that the viewing public and policy makers would be willing to continue to support a public broadcast system that is indistinguishable from the commercial system.

**A. Only Congress Can Permit Noncommercial Broadcasters to Carry Commercial Advertisements.**

The Commission proposes to permit noncommercial stations to carry advertisements on any subscription services they provide over their digital TV bitstream. *NPRM* at ¶36. It asks whether 47 USC §399B prohibits such a result, and if so, whether 47 USC §336(a)(2) allows advertiser supported services if the Commission finds that the services are in the public interest. *Id.* at ¶37.

The Commission does not have the authority to permit noncommercial TV stations to carry advertisements. The plain language of Section 399B prohibits any such action, and Section 336(a)(2) does not repeal that prohibition. Congress has been repeatedly asked to permit advertising on public TV stations for thirty years and has done so only once, in an experiment which long ago ended, and was not reauthorized. The Commission cannot step in and usurp Congress' decisionmaking in this area.

1. ***The Plain Language of Section 399B Prohibits Any Transmission of Commercial Advertisements By Noncommercial Licensees.***

Section 399B of the Communications Act states that

No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

47 USC §399B(b)(2). An advertisement is defined by that section as

any message or other programming material which is broadcast or *otherwise transmitted* in exchange for any remuneration, and which is intended -

(1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit:

(2) to express the views of any person with respect to any matter of public importance or interest; or

(3) to support or oppose candidates for political office.

47 USC §399B(a) (emphasis added).

Despite this plain language prohibiting noncommercial broadcast stations from carrying advertisements, the Commission purports to find a loophole by using its decision in *Subscription Video*, 2 FCC Rcd 1001 (1987), *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). The Commission determined there that subscription television services are not "broadcasting" and therefore not subject to the public interest requirements of Title III of the Communications Act. Focusing solely on the language of Section 399B(b)(2), which states that noncommercial licensees "may not make its facilities available to any person for the *broadcasting* of any advertisement," the Commission proposes permitting noncommercial TV broadcasters to carry advertisements on any *subscription* ancillary or supplementary services they might offer, because, it argues, these services are not "broadcasting" under *Subscription Video*. *NPRM* at ¶137 (emphasis added).

As some of the signatories to these comments and others have done since 1987, UCC, *et al.* call upon the FCC to overrule its ill-considered decision in *Subscription Video*.<sup>2</sup> *E.g.*, April 6, 1998 Comments of UCC and Consumers Union in IB Docket 98-21 at 2-3; November 20, 1995 Comments of Media Access Project, *et al.* in MM Docket No. 87-268 at 26-27. The Commission has the statutory and regulatory authority to revisit its decision and reclassify subscription services as broadcast services, as long as it provides a reasoned explanation.

Even if the Commission does not overrule *Subscription Video*, it cannot apply the decision to noncommercial television stations. At time of the *Subscription Video* decision, noncommercial licensees did not have the authority to provide such services, and they still do not today. See *Amendment of Part 73.642(a) of the Commission's Rules*, 97 FCC 2d 411 (1984). Nothing in the *Subscription Video* decision mentions noncommercial licensees, and indeed, no noncommercial licensee or entity even participated in the rulemaking proceeding that resulted in that decision. In addition, in 1981, when Congress passed the prohibition on advertising in Section 399B, the Commission had not yet determined that subscription TV services were not "broadcasting."

---

<sup>2</sup>The Commission's decision was based on its finding that subscription TV services, using special decoders, are not intended to be received by the "general public." In support of that finding, the Commission noted that reception of DBS programming requires "special equipment" and that DBS licensees do not "seek to maximize audience in the same way as conventional licensees....[S]ubscription services are interested in maximizing revenues which may not necessarily mean maximizing audience." *Subscription Video*, 2 FCC Rcd at 1004. But these are distinctions without a difference. The earmark of broadcasting is the use of public spectrum. Both subscription-based video providers and over-the-air broadcasters intend to reach the "general public." Both subscription service providers and terrestrial broadcasters simply want to increase profit margins, not limit audience size to "specific addresses." *Id.* Furthermore, whether equipment is "special" is a function of technological change over time and public familiarity with new technology. In an industry where rapid technological change is the norm, it is ludicrous to classify communications services based on the highly subjective determination that one technology is "special," while another is "common."

