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The Coalition for Noncommercial Media ("CNM"), by counsel and pursuant to 47 CFR §1.115, respectfully seeks review of Amendment 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) (Report and Order), DA 99-1442 (Chief, Allocations Branch, released July 23, 1999) ("R&Q"). Review is sought because the R&Q "is in conflict with...established Commission policy", 47 CFR §1.115(b)(2)(i), and because the R&Q contained a manifestly "prejudicial procedural error", 47 CFR §1.115(b)(2)(v).

I. Background

At the request of petitioner Western New York Public Broadcasting Association ("WNYPBA"), the Commission issued a Notice of Proposed Rulemaking proposing to assign Channel 17 a noncommercial reservation and to dereserve the noncommercial status for Channel 23*. NPRM, 13 FCC Rcd 18803 (1998). Channel 17 is occupied by WNYPBA's flagship WNED-TV and Channel 23 by its "second service" station, WNEQ-TV. WNEQ-TV is used primarily for educational programs, and for special programs aimed at children, minorities and the elderly, while WNED-TV primarily carries standard PBS fare. WNED-TV's operation on Channel 17 has superior technical facilities and a wider signal reach than WNEQ-TV's operation on Channel 23; thus, WNYPBA preferred to retain the Channel 17 facility and sell the Channel 23 facility. WNYPBA has acknowledged that the only purpose of the swap of noncommercial reservations is to permit it to sell WNEQ-TV, and that it would use the money for DTV conversion and television program production.

Several parties, including CNM, opposed the dereservation of Channel 23. CNM offered a timely counterproposal: reserving

Channel 17 for noncommercial use and also retaining the noncommercial reservation for Channel 23.

The R&Q granted WNYPBA's proposal. CNM now applies for review of the R&Q.

II. Summary of Argument (see 47 CFR §1.49(c))

The core issue raised by the R&Q -- 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. This Application for Review asks the Commission to reaffirm its longstanding policy favoring the availability of two public television channels to the public where that is technically possible. We ask the Commission to reject the Bureau's unprecedented attempt to make a 180 degree turn from that policy. For no compelling reason, the Bureau would have the Commission prefer the institution of an eighth commercial service at the expense of a second noncommercial service. Yet imagine the outcry if the Commission preferred a eighth noncommercial service rather than a second commercial one.

The Commission should never 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 local public TV stations, which offer the one solid, secure opportunity for the presentation of diverse viewpoints. This is especially not the

time to kill off the "second service" channels, which typically cater to smaller, niche audiences underserved both by commercial broadcasting and by traditional, first-service public broadcasting. These audiences, all served by the "second service" WNEQ-TV, include those needing at-home free access to educational programming, children, the elderly and minority groups.

Never has the Commission approved the dereservation of a noncommercial channel for the purpose of killing an operating public television station. Thus, the R&O raised 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 WNYPBA could be repeated in at least 14 other cities, depriving millions of Americans of two-channel public television service.^{1/}

Thus, the Commission should reaffirm its policy favoring diversity in public broadcasting. In addition, the Commission should permanently reserve, for noncommercial use, all channels throughout the United States on which public television stations presently operate.

After explaining why it is interested in this proceeding (§III infra), CNM describes the Bureau's initial and fatal procedural

^{1/} There are evidently fifteen markets -- most quite large -- with two public television stations, one of which operates on a nonreserved channel. The markets are: Orlando, FL, Evansville, IN, Indianapolis, IN, Flint, MI, Kansas City, MO, St. Louis, MO, Charlotte, NC, N. Platte, NE, Albany, NY, Buffalo, NY, New York, NY, Oklahoma City, OK, Greenville, SC, Harlingen, TX, and Waco, TX. Whether one considers this a "flood" or a mere "handful" of endangered stations is a matter of degree. See R&O at 5 ¶10. In the public television world, fifteen stations is a flood. That many stations are a significant factor in any national marketplace for endangered programming. These stations' loss would make it considerably more difficult for educational and alternative programmers to achieve the critical mass of public television outlets required to cover their production costs.

error in failing to fully describe CNM's counterproposal and hold it to be mutually exclusive to WNYPBA's proposal (§IV infra). CNM then explains in detail why its counterproposal is superior to WNYPBA's proposal (§§IV-VIII infra).

III. 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.

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 take no position on the qualifications of the potential commercial operator of WNEQ-TV.^{3/}

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

^{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. Sinclair recently proposed to sell these stations to a third party, while continuing to operate them through LMAs. BAPCT-990721IA (WUTV-TV) and BALCT-990721IB (WUHF-TV). 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.

