

dissenters noted that *Red Lion*

has been the subject of intense criticism. Partly this rests on the perception that the "scarcity" rationale never made sense -- in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare). And partly the criticism rests on the growing number of available broadcast channels. While *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death, we can think twice before extending it to another medium.<sup>27</sup>

CBS respectfully suggests that a question raised by one-half the membership of the District of Columbia Circuit as to whether the "scarcity rationale [ever] made sense" should also give the Commission pause as it considers adopting an extensive new regulatory scheme for digital television -- a medium which, like DBS, has a multichannel capacity which would make the relevance of the scarcity doctrine to its regulation all the more tenuous.

In any event, even if the theories of spectrum scarcity and government "ownership" of the airwaves proved sufficient to sustain the constitutionality of the type of regulation which the Commission appears to contemplate in the *Notice*, that does not answer the question of whether such regulations would be good public policy. In an era in which the amount of information and entertainment available to the American public has increased to an extent which can only be termed revolutionary, it seems anomalous, to say the least, that the Commission should be considering the adoption of quantitative programming requirements, and the reimposition of formal ascertainment obligations, based on the premise of "scarcity." CBS respectfully submits that in considering such regulations the Commission must not only ask whether they would be constitutional, but whether they make sense.

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<sup>27</sup> Id. at 724, n.2 (citations omitted).

A. Spectrum Scarcity

In holding in *Syracuse Peace Council* that the theory of spectrum scarcity could no longer justify differential First Amendment treatment of the print and electronic press, the Commission relied in large part on a comprehensive review of the media marketplace which it had conducted in connection with its review of the fairness doctrine two years earlier.<sup>28</sup> Based on that review, the Commission found that “in recent years ... there [has] been an explosive growth in both the number and types of [media] outlets providing information to the public” and concluded that “the Supreme Court’s concern that listeners and viewers have access to diverse sources of information has now been allayed.”<sup>29</sup>

As examples of this “explosive growth,” the Commission cited a 48 percent increase in the number of radio stations and a 57 percent increase in the number of television stations since the Supreme Court’s decision in *Red Lion*;<sup>30</sup> the growth in the percentage of cable systems having the capacity to carry 12 or more channels from one percent in 1969 to 69 percent (and 92 percent of all subscribers) in 1987;<sup>31</sup> cable penetration rates equaling 47 percent of all television households;<sup>32</sup> and a number of “new electronic technologies” unavailable at the time of the *Red*

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<sup>28</sup> *In the Matter of Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143 (1985).

<sup>29</sup> *Syracuse Peace Council, supra*, 2 FCC Rcd at 5053.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id.

*Lion* decision, such as low power television, MMDS (wireless cable), video cassette recorders, and satellite master antenna systems (“SMATV”).<sup>33</sup> The Commission also noted the emergence of “a number of other electronic services, such as direct to home satellite services, satellite news gathering, subscription television, FM radio subcarriers, teletext, videotext and home computers [which] ‘have the potential of becoming substitute information sources in the marketplace of ideas.’”<sup>34</sup> Some of these technologies, the Commission observed, “are beginning to merge characteristics of the electronic media with those of print media, further complicating the choice of an appropriate constitutional standard to be applied to their regulation.”<sup>35</sup>

That was in 1987, and the changes in the media landscape since the fairness doctrine had been sustained on the basis of “spectrum scarcity” had indeed been dramatic. But those changes pale in comparison to what has occurred since then. Today there are not slightly over 1200 television stations in the United States but more than 1600;<sup>36</sup> cable subscribership approaches 70, rather than 47, percent of all television households;<sup>37</sup> 92 percent of cable systems and nearly 97 percent of all cable subscribers are able to receive 12 or more channels, with 95 percent of subscribers being able to receive 30 or more;<sup>38</sup> and more than 13 million households subscribe

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<sup>33</sup> Id. at 5053.

<sup>34</sup> Id.

<sup>35</sup> Id. at.5053-54

<sup>36</sup> Television and Cable Factbook 2000 at I-45 (Warren Communications News).

<sup>37</sup> *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report*, CS Docket No. 99-230, FCC 99-418 (released January 14, 2000) at ¶ 20 (“*Sixth Annual Report*”).