Thus, Congress did not intend to infuse the term "broadcast" in Section 399B(b) with any specific meaning. "Broadcasting" was the only way that noncommercial television stations could carry advertising at the time.

Regardless of how the Commission interprets *Subscription Video*, it still cannot permit advertising on noncommercial TV, because to do so would violate the plain language of Section 399B. Section 399B(a) defines an advertisement as "any message or other programming material which is broadcast *or otherwise transmitted* in exchange for remuneration" and which meets one or more of the three categories described in that subsection. 47 USC §399B(a). That definition is incorporated by express reference in Section 399B(b)(2). Thus, to the extent that subsection prohibits "advertisements," it prohibits any message meeting the three criteria that is either broadcast or "otherwise transmitted." Were the Commission to limit the prohibition on advertisements to "broadcasting" it would render the "otherwise transmitted" language meaningless. The Commission cannot interpret a statute in a way that renders some of its language superfluous. See *Dunn v. CFTC*, 519 U.S. 465 (1997); *Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997).

2. *Section 336(a)(2) Does Not Repeal the Prohibition Against Advertising in Section 399B.*

The Commission seeks comment on AAPTS/PBS's assertion that even if Section 399B prohibits commercial advertising on noncommercial licensees, the Commission may still permit such advertising under Section 336(a)(2) of the Communications Act if it finds that these services are in the public interest. *NPRM* at ¶137.

Section 336(a)(2) requires the Commission, if it issues digital TV licenses, to:

adopt regulations that allow the holders of such licenses to offer such ancillary or supple-

mentary services on designated frequencies as may be consistent with the public interest, convenience and necessity.

47 USC §336(a)(2).

Nothing in this language explicitly permits public broadcasters to carry commercial advertisements or explicitly repeals the prohibition on advertising in Section 399B(b)(2). Were the Commission to interpret Section 336(a)(2) to permit advertising on noncommercial stations, it would directly conflict with Section 399B(b)(2). If possible, administrative agencies must interpret statutes so that they do not conflict, or result in an implicit repeal of one of those statutes. *See International Union of Electrical, Radio & Machine Workers, AFL-CIO v. NLRB*, 289 F.2d 757 (D.C. Cir. 1960); *A.P.W. Paper v. FTC*, 149 F.2d 424 (2nd Cir. 1945); *See generally*, Singer, *Sutherland on Statutory Construction* at §§51.01-51.03.

It is possible for the Commission to harmonize Sections 336(a)(2) and 399B(b)(2) by permitting noncommercial broadcasters to provide remunerative ancillary or supplementary services that are not advertiser-supported. The APTS/PBS interpretation of those provisions leads to irreconcilable conflict.

3. *While Giving Noncommercial Broadcasters Flexibility to Increase Their Revenues, Congress Has Drawn the Line at Carriage of Commercial Advertisements.*

As the Commission recognizes, our system of noncommercial broadcasting was based on the desire of both the Commission, and later the Congress "to sponsor independent sources of broadcast programming as an alternative to commercial broadcasting." *NPRM* at ¶23. Stations that do not have to concern themselves with the whims of advertisers and the marketplace are able more freely to provide the kind of high quality public affairs, arts, cultural and educational programming not often seen on commercial television. *See Table of Allotments*, 41 FCC 148,

165 (1952). ("The need for such [noncommercial educational] stations was justified upon the high quality type of programming which would be available on such stations - programming of an entirely different character from that available on most commercial stations.")

The very defining characteristic of these stations is that they are noncommercial - that is, both nonprofit and free of advertisements. Indeed, in recommending to Congress how to create, sustain and fund a system of noncommercial television stations, the Carnegie Commission considered, but rejected "removing restrictions which prevent educational television from accepting advertising." *Carnegie Commission Report* at 71-72. The Public Broadcasting Act of 1967, which created the system of public broadcasting we know today, adopted the vast majority of the Carnegie Commission's recommendations.