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

If WNYPBA's proposal 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.^{4/}

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. As shown herein, the Commission should invite WNYPBA to generate that revenue by selling WNEQ-TV to an entity that would continue to operate it noncommercially.

IV. The Bureau Erred In Holding That CNM's Counterproposal Was Not Mutually Exclusive With WNYPBA's Proposal

CNM's "Comments, Counterproposal, and Proposal to Reserve all Channels Used by Noncommercial Television Stations" (filed November

^{4/} This concern, one held by all parents, quite properly animates CNM's participation in this proceeding. But the Commission need not ground its decision on a comparison of the specific proposed program offerings of WNEQ-TV and a potential commercial operator. Instead, the Commission should be guided by the fact that the marketplace for programs paid for by advertisers is a different marketplace than that for programs paid for by donors, foundations and government entities. The types of programs differ as a function of the mission and financing paradigms for the stations, and on the different types of audiences and the needs of those audiences. Thus, the Commission should reaffirm that it wishes to sustain a strong and diverse noncommercial television market. Cf. Sangre de Cristo Communications, Inc. v. FCC, ___ F.3d ___, 12 CRR 88, 92 (D.C. Cir. 1988) (holding that in considering the commercial or noncommercial status of an applicant for a change in technical facilities, the Commission "must ground the modification in a manner consistent with the First Amendment.")

16, 1998 in this proceeding) ("CNM Comments") urged the Commission to add noncommercial reservations to commercial television channels occupied by noncommercial broadcasters. CNM Comments at 18-19. The R&Q stated that this counterproposal "is not mutually exclusive with the Buffalo proposal and is therefore not appropriately filed in this proceeding. We will not consider this proposal further." R&Q at 1 n. 2.

Unfortunately, the R&Q did not appear to consider CNM's actual primary counterproposal, which was clearly labelled. Therein, CNM proposed that the Commission amend the Television Table of Allotments and by reserving Channel 17 and to amend the DTV Table of Allotments by reserving Digital Channel 32. CNM Comments at 18.

CNM's Buffalo-specific counterproposal CNM was obviously mutually exclusive with WNYPBA's proposal. Its mutual exclusivity derives from the larger principle of Ashbacker v. FCC, 326 U.S. 327 (1945). That principle is that when the grant of one proposal precludes the grant of the other, the two must be evaluated comparatively.^{5/} CNM's counterproposal obviously is mutually exclusive to WNYPBA's proposal, because if CNM's counterproposal were granted, there would be nothing for WNYPBA to swap, and if WNYPBA's proposal were granted, there would be no second noncommercial channel for CNM to seek to preserve.

Since no head-to-head comparison of WNYPBA's proposal with CNM's proposal with WNYPBA's proposal was undertaken, the R&Q

^{5/} The R&Q stated that the narrow message of Ashbacker -- that competing applications for vacant spectrum must undergo comparative hearings -- does not apply when channels are occupied. R&Q at 5-6 ¶12 (citing Rainbow Broadcasting Co. v. FCC, 949 F.2d 405, 410 (D.C. Cir. 1991)). However, the Commission should apply the larger meaning of Ashbacker, which is that due process requires equivalent treatment of mutually exclusive proposals. By disregarding CNM's counterproposal, the R&Q erroneously preferred an incumbent's idea merely because it was advanced by an incumbent.

erroneously evaluated WNYPBA's proposal using the much lower standard of review owing to non-mutually exclusive proposals. As shown infra, the Commission should evaluate CNM's and WNYPBA's proposals comparatively, and in doing so it must find CNM's proposal superior.

V. Noncommercial Channels Are A Sacred Trust Which Must Be Held Inviolate

No resource held in trust by the Commission 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 ever relinquishes its channel to a noncommercial user. Thus, the question presented by this case is whether the Commission, 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 Commission 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 WOED 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 (MO&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 WOED attempted to do directly. WNYPBA proposes to "swap" a noncommercial for a commercial reservation, for the purpose of killing one of the noncommercial stations.^{6/} In evaluating whether to allow this, the Commission should whether the Department of the Interior could create a new national park adjacent to an existing one, on pristine but 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,"

^{6/} The Commission should focus on the underlying purpose of WNYPBA's proposal. Most viewers are unaware of decisions the Commission made over 40 years ago to reserve only certain channels. Viewers do know which channels offer noncommercial programming. The Commission should regulate with viewers' perceptions in mind, rather than relying on the meaningless and arbitrary distinction between whether deservation is attendant to a channel swap (as here) or is proposed without a swap (as in Pittsburgh). It would be small comfort to the viewing public that although their children will enjoy one less public television station, there was no "elimination of any noncommercial channel reservations."