<sup>38</sup> Television and Cable Factbook 2000 at I-98 (Warren Communications News).

to multichannel program services delivered directly to the home by satellite,<sup>39</sup> a service which was mentioned by the FCC only in terms of its “potential” in 1987. Most dramatic of all, the astonishing rise of the Internet from an obscure computer network, known only to a relative handful of scientists, to a dominant feature of our culture has brought a hitherto unimaginable wealth of entertainment, information and opinion to the fingertips of 100 million Americans.<sup>40</sup> Thus, in fact as opposed to theory, it is almost too obvious to say that American broadcasters now operate in the most information-rich society in history. The advent of digital television will only further add to this unprecedented abundance.<sup>41</sup>

To speak of “scarcity” in this environment appears to border on the bizarre. Nevertheless, advocates of increased broadcast regulation contend that scarcity still exists in the constitutional sense -- as it will presumably always exist -- by virtue of the fact of government licensing. These proponents of regulation argue that broadcast frequencies are scarce -- no matter how many stations are actually on the air -- because there are still more persons wishing

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<sup>39</sup> See [http://www.skyreport.com/skyreport/dth\\_us.htm](http://www.skyreport.com/skyreport/dth_us.htm).

<sup>40</sup> *Sixth Annual Report*, supra n.23, at ¶15.

<sup>41</sup> More than 25 years ago, the United States Court of Appeals for the District of Columbia Circuit had occasion to observe:

In this nation the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune-in his television. Information indicative of all viewpoints is available merely for the seeking.

*Democratic National Committee v. FCC*, 460 F.2d 891, 910 (D.C. Cir), cert. denied, 409 U.S. 843 (1972). It goes with out saying that this statement is even more true today.

to broadcast than there are frequencies. This necessitates allocation of the available frequencies by the Commission, as part of which, the advocates of regulation contend, government may attach conditions to their use..

However, the fact that broadcast frequencies are licensed by the government in order to minimize interference is -- at the very least -- a dubious basis for affording broadcast stations a lesser degree of First Amendment protection than newspapers. To begin with, this rationale could easily justify government oversight of the content of *all* media,<sup>42</sup> a concept which is wholly foreign to the most fundamental traditions and beliefs of this nation. For example, during World War II, newsprint was scarce because its production used too many materials critical to the war effort, and was thus subject to government ordered consumption quotas.<sup>43</sup>

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<sup>42</sup> The potential elasticity of the scarcity rationale has been expressly recognized by the United States Court of Appeals for the District of Columbia Circuit:

A publisher can deliver his newspapers only because government provides street and regulates traffic on the streets by allocating rights of way. Yet no none would contend that the necessity for these government functions, which are certainly analogous to the government's function in allocating broadcast frequencies could justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

*Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 509 (D.C. Cir), *reh. denied*, 806 F.2d 1115 (1986), *cert. denied*, 482 U.S. 918 (1987).

<sup>43</sup> See, Ellis, Newsprint: Producers, Publishers and Political Pressures, 54-91 (1960); Chafee, Government and Mass Communications, 506-07 (1947). In *Syracuse Peace Council*, the Commission took note of this episode, describing it as follows:

[T]he scarcity of newsprint extended throughout the war and well into the post-war period. During this time, many papers, especially dailies, were forced by circumstances to adopt such practices as circulation freezing, size reduction, and switching to weekly publication. Indications are that the shortage of newsprint due to government rationing caused many smaller newspapers to go out of business, in addition to creating a substantial barrier

Nevertheless, the real scarcity of raw materials affecting newspapers then -- as opposed to the theoretical scarcity underlying the rationale for broadcast content regulation now -- was never thought to be the basis for the creation of a Federal Newspaper Commission to oversee whether newspapers were performing in the public interest. Would anyone contend that this was a missed opportunity by the government to advance the public good? Perhaps some media critics and access advocates would do so; nonetheless, there can be no doubt that the view that government oversight of the press actually promotes First Amendment "values" is both directly at odds with the plain language of the First Amendment itself ("*Congress shall make no law*") and our interpretation of that amendment as it has grown up for more than two hundred years.<sup>44</sup>

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to those who desired entry into newspaper publishing. Yet the policy of newsprint allocation under government auspices, which caused a reduction in the overall amount of newspaper speech -- due either to those who left or those who could not enter -- did not give rise to the imposition of obligations on the remaining newspapers to make their facilities available for those speakers who were silenced.

2 FCC Rcd at 5055, n.202.

<sup>44</sup> As Justice Douglas stated in his concurring opinion in *Columbia Broadcasting System, Inc v. Democratic National Committee*, 412 U.S. 94, 160-61 (1973):

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions.