Surely the most shortsighted and self-defeating aspect of the 1967 legislation was Congress' failure to adopt one critical recommendation made by the Carnegie Commission - the development of a permanent funding source.<sup>3</sup> See e.g., H.Rep. No. 90-572, 90th Cong., 1st Sess., 1967 USCCAN 1799, 1811-12 (1967) ("In view of the many uncertainties with regard to both the estimated fund requirements at the possible sources of support, the committee is forced to reject all suggestions for permanent financing at this time and await more specific information from the Corporation.") The absence of long-term funding has made public broadcasting vulnerable to periodic reductions in short-term federal funding, when Congressional fashions dictate. The Commission properly recognizes that the great challenge is to "maintain the integrity

---

<sup>3</sup>The Carnegie Commission recommended that "Congress provide the federal funds required by the Corporation [for Public Television] through a manufacturer's excise tax on television sets (beginning at 2 percent and rising to a ceiling of 5 percent). The revenues should be made available to the Corporation through a trust fund." *Carnegie Commission Report* at 68.

of its noncommercial status with the fact that public television must have access to adequate funding in order to survive." *NPRM* at ¶23.

Over the past thirty-one years, Congress' solution to public TV's funding problems has been to give licensees increasing flexibility to seek revenues from other sources. However, it is of critical significance that in so doing, Congress has always drawn the line against permitting broadcasters to carry advertisements. In 1981, in response to a growing federal deficit that put pressure on Congress to reduce federal spending for public telecommunications, Congress passed amendments to the Public Broadcasting Act. Omnibus Budget Reconciliation Act, P.L. 97-35, 95 Stat. 357 (1981). *See* H.Rep. No 97-82, 97th Cong., 1st Sess. at 13 (1981) ("[I]n keeping with public and Congressional sentiment to reduce government spending, severe austerity must also apply to the Federal support of public telecommunications"). Those amendments, *inter alia*, permitted noncommercial stations to carry visual "logograms" of sponsoring entities, 47 USC §399A, and to offer "services, facilities and products for remuneration." 47 USC §399B. The one exception to the latter rule was the carriage of advertisements, which Congress explicitly prohibited. *Id.*

Instead, Congress authorized the Temporary Commission on Alternative Financing for Public Telecommunications ("TCAF") to examine the feasibility of advertising through a limited "advertising demonstration program" involving nine noncommercial TV stations.<sup>4</sup> H.R. Conf. Rep. No. 97-208, 87th Cong., 1st Sess. at 895 (1981). The objective of the demonstration program was to "reduce the uncertainty about the advantages and disadvantages accompanying

---

<sup>4</sup>Ten television stations originally participated. One dropped out soon after the program started. The station chosen to replace that station also withdrew from the experiment, but was not replaced. *TCAF Final Report* at 15.

public broadcast stations' use of limited commercial advertising or expanded underwriting credits." *Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications* (October 1983) at 11 (*TCAF Final Report*).<sup>5</sup>

In the end, while "[t]he demonstration program helped to define the costs and benefits associated with limited advertising, [it] only narrowed the range of uncertainty." *TCAF Final Report* at 42. The TCAF identified numerous difficulties that might result from permitting non-commercial stations to broadcast advertisements, including:

- significant and possibly prohibitive increases in labor costs as unions would seek "commercial" rates and rights agreements from stations airing advertisements and from producers whose programs are used by stations airing advertisements;
- increased payments to copyright owners from stations that broadcast advertisements and from producers whose programs are used by stations broadcasting advertisements;
- threats to special provisions provided to noncommercial stations by the Copyright Act of 1976, including an "automatic" right to use published nondramatic music and visual works under a compulsory license and a special exemption from making payments to record companies for broadcast-related use of sound recordings;
- possible increased tax liability if advertising is considered "unrelated" to a station's tax exempt purpose, and uncertainty about the expenses that noncommercial stations could charge against advertising revenues;<sup>6</sup>
- probable increases in rates stations pay for audience rating services, wire services

---

<sup>5</sup>The stations were subject to three basic guidelines: 1) Advertisements could not interrupt programs unless such programs were two hours or longer in length; 2) Advertisements could not be broadcast consecutively for more than two minutes, nor could there be more than a single cluster of commercials during any 30 minute period; and 3) No advertisements could promote religious interests, political candidates, or opinions on matters of public interest. *TCAF Final Report* at 15-16.

