

SUITE 301  
1000 POTOMAC ST., NW  
WASHINGTON, DC 20007

# The Media Institute

TELEPHONE 202-298-7512  
FAX 202-337-7092  
E-MAIL tmi@clark.net

March 27, 2000

DOCKET FILE COPY ORIGINAL

RECEIVED

MAR 27 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

RE: Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360,  
Notice of Inquiry

Dear Ms. Salas,

Enclosed please find one original and four copies of Public Comments of The Media Institute in the above captioned proceeding.

We are also furnishing disks to Ms. Wanda Hardy, FCC Mass Media Bureau, and to International Transcription Service, Inc., per Section IV of the Notice of Inquiry.

If you have any questions, please feel free to contact me at the above numbers, or at my direct e-mail, kaplar@clark.net.

Sincerely,



Richard T. Kaplar  
Vice President

No. of Copies rec'd 0+4  
List A B C D E

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of  
Public Interest Obligations  
of TV Broadcast Licensees

)  
)  
)  
)  
)

MM Docket No. 99-360

NOTICE OF INQUIRY

**RECEIVED**  
MAR 27 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**PUBLIC COMMENTS OF THE MEDIA INSTITUTE**

March 27, 2000

LAURENCE H. WINER  
ARIZONA STATE UNIVERSITY  
COLLEGE OF LAW  
Orange and McAllister Streets  
Tempe, Arizona 85287-7906  
(480) 965-5806  
*Counsel for The Media Institute*

PATRICK D. MAINES, PRESIDENT  
RICHARD T. KAPLAR, VICE PRESIDENT  
THE MEDIA INSTITUTE  
Suite 301  
1000 Potomac Street, N.W.  
Washington, D.C. 20007  
(202) 298-7512

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	THE PREMISE FOR NEW REGULATION OF BROADCASTING IS FAULTY .....	3
III.	THE GORE COMMISSION'S FINAL REPORT IS ENTITLED TO ABSOLUTELY NO DEFERENCE .....	6
IV.	THE FCC FACES A DAUNTING IF NOT IMPOSSIBLE TASK IN TRYING TO JUSTIFY ANY ADDITIONAL REGULATION OF BROADCASTING .....	13
	A. The FCC Must Consider the Appropriate Media Marketplace .....	14
	B. Scarcity Is As Dead As Rosencrantz and Guildenstern .....	17
	C. There Is No Such Thing As Public Ownership of the Spectrum .....	20
	D. Any Regulatory Rationales Must Survive Strict Scrutiny .....	21
	E. The FCC Should Expand and Strengthen Public Broadcasting While Deregulating Commercial Television .....	23
V.	THERE CAN BE NO LINKAGE BETWEEN PUBLIC INTEREST OBLIGATIONS AND DIGITAL MUST-CARRY .....	27
VI.	THERE IS NO BASIS FOR ANY INTRUSIVE GOVERNMENT REGULATION IN ANY OF THE FOUR AREAS SPECIFICALLY TARGETED IN THE NOI .....	29
	A. Multicasting and Ancillary and Supplementary Services .....	30
	B. Community Responsiveness .....	31
	1. Disclosure Obligations .....	32
	2. Disaster Warnings .....	33
	C. Enhanced Access to the Media .....	33
	D. Political Discourse .....	36
VII.	CONCLUSION .....	39

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
Public Interest Obligations	)	MM Docket No. 99-360
of TV Broadcast Licensees	)	
	)	NOTICE OF INQUIRY
	)	

**PUBLIC COMMENTS OF THE MEDIA INSTITUTE**

**I. INTRODUCTION**

The Media Institute<sup>1</sup> submits these Public Comments on the FCC’s Notice of Inquiry in the Matter of Public Interest Obligations of TV Broadcast Licensees (NOI) to emphatically urge the Commission to consider and implement substantial *deregulation* of the commercial television broadcast industry. Such deregulation, including the elimination of most if not all so-called “public interest” obligations, is long overdue and now constitutionally mandated. Moreover, such deregulation is the only rational approach in the radically transformed digital information age of media abundance in the 21<sup>st</sup> century.