There is yet another major problem with the theory that licensing in itself establishes “scarcity” -- namely, it takes no account of the fact that both broadcast stations and newspapers are in reality “allocated” by the forces of supply and demand in a free market. Although there may be more who want to use the airwaves than there are broadcast licenses available, the fact remains that broadcast stations can be bought and sold,<sup>45</sup> and the resultant scarcity of broadcast stations is therefore primarily economic, just as it is for newspapers. In 1987, the Commission observed that approximately 71 percent of radio stations, and 54 percent of television stations, had been acquired by purchase.<sup>46</sup> Thirteen years later, after a period of unprecedented transactional activity in the industry, it is obvious that those figures must be substantially higher. Thus, what the Commission had to say in 1987 about the “allocation” of broadcast frequencies is even more true today:

[I]n the vast majority of case, broadcast frequencies are “allocated” -- as are the resources necessary to disseminate printed speech -- through a functioning economic market. Therefore, after initial licensing, the only relevant barrier to acquiring a broadcast station is not governmental, but -- like the acquisition of a newspaper -- economic.<sup>47</sup>

In *Miami Herald Publishing Company v. Tornillo*, the Supreme Court unanimously rejected the notion that economic scarcity of this kind could justify government regulation of the content of newspapers. The Court noted that “the press of today is in reality very different from that known in the early years of our national existence,” when entry into publishing was

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<sup>45</sup> Although the assignment of a broadcast license requires approval by the Commission, such applications are insulated from comparative challenge, 47 U.S.C. § 310(d), and are virtually never denied.

<sup>46</sup> *Syracuse Peace Council, supra*, 2 FCC Rcd at 5055.

<sup>47</sup> Id.

inexpensive and “[a] true marketplace of ideas existed in which there was relatively easy access to the channels of communication.”<sup>48</sup> The Court recognized that, by contrast, the decrease in the number of newspapers serving a larger literate population, the growth of chain newspaper ownership and national newspapers, and the increase in one newspaper towns, had led to a “concentration of control of outlets to inform the public.”<sup>49</sup> As a result, the Court acknowledged that barriers to entry into newspaper publishing were, even in 1974, extremely high:

the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers . . . have made entry into the marketplace of ideas served by the print media almost impossible.<sup>50</sup>

Nevertheless, the Court found the argument that, in these conditions of “scarcity,” newspapers were to act as “surrogates for the public” with “a concomitant fiduciary obligation to account for their stewardship”<sup>51</sup> irreconcilable with the First Amendment:

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years.<sup>52</sup>

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<sup>48</sup> 418 U.S. at 248.

<sup>49</sup> Id. at 249-51.

<sup>50</sup> Id. at 251.

<sup>51</sup> Id.

<sup>52</sup> Id. at 254. *See also, Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 159 (1973) (Douglas, J., concurring):

It is, indeed, ironic to note that although broadcasters enjoy a lesser degree of First Amendment protection than newspapers because of their supposed scarcity, there are many more broadcast stations in the United States than there are daily newspapers.<sup>53</sup> This fact only reinforces what we believe to be obvious: spectrum scarcity is a wholly theoretical construct, bearing no relation to the reality of the modern media marketplace. Moreover, even as a theory justifying the regulation of broadcast content, spectrum scarcity suffers from notable conceptual weaknesses.<sup>54</sup> In short, this hoary doctrine would hardly provide a firm constitutional foundation for the extensive regulation of digital television contemplated in the *Notice*.

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Th[e] uniqueness [of broadcasting] is due to engineering and technical problems. But the press in a realistic sense is likewise not available to all. Small or "underground" papers appear and disappear; and the weekly is an established institution. But the daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like TV and radio, are available only to a select few. Who at this time would have the folly to think he could combat the New York Times or Denver Post by building a new plant and becoming a competitor? That may argue for a redefinition of the responsibilities of the press in First Amendment terms. But I do not think it gives us carte blanche to design systems of supervision and control or empower Congress to read the mandate in the First Amendment that "Congress shall make no law . . . abridging the freedom . . . of the press" to mean that Congress may, acting directly or through any of its agencies such as the FCC make "some" laws "abridging" freedom of the press.

<sup>53</sup> At the time of its decision in *Syracuse Peace Council*, the Commission found that there were 11,443 broadcast stations nationwide, but only 1657 daily newspapers. 2 FCC Rcd at 5054.

<sup>54</sup> As the D.C. Circuit has observed:

[T]he line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.

However, even if the spectrum scarcity doctrine were somehow to survive a serious constitutional challenge, this would not relieve the Commission of its obligation to determine whether detailed government regulation of digital television would serve the public interest. Whether or not “allocational” as opposed to actual scarcity would be sufficient to sustain such regulations as a matter of constitutional law, the fact would still remain that an abundant number of broadcast stations are on the air, and that television -- together with newspapers, magazines, books, cable television, DBS and the Internet -- provide more varied entertainment, information and diverse opinion than any person could possibly consume. In this environment, we believe the Commission must ask itself whether imposing intrusive content regulations on digital broadcasters is necessary or would serve any real purpose. CBS respectfully submits that the answer to these questions is clearly no.

B. Government “Ownership” of the Airwaves

Perhaps the most frequently heard refrain in the debate over broadcast regulation is the assertion that “the public owns the airwaves.” From this incantation it is taken to follow that government can impose such public interest obligations as it sees fit on the licensees who have

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It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.