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 expand the boundaries of the existing national park to

6/ [continued from p. 9] Ironically, in another context, the R&O also preferred to ground its analysis on what it considers the real world consequences of WNYPBA's proposal. Id. at 4 ¶8 (contending that WNYPBA could have circumvented the rulemaking process by selling WNED-TV outright.) In this respect, the R&O erroneously assumed that such a proposed sale would have passed the laugh test. First, such a move would deprive many rural viewers in Western New York of any public television service, and it is unthinkable that in the face of the many inevitable petitions to deny, the Commission would approve such a drastic step. Second, the Commission would still be faced with the argument that a noncommercial station, in a market with only two noncommercial allotments, should not be sold except to another noncommercial broadcaster. WNYPBA knows this, and understandably did not propose any such dead-on-arrival sale of WNED-TV.

include the commercially threatened adjacent land.^{7/}

This explains why the Commission 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.^{8/}

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.

^{7/} The R&O disputed this, pointing to a statute authorizing the conversion to private use of governmentally acquired property. R&O at 3 n. 4 (citing 16 U.S.C. §4601-8(f)(3)). However, the R&O pointed to no instance in which the Interior Department ever converted national parkland to commercial use in exchange for adjacent private land, much less a conversion which yielded a net result which halved the land -- publicly or privately owned -- actually used by the public for conservation and recreation. Indeed, the Clinton Administration announced just two days ago that it seeks through its "Land Legacy" program to protect dozens of sites adjacent to federal sanctuaries, including 9,300 acres next to Yellowstone National Park. See C. Babington, "Clinton Seeks to Preserve Land Next to Yellowstone," Washington Post, August 22, 1999, p. A-8. The administration obviously understands that what an agency can do is not the same as what the agency should do.

^{8/} The growth of commercial television concentration since the Telecommunications Act of 1996 has been well documented by University of Illinois media historian Robert McChesney in Corporate Media and the Threat to Democracy (Seven Stories Press, 1997) at 17-22. This phenomenon changes the equities substantially in favor of the defense of noncommercial spectrum. The answer to greater commercial concentration is more noncommercial protection.

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.

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.^{9/}

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 healthy alternatives to standard commercial fare.^{10/}

A comparison between CNM's proposal for two reserved public TV channels with WNYPBA's proposal for one reserved public TV channel and an eighth commercial channel is not even close. As noted above, public TV is a very different service from commercial TV, and a fundamental goal of the Commission is preserving multiple services in each community. One of the Commission's three core goals in implementing its Section 307(b) responsibilities is to provide multiple outlets for local self expression addressed to each community's needs and interests.^{11/} The distribution of a license to a community "in order to secure local competition for

^{9/} 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 WNEQ-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.

^{10/} 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).

^{11/} 47 U.S.C. §307(b) states: "In considering application for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." See WHW, Inc. v. FCC, 753 F.2d 1132 (D.C. Cir. 1985); Revision of FM Broadcast Rules, 40 FCC 662, 664 (1962).

originating and broadcasting programs of local interest falls well within the Commission's allowable area of discretion to make a "fair, efficient, and equitable distribution of radio service" among different localities."^{12/}

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 proposal.^{13/} Under this approach, noncommercial applicants for

^{12/} See, e.g., FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 360 n. 1 and 362 n. 4 (1965).

^{13/} The Commission was not sure how to construe Section 309(j)(2)(C) of the Act, which provides that competitive

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.^{14/}

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.

VI. The Petition For Rulemaking Did 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

^{13/} [continued from p. 14] 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 Furchtgott-Roth and 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 this reading of the statute.

^{14/} 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.

system of broadcasting is premised upon the inviolateness of the reserved channels.

The public interest detriment of a reduction by half in the number of noncommercial voices cannot possibly be offset by the public interest value in having an eighth commercial voice. 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.

This explains 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 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.")^{15/}

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 WQED's request for dereservation of a channel to accommodate the sale of WQED'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 could generate or save revenue by assigning WNEQ-TV to another noncommercial entity.^{16/}

Indeed, the equities in Pittsburgh were much stronger than those here. WQED was technically bankrupt; see Pittsburgh, 11 FCC

^{15/} See also Amendment of Section 73.606(b) (Columbus and Royston, Georgia), RM-4894, rel. 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).