<sup>6</sup>The TCAF concluded that because the answers to these tax questions "are not available under existing laws and Service guidelines[,] Congressional direction on this issue might be necessary if limited advertising were authorized." *TCAF Final Report* at 34.

and syndicated program distribution; and

- reduced funding from local and state governments, which then provided 36 percent of total public TV income.

*Id.* at 27-34.

Therefore, even though the TCAF concluded that "[l]imited advertising could be a significant supplemental business revenue source for certain public television stations," *id.* at 40, it recommended to Congress that it:

- Continue the existing prohibition on advertising unless it can be established clearly that:
- Overall benefits to public broadcasting will exceed the costs; and
  - Stations that do not choose to carry limited advertising will not share the risks associated with advertising while not receiving direct revenues.

*Id.* at 45-46.<sup>7</sup>

Thus, Congress was presented with a comprehensive report on the pros and cons of advertising on noncommercial stations. Based on a substantial record, it chose not to enact any further legislation extending or modifying the experiment much less making it permanent.

Since that time, and after years of debate and a myriad of opportunities to change its position on advertising on noncommercial stations, Congress has still chosen not to allow such advertising. This is a decision that has always been left to Congress. The Commission cannot now enter the debate and usurp that process.

**B. Permitting Noncommercial TV Licensees to Provide Advertiser-Supported Ancillary or Supplementary Services Would Harm Noncommercial Television Licensees More Than it Would Help Them.**

Putting aside the legal impediments, UCC, *et al.* question the soundness of a Commission

---

<sup>7</sup>By making recommendations to Congress, and not to the FCC, the TCAF recognized that the Commission was without authority to permit advertising on noncommercial stations.

policy that would permit noncommercial stations to operate in a manner that is contrary to their core purpose. Permitting noncommercial stations to carry commercials would not simply be ironic. It would harm public broadcasters more than help them.

The reason why this would be so is simple: Congress and the public - two of the primary sources of public broadcasting - will be ill-disposed to continue that funding if it appears that public stations garner revenues from advertisements. For members of Congress, such a policy will give ammunition to those who argue that taxpayer dollars are no longer needed to fund public broadcasting. On the other hand, friends of public broadcasting in Congress will be far less willing to defend a noncommercial system that is no longer truly noncommercial. Similarly, the viewing public will be disinclined to maintain its level of contributions or to urge Congress to provide public funding if their tax money is being used to fund a system which no longer fulfills the purpose of being an alternative to advertiser-supported television.<sup>8</sup>

Thus, noncommercial TV licensees - and the Commission - should be cautious. While permitting advertiser-supported ancillary or supplementary services over noncommercial stations may bring some short-term financial gains for those stations, they could very well lead to the long-term erosion of the entire system. This would be harmful not only for public broadcasters, but for the American people.

---

<sup>8</sup>Experience with underwriting suggests that the drive for advertising will generate changes in cultural and educational programming, making them more nearly like that already found on commercial cable and DBS channels. The viewers that give the most money to public television also have the means to afford cable and DBS. If the programming becomes indistinguishable, viewers may simply be content to give their money to an MVPD as opposed to their local noncommercial television stations.