*Telecommunications Research and Action Center v. FCC*, supra, 801 F.2d at 508.

been awarded the valuable right to broadcast on the public's airwaves "for free." CBS does not dispute that government can place conditions on licenses it grants, pursuant to regulations of general applicability, provided those conditions do not unduly infringe upon constitutional rights (a subject to which we return below). To the extent that the old chestnut "the public owns the airwaves" is used merely as a figure of speech for this principle, it is harmless enough. Too often, however, the phrase is invoked in defense of government intrusions on broadcasters' First Amendment rights, or in justification of mandating that broadcasters alone bear the cost of what is perceived to be a public good -- for example, by requiring that broadcasters provide free time to political candidates.<sup>55</sup> Used in this manner, the concept of "public ownership of the airwaves" is as pernicious as it is wrong.

It is, first of all, futile to speak of public or government ownership of the airwaves, since the electromagnetic spectrum is not a thing which can be owned. The spectrum exists only by virtue of electromagnetic radiation, which is produced by a radio transmitter -- in almost all cases privately owned -- sending energy through space, which is not generally thought to be susceptible of ownership. As five judges of the United States Court of Appeals for the D.C. Cir. observed in *Time Warner Entertainment Co., L.P. v. FCC*:

unallocated spectrum is government property only in the special sense that it simply has not been allocated to any real "owner" in any way. Thus it is more like unappropriated water in the western states, which belongs, effectively, to no one. Indeed, the common law courts had treated spectrum in this manner before the advent of full federal regulation. See *Chicago Tribune Co. v. Oak Leaves Broadcasting Station*, Ill. Circuit Ct., Cook County, Nov. 17, 1926, reprinted in 68 Cong. Rec. 215-19 (1926) (recognizing rights in spectrum acquired by reason of investment of time and money in application of

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<sup>55</sup> See discussion at Section IV. D, *infra*.

the resource to productive use, and drawing on analogy to western water rights law).<sup>56</sup>

Former Commissioner Glen O. Robinson has made a similar point:

[s]aying that the government owns “property” in the spectrum is simply a way of describing the government’s control of the uses of radio frequencies, in space, in order to prevent what the common lawyer might call a nuisance ....

The government has long had laws controlling such [matters]; zoning laws are a classic example. However, as far as I am aware, those laws are never characterized as an exercise of public ownership rights by the government.<sup>57</sup>

Indeed, although the nature of the electromagnetic spectrum is such that it cannot, in any realistic sense, be owned by anyone, it is quite clear that a broadcaster has a species of property right in its license to broadcast over a particular frequency during a given period. As one commentator has described it:

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<sup>56</sup> 105 F.3d at 727 (Williams, J., dissenting from denial of rehearing *en banc*). Significantly, the dissenting judges went on to question the constitutionality of the very concept of government “ownership” of the spectrum:

Further, the way in which the government came to assert a property interest in spectrum has obscured the problems raised by government monopoly ownership of an entire medium of communication. We would see rather serious First Amendment problems if the government used its power of eminent domain to become the only lawful supplier of newsprint and then sold the newsprint only to licensed persons, issuing the licenses only to persons that promised to use the newsprint for papers satisfying government-defined rules of content. The government asserted its monopoly over broadcast spectrum long before the medium attained dominance, making the assertion of power seem modest and, by the time dominance was manifest, normal. While this sequence veiled the size and character of the asserted monopoly, it is not clear why it should justify an analysis any different from what would govern the newsprint hypo.

Id. at 728.

<sup>57</sup> Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 912 (1998).

For their duration, broadcast licenses grant to licensees the functional equivalent of property rights: exclusive entitlement to and prohibition of interlopers from trespassing on their particular spectrum space. The sanctions to which licensees are subject if they broadcast outside the wavelengths covered by their licenses serve much the same function as fences around the borders of real property: they prevent encroachment upon assets to which the law grants others exclusive possession. Another fact indicating that licenses are the functional equivalent of property is that, despite being limited in duration, they are traded in an active market where prices clearly reflect buyers' expectations of uninterrupted long-term enjoyment. Moreover, ...broadcasters' expectations of uninterrupted income streams are investment-backed and ...broadcasters' investment in reliance on the continuation of the licensing regime is encouraged by a number of explicit FCC policies.<sup>58</sup>

Finally, even if it were possible meaningfully to speak of government ownership of the airwaves, it would say nothing about the government's power to regulate speech on those airwaves. No one would argue, for example, that government ownership of the streets and public parks lend it any authority to limit expression in those venues, other than reasonable regulations as to the time, place and manner of such expression.<sup>59</sup> The contention that government "ownership" of the airwaves would increase in the slightest its authority to intrude into editorial decisions made by private broadcasters, duly licensed to use those channels of communication, is likewise completely without basis.