^{16/} 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.

Rcd at 17703 ¶6. Fortunately, WNYPBA is solvent. For twelve 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 the LMA'ed operation of another company that now owns and plans to continue to operate the Fox affiliates in Buffalo and Rochester. See n. 3 supra. Not only would the sale of WNEQ-TV reduce noncommercial diversity, it would actually also reduce commercial service diversity.

Any potential benefits of the WNEQ-TV sale are hardly compelling; indeed, they are extremely speculative. WNYPBA states that it will use the money from the sale to produce more 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 or Canadian syndication. WNYPBA has not even attempted to demonstrate that there is a dire national shortage of nationally syndicated programming. WNYPBA's proposal is a solution in search of a problem.

WNYPBA also wishes to secure additional funds for digital TV, as did WQED in the Pittsburgh case. R&O at 2 ¶4. 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.^{17/}

The prospect of digital television is speculative, and may become limited by law or custom to one wide-screen channel. If WNYPBA later chooses 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.

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.^{18/} 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

^{17/} The cost of DTV conversion was estimated by WNYPBA at \$7-10 million. WNYPBA Petition for Rulemaking at 4. Some of this cost will be government-subsidized. The remainder 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*. The sale of WNEQ-TV to another noncommercial operator (as in Pittsburgh) could well fully subsidize WNEQ-TV's digital conversion costs.

^{18/} WNYPBA cannot understand why the public would need eight digital channels rather than four. See R&O at 2 ¶3. 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.

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

As it did in Pittsburgh, the Commission should expect WNYPBA to undertake to sell WNEQ-TV to a noncommercial entity before coming back to it seeking to sell it to a commercial one. WNYPBA does not contend that such a sale is impossible, or even assert that it has made a reasonable effort to attempt such a sale. Nor does WNYPBA contend that such a sale would not yield ample funds to complete WNEQ-TV's digital conversion with money left over for new programming initiatives, akin to what WQED in Pittsburgh will enjoy if it closes its sale of its second station to noncommercial Cornerstone Television.

Understandably, WNYPBA would withdraw its proposal if competing expressions of interest were permitted. R&O at 6 ¶13.^{19/} A better approach would be for the Commission to embrace the reasoning it used in Pittsburgh, which ratified a prescient

^{19/} CNM expresses no view on whether the Commission is required to open WNEQ-TV for auction. See R&O at 2-3 ¶5, which details arguments made by objectors WKBW-TV Licensee, Inc. ("WKBW") and by Grant Television, Inc. ("Grant"). These are serious contentions, however, which deserve clarification by the Commission on its own motion even if WKBW-TV and Grant elect not to seek review of the R&O.

licensee's fallback plan to sell its second station to a different noncommercial operator.

VII. 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. Fourteen 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. See n. 1 supra.

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

Now is the time for the Commission 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 Commission should act decisively to protect forever the public's last remaining electronic unprotected space -- the nonreserved channels used for public broadcasting.

VIII. If It Reserves All Channels Used For Public Broadcasting, The Commission Will Have Greater Flexibility To Deregulate 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.^{20/} Likewise, as it implements additional deregulation of commercial television,^{21/} the Commission can draw comfort from the existence of a robust, fully vested public television system.

Conclusion

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

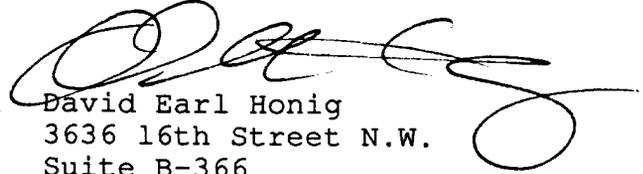
I decline to disturb long standing Commission precedent, especially with a decision that could ripple through the country, putting undue pressure on other public television stations to sell what essentially is their birthright. The strength of our noncommercial system flows from the combination of quality 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.

^{20/} 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)).

^{21/} See generally Review of the Commission's Regulations Governing Television Broadcasting (Report and Order), FCC 99-209 (released August 6, 1999) (ironically authorizing many new commercial duopolies of the type previously authorized only for public television licensees like WNYPBA.)

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Honig", written over the typed name and address.

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August 23, 1999

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 23rd day of August, 1999 caused the foregoing "Application for Review" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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