**II. NONCOMMERCIAL TV LICENSEES SHOULD BE EXEMPT FROM FEES FOR ANCILLARY OR SUPPLEMENTARY SERVICES ONLY IF THEY ARE NOT PERMITTED TO PROVIDE ADVERTISER-SUPPORTED ANCILLARY OR SUPPLEMENTARY SERVICES.**

The Commission seeks comment on AAPTS/PBS request that noncommercial TV licensees be exempt from the fees on broadcasters's revenues from ancillary or supplementary services required by 47 USC §336(e). NPRM at ¶¶38-40 That provision mandates the FCC to adopt a fee structure:

(i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment....

47 USC §336(e)(2)(A).

The Commission notes that AAPTS/PBS refer to this language in making their request, arguing "that there is not need to 'recover' a portion of the value of the DTV spectrum for the public if the revenue is used to support noncommercial services that Congress had declared to be in the public interest." *NPRM* at ¶38.

This interpretation might have some merit as long as noncommercial licensees were offering noncommercial services. However, it breaks down entirely if they are carrying advertiser-supported services and programming. Under the plain language of Section 336(e), fees are required wherever it is necessary to recover "a portion of the public spectrum resource *made available for commercial use....*" (emphasis added) By permitting a portion of its spectrum to be used by commercial advertisers, noncommercial licensees are making it available for "commercial" use, and therefore fees must be applied.

AAPTS/PBS's linked requests to be permitted to carry advertiser-supported ancillary or supplementary services *and* to be exempt from fees cannot be sustained under any reading of

Section 336(e). APTS/PBS have argued that because the plain language Section 336(a)(2) does not distinguish between commercial and noncommercial TV licensees in permitting the provision of ancillary or supplementary services, noncommercial TV stations should be permitted to provide equivalent ancillary or supplementary services, including advertiser-supported services. *E.g.*, APTS/PBS Petition for Reconsideration or Clarification in MM Docket No. 87-268 at 26-27; July 31, 1997 APTS/PBS Reply Comments in MM Docket No. 87-268 at 4-6. But in requesting an exemption from fees, they are inconsistently asking the Commission to read into the statute a distinction between noncommercial and commercial TV licensees which does not exist.

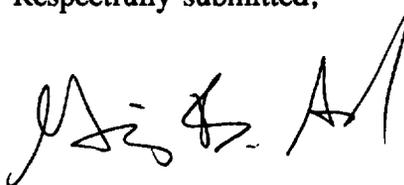
APTS and PBS cannot have their cake and eat it too. Notwithstanding the fact that Section 399B of the Communications Act prohibits noncommercial licensees from broadcasting advertisements, the public broadcasters cannot, under any plausible reading of Section 336, be permitted to provide advertiser-supported ancillary and supplementary services *and* also be exempt from fees for those services. Just as Section 336 makes no distinction between broadcasters with respect to their ability to provide advertiser-supported ancillary and supplementary services, it also makes no distinction as to which broadcasters must pay fees. Either public television is a noncommercial service entitled to special benefits because of its noncommercial nature, or it is a commercial service that should be treated like other comparable services.

### CONCLUSION

A prohibition against noncommercial broadcasters offering advertiser-supported ancillary or supplementary services does not eliminate all opportunities for these stations to increase revenues through new digital technologies. They should be able to use their digital TV capacity to make money - but they may not be permitted to use it to run commercials. To permit noncom-

mercial stations to run commercials would be an invitation to ride down a very slippery slope - one that will in all likely lead to reduced Congressional and viewer funding. If public broadcasters want to run commercials, they should seek that relief from Congress. The FCC should not permit them to sow the seeds of their own destruction.

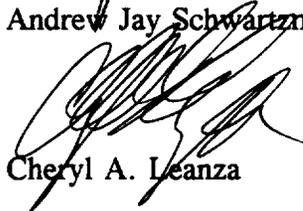
Respectfully submitted,



Gigi B. Sohn



Andrew Jay Schwartzman



Cheryl A. Leanza

Law Student Intern:

Heather Mayer  
University of Pennsylvania  
Law School

MEDIA ACCESS PROJECT  
1707 L Street, NW  
Washington, DC 20036  
202-232-4300

*Counsel for UCC, et al.*

February 16, 1999