As we have shown, even brief analysis reveals the concept of "public ownership of the airwaves" to be utterly simplistic. It is a notion that, however wizened, is entitled to no weight in evaluating regulatory proposals which would trench on broadcasters' First Amendment rights, or impose on them burdens which would universally be regarded as onerous and discriminatory if

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<sup>58</sup> Lillian R. BeVier, *Is Free Time for Candidates Constitutional*, American Enterprise Institute, at 8 (1998) (available at [www.aei.org](http://www.aei.org)). It may be additionally noted that, like any property right, a broadcaster cannot be deprived of its license without due process of law.

applied to any other industry.<sup>60</sup> When such extravagant demands are made on broadcasters, it is well to remember that a bare frequency allocation produces nothing of value. Private capital and initiative are required to construct the facilities which make “airwaves” out of mere air, and to invest in the personnel, equipment and programming which provide a source of entertainment and information to millions. Absent the investment, talent and enterprise that go into putting a broadcast station on the air, there would be precious little on the public airwaves for the public to watch. The theory that government “owns” the spectrum used by entrepreneurs to make the wonder of broadcasting a reality provides no basis -- constitutional or otherwise -- for imposing burdensome new regulation on digital television.

C. The Fact That Government Must of Necessity Allocate the Right to Broadcast Over a Particular Frequency Provides No Justification for Imposing Regulations on Broadcasters Which Would Violate the First Amendment if Applied to Other Media.

As we have indicated, it is clear that government may impose conditions on licenses it grants and benefits it confers. In granting a building permit for the construction of a supermarket, for example, the government may require that sufficient parking facilities be provided to accommodate the additional vehicles which the market may be expected to attract to the area. As a condition of receiving a government contract, an agency may insist that the contractor adhere to its regulations regarding non-discrimination in employment. And the holder of an FCC broadcast license may be required to operate during certain hours and within

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<sup>59</sup> See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

<sup>60</sup> For example, would anyone *conceive* of requiring the owners of auditoriums, or the manufacturers of posters and bumper stickers, to provide their facilities and products to political candidates *for free*? And while CBS has been a leader in voluntarily making its programming accessible to persons with disabilities, can a proposal be imagined that newspapers be *required* to prepare a Braille edition so as to be more accessible to the visually impaired?

specified technical parameters, as well as to cooperate with federal plans for the use of broadcast facilities during local and national emergencies. Most obviously, the government may, if it chooses, sell to the highest bidder the right to exploit natural resources which it must of necessity apportion, such as the right to drill for oil on federal lands, operate a concession in a national park, or broadcast on a particular frequency.<sup>61</sup>

There are, however, limits on the government's power to grant or withhold benefits based on the recipient's willingness to agree to accept terms which the government imposes. As stated by the Supreme Court in *Perry v. Sinderman*:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.<sup>62</sup>

As noted by the *Perry* Court, this principle has been applied to denial of tax exemptions,<sup>63</sup> unemployment applications,<sup>64</sup> welfare benefits,<sup>65</sup> and the denial of public employment.<sup>66</sup> It has

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<sup>61</sup> The government has not, of course, chosen to auction broadcast frequencies, at least until recently. The fact of that choice, however, cannot justify governmental interference with broadcast content which would otherwise be unconstitutional. Nor can it affect the legitimacy of a broadcaster's expectancy of renewal of its license, during good behavior, to which it is entitled by virtue of its purchase (in most cases) of that license, and its expenditure of money and effort in building its business.

<sup>62</sup> 408 U.S. 593, 597 (1972).

<sup>63</sup> *Speiser v. Randall*, 357 U.S. 513 (1958).

also been applied in the area of broadcasting. In *League of Women Voters v. FCC*,<sup>67</sup> the Supreme Court found unconstitutional under the First Amendment Section 399 of the Public Broadcasting Act, which prohibited editorializing by non-commercial educational broadcasting stations which received funds from the Corporation for Public Broadcasting. The Court expressly rejected the government's argument that withholding CPB funds from non-commercial stations which engaged in this form of expressions was just a legitimate exercise of its spending power, embodying a Congressional determination that it would not subsidize public broadcasting editorials.

Similarly, the additional content-based restrictions on the editorial freedom of digital broadcasters' discussed in the *NOI* cannot be characterized simply as the withholding or conditioning of a government benefit or subsidy.<sup>68</sup> Those restriction would be highly coercive in

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<sup>64</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>65</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>66</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968); *United States v. Robel*, 389 U.S. 258 (1967); *Whitehall v. Elkins*, 389 U.S. 54 (1967); *Keyishan v. Board of Regents*, 385 U.S. 589 (1967).

<sup>67</sup> 468 U.S. 364, (1984).

<sup>68</sup> *Compare Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Court held that certain federally funded family planning services could be constitutionally prohibited from the "counseling, referral and the provision of information about abortion." In that case, the limitation on the expenditure of federal funds could hardly be said to "coerce" the clients of such programs from exercising their constitutionally protected right to an abortion, since no direct benefit to them was in issue. Nor did the expenditure limitation impinge on the First Amendment rights of the doctors, nurses and counselors working in the family planning services, since they were merely restricted in their ability to provide information about abortion in their capacity as representatives of a federally funded program, the proper scope of which could be legitimately determined by Congress.

that they would directly make both the initial receipt of the benefit and its retention dependent on the broadcaster's implicit agreement to forswear First Amendment rights, and its subsequent performance consistent with that agreement. The situation is thus similar to that in *Speiser v. Randall*,<sup>69</sup> in which the Court found unconstitutional the conditioning of certain veterans' tax benefits on the veteran's willingness to take a loyalty oath. As stated by the *Speiser* Court:

[The] deterrent effect [of denial of a benefit] is the same as if the State were to [impose a] fine . . . for this speech. The [argument is] plainly [mistaken] that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech. . . . This Court has . . . rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, or the opportunity for public employment. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.<sup>70</sup>

In the same manner, conditioning the grant of a digital broadcast license on an applicant's adherence to regulations clearly impinging on freedoms guaranteed by the First Amendment would be unconstitutional.

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<sup>69</sup> 357 U.S. 513 (1958). Nor can it be contended that a greater "nexus" between the government condition and the benefit exists in the present circumstances than in *Speiser*. The additional restrictions on the editorial decision making of digital broadcasters discussed in the Notice are simply unrelated to the change in the technology of delivering and receiving television signals related to the digital transition. See Separate Statement of Commissioner Furchtgott-Roth, generally.

<sup>70</sup> *Speiser v. Randall*, supra 357 U.S. at 518-19.

IV. Proposals for the Imposition of New Public Interest Obligations Are Unnecessary in Light of the Voluntary Efforts of Broadcasters, Contrary to the Deregulatory Intent of the Telecommunications Act, Counterproductive to the Achievement of the Act's Goals, Represent An Unjustifiable Return to The Highly Regulatory Policies of the Past That the Commission Has Properly Abandoned, and Are Constitutionally Suspect

Without itself endorsing any specific proposals, the Commission seeks comment on a variety of suggestions for additional, new public interest obligations to be imposed on digital broadcasters. It bears reemphasis that the Telecommunications Act of 1996 clearly contemplates retention of broadcasters' existing obligation to serve the public interest.<sup>71</sup> CBS in no way contests the applicability of the present regulations to the digital environment. We recognize that under the regulatory scheme, broadcasters will continue to carry out the full range of their current obligations on a digital service whose resolution is "comparable to or better than that of today's service" and that operates during the same hours as the broadcasters' current analog channel.<sup>72</sup>

But it is CBS's view that the passage of the Act and the conversion to digital broadcasting provide no justification for the imposition of new burdens on broadcasters. In fact, the impulse to pile additional requirements on broadcasters is contrary to the intent of the Act, whose preamble states it is legislation designed "to promote competition and reduce regulation in

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<sup>71</sup> "Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity." 47 U.S.C. §336(d). The Commission has clearly stated that "existing public interest requirements continue to apply to all broadcast licensees." See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809, 12830, ¶50 (1997) (*Fifth Report and Order*)

<sup>72</sup> Id. at 12820, ¶28.

order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>73</sup> Imposition of new public interest obligations is inconsistent with both statutory goals of reducing regulatory burdens and facilitating broadcasters’ efforts to bring innovative services to the public.

As aptly put by Commissioner Furchtgott-Roth, the bulk of the proposed new obligations “have no discernible nexus to the transition to digital technology.”<sup>74</sup> The transition apparently represents to some a moment of vulnerability for broadcasters during which the lost regulatory battles of the past can be waged again. But the sound reasons the Commission invoked to cast off old regulatory burdens – or to refuse to impose them in the first place – remain valid today. The Commission should continue to rely on the existing regulatory scheme and broadcasters’ demonstrated record of voluntary public service.

- A. Broadcasters’ Public Interest Obligations Should Apply to the DTV Channel as a Whole, and Not To Each Program Stream Offered
  - 1. The Telecommunications Act and Sound Policy Dictate that New Public Interest Obligations Should Not Attach To Free Broadcast Services Other Than A Broadcaster’s Primary Broadcast Signal

One of the questions raised in the NOI that does have a direct nexus to the transition to digital broadcasting is whether a digital broadcaster who offers more than one free over-the-air program service should have the discretion to fulfill its public interest obligations on one of its

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<sup>73</sup> Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996) (Emphasis added.)

<sup>74</sup> Separate Statement of Commissioner Harold Furchtgott-Roth, at 1.

program streams, or whether it must satisfy the panoply of obligations on each of the multiplexed services it offers. CBS submits that purposes of the Telecommunication Act and the sound policies pursued by the Commission in implementing the Act require that broadcasters be permitted to fulfill their obligations on their primary broadcast signal.

As stated above, the intent of the Telecommunications Act was both to reduce regulation and to facilitate broadcaster's ability to offer Americans new telecommunications services. In implementing the Act, the Commission consistently has taken steps to ensure that it does not impose obligations on broadcasters that might hinder their ability to innovate and experiment with program offerings to the public. It was for this reason that the Commission declined to impose a requirement that broadcasters provide any minimum amount of high definition television programming, instead leaving the decision to the discretion of the broadcaster.<sup>75</sup> The Commission's specific stated reason for this decision was to:

allow broadcasters the freedom to innovate and respond to the marketplace in developing the mix of services they will offer to the public. In this regard, we endeavor to carry out the premises of the 1996 Act which ... seeks "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"<sup>76</sup>

The Commission further stated that it was not possible in this early stage of the digital era to know what service consumers might "demand and support," and, consequently, the more "prudent" course was to "leave the choice up to broadcasters so that they may respond to the demands of the marketplace," and avoid imposition of an HDTV minimum that could "stifle

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<sup>75</sup> *Fifth Report and Order*, 12 FCC Rcd at 12826, ¶41.

<sup>76</sup> *Id.*, quoting Preamble to the 1996 Act.

innovation.” It concluded that “allowing broadcasters flexibility as to the services they provide will allow them to offer a mix of services that can promote increased consumer acceptance of digital television....”<sup>77</sup>

Similarly, the Commission declined to adopt any requirement to simulcast in the early years of the transition to digital broadcasting.<sup>78</sup> That decision also was premised on recognition of “the need to afford broadcasters flexibility to program their DTV channels to attract consumers,” and to “give broadcasters the ability to experiment with program and service offerings.” The Commission feared that “a simulcast requirement might limit broadcasters’ ability to experiment with the full range of digital capabilities.”<sup>79</sup>

The same sound policy, rooted in the intent of the statute, dictates that broadcasters should be permitted to fulfill their public interest obligations on their primary broadcast channel. There is great potential public value in allowing broadcasters to experiment and innovate with new, free over-the-air programming through multiplexing. While the costs of developing such programming – and the general costs of the conversion to digital broadcasting – will unquestionably be high, it is unknown whether the provision of additional free programming will be profitable. To impose the range of public interest obligations on these nascent programming services will create a significant disincentive to experiment with them and will stifle innovation. To give just one example, an obligation to broadcast children’s programs on all program streams would significantly increase the intrusion into broadcasters’ programming choices in terms of the

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<sup>77</sup> Id. at 12826-27, ¶42.

<sup>78</sup> Id. at 12832, ¶54.

<sup>79</sup> Id. at 12833, ¶55

sheer quantity of the requirement. It could also reduce the chances for success of a program service that might have a focus other than on children.

The notion that broadcasters should pay fees in lieu of the imposition of public interest obligations on multiplexed free services is also contrary to the intent of the statute. In passing the Telecommunications Act, Congress considered and rejected the idea of requiring broadcasters generally to pay for digital spectrum. Rather, Congress created a clear delineation between subscription services, for which a fee structure was required, and free over-the-air services, for which Congress declined to impose fees.<sup>80</sup>

It was specifically in relation to those broadcasters offering subscription services that the Telecommunications Act employed the language in section 336(d) on which the Notice seeks comment.<sup>81</sup> In context, the language of the statute states:

In the Commission's review of any application for renewal of a broadcast license for a television station *that provides ancillary or supplementary services*, the television licensee shall establish that all of its program services are in the public interest.<sup>82</sup>

In contrast to the earlier language in the same section, which states that nothing in the section should be "construed as relieving" broadcasters of their existing public interest obligations, this language is directed to those broadcasters offering subscription services, and places them on

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<sup>80</sup> See 47 U.S.C. §336(e)(1). See also H.R. Rep. No. 104, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 117 (1996) *reprinted in* 1996 U.S.C.C.A.N. 10, 85 (The Telecommunications Act "requires the Commission to establish a fee program for any ancillary or supplementary services if subscription fees or any other compensation fees apart from commercial advertisements are required in order to receive such services.")

<sup>81</sup> See *NOI* at ¶11 and n.44

<sup>82</sup> 47 U.S.C. §336(d) (emphasis added).

notice that their pay services must be in the public interest. The plain meaning of this language is simply that paid services that arguably do not serve the public interest – such as pornographic programming or interactive gambling services – will place broadcasters’ renewals in jeopardy. But this sentence does not even address, much less prescribe public interest obligations, for broadcasters who offer free, over-the-air services in addition to their primary broadcast signal.

2. Congress Did Not Intend That The Panoply of Public Interest Obligations Would Apply To Subscription Services for Which The Statute Requires Payment Of Fees Equal To Those Recoverable Had the Spectrum Been Auctioned

The Notice seeks comment on whether broadcasters’ public interest obligations apply to ancillary and supplementary services. As the Notice acknowledges, the Telecommunications Act requires that the Commission collect fees from digital broadcasters who offer ancillary and supplementary services, and that the fees must “recover for the public” an amount equal to that which would have been recovered if such services had been auctioned pursuant to section 309(j) of the Act.<sup>83</sup> It is illogical to suppose that Congress intended both to extract fair market value for these pay services from broadcasters *and* also to impose on them affirmative public interest obligations. As proposed by the Advisory Committee Report and others, the revenue from fees for these pay services can be dedicated to enhance the public interest in broadcasting. But there is no basis for, in effect, taxing broadcasters’ provision of these services twice, once in the form of fees and then again by the imposition of affirmative obligations that have little, if any connection to broadcasting or to the businesses – such as paging – being conducted.

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<sup>83</sup> See *NOI* at ¶13, citing 47 U.S.C. §336(e).

The language of the statute does not support application of public interest obligations to these pay services. Section 336(a)(2) merely recites that the Commission is to adopt regulations for these services that are consistent with the “public interest, convenience and necessity,” standard language to describe the mandate of regulatory agencies. But, as pointed out above, the section of the statute that *defines* the public interest requirement for ancillary and supplementary services<sup>84</sup> merely states that licensees must establish at renewal time that their services “are in the public interest.” The clear meaning of this language is that subscription services must not be in derogation of the public interest, not that these services, for which broadcasters are paying fair market value, must also provide other public benefits.<sup>85</sup>

B. The Bulk of the Proposals for “Enhancing” Broadcasters’ Responsiveness to Their Communities Are Unnecessary and Burdensome, Would Resurrect Regulations Properly Discarded by the Commission Over Fifteen Years Ago, and Are of Doubtful Constitutionality

The NOI rightly notes that airing programming responsive to the needs and interests of its community of license is a fundamental obligation of broadcasters. It is significant that, in supporting this point, the Notice cites the proceeding more than sixteen years ago in which the Commission endorsed extensive deregulation of television broadcasting.<sup>86</sup> In that proceeding,

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<sup>84</sup> Section 336(d) is entitled “Public interest requirement.”

<sup>85</sup> The *NOI* refers to various suggestions that digital broadcasters transmit data to or on behalf of schools or other entities. On a voluntary basis, broadcasters who develop ancillary and supplementary services involving datacasting may well choose to provide this public benefit. But there is no legal basis under the Act for obligating broadcasters to do so.

<sup>86</sup> Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670,

the Commission concluded that programming, ascertainment and disclosure requirements -- similar to those that some now would impose on digital broadcasters -- were overly burdensome and unnecessary to ensure that broadcasters would fulfill their obligation to provide programming responsive to issues and concerns of their communities. A brief recounting of the Commission's findings and conclusions in its deregulatory proceeding demonstrates why adoption of the current proposals would be an unwarranted step back into the overregulated past.

Prior to the initiation of its deregulation proceeding, the Commission used quantitative guidelines regarding informational, local and non-entertainment programming in processing license renewals.<sup>87</sup> The Commission eliminated these guidelines based on two "fundamental considerations." First, the Commission found, based on studies of station performance, that broadcasters were providing public interest programming in quantities greater than those prescribed by the regulations and concluded that "licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines."<sup>88</sup> Second, the Commission found disadvantages "inherent" in the regulatory scheme for a variety of reasons, including that it conflicted with Congress's intent to deregulate, imposed burdensome compliance costs, infringed on the editorial discretion of broadcasters, and was at odds with the

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*Report and Order*, 98 FCC 2nd 1076 (1984) ("*Deregulation of Television*"), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part*, *ACT v. FCC*, 821 F. 2d 741 (D.C. Cir. 1987).

<sup>87</sup> See *Deregulation of Television*, 98 FCC 2d at 1078, ¶5 & n. 5, *citing Order (Amendments to Delegations of Authority)*, 59 FCC 2d 491, 493 (1976).

<sup>88</sup> *Deregulation of Television*, 98 FCC 2d at 1080, ¶8.