Nothing in the Telecommunications Act of 1996 requires either that the FCC impose new obligations on digital broadcasters or that the Commission continue any current regulations beyond already existing specific statutory mandates.<sup>2</sup> Quite the contrary, the entire thrust of that Act to

---

<sup>1</sup> The Media Institute is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; the maintenance and development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and the Supreme Court of the United States. The Institute also conducts research projects and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

<sup>2</sup> To the extent that some deregulatory measures would require statutory authorization, we urge the Commission to suggest such changes to Congress.

foster competition in, and deregulation of, the communications industry supports our position here. And, strangely, few if any of the issues addressed in the NOI have any relationship to the ongoing transition from analog to digital broadcasting that presumably is the catalyst for the NOI. There is, therefore, no reason now to contemplate additional regulation of broadcasting and every reason to pursue deregulation for the digital era.

Similarly, the Final Report of the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (popularly known as the Gore Commission) that the NOI inappropriately relies on is no basis for any new or old regulation of broadcast television. The Gore Commission was fatally flawed by its highly skewed and unrepresentative composition, its lack of resources, and its inability and unwillingness to address, analyze, or advance any rationale or justification for its sweeping recommendations. The Final Report is simply a wholly unsubstantiated "wish list" from a group of largely pro-regulatory special interests and is entitled to no deference whatsoever.

The Media Institute respectfully suggests that with this NOI the FCC can no longer avoid a searching and difficult inquiry into the central issue that up to now the Commission understandably has been reluctant to engage: Why should broadcasters at a time of indisputable media abundance continue to be singularly relegated to second-class constitutional status and regulated, extensively and intrusively, by the federal government, all in the name of an amorphous, bureaucratically defined "public interest"? The Commission must establish, if it can, a logically, empirically, and constitutionally sound rationale for *each* aspect of government regulation of digital broadcasting or announce the essential absence of any such rationale and move to a deregulatory agenda. If, for example, the Commission wishes to cling to the anachronistic concept of spectrum scarcity, it now must justify for a technologically transformed 21<sup>st</sup> century a notion that already has long since been discredited even before the digital revolution.

Further, we believe that any such rationale, and *each* specific content-based regulation the Commission advances, must satisfy the strict scrutiny a modern Supreme Court is likely to apply. With respect to any public interest programming regulations, the FCC must bear firmly in mind

the Supreme Court's most recent, directly relevant pronouncement that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations."<sup>3</sup> Thus the Commission cannot simply assert important interests in the abstract, but must actually demonstrate that any broadcast regulation it proposes in fact is narrowly tailored to serve a compelling interest that cannot be met in another, less speech-restrictive way.

These Public Comments will first establish that not only is there no reason for the Commission to consider new public interest obligations for television broadcasters, or even to continue such existing regulations into the digital age, but that in fact the Commission should adopt a deregulatory agenda. Then they will demonstrate why the Gore Commission Final Report lacks any credibility and is entitled to no special status before the FCC. Rather, the Commission now should acknowledge the lack of any special justification for content-based government regulation of broadcast programming, beyond that applicable to other mass media, and begin to reverse its unfortunate and deleterious decades-long disfavored treatment of broadcasting. Finally, these Comments will address on their own merits each of the four areas in which the NOI seeks comment and explain why there is no basis for considering any additional regulation of broadcasting in these specific matters.

## II. THE PREMISE FOR NEW REGULATION OF BROADCASTING IS FAULTY

The Telecommunications Act of 1996 (the Act) that provides for the transition to digital broadcasting by assigning initial digital licenses to current broadcast licensees also states: "Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity."<sup>4</sup> The NOI indicates that the FCC relied on this language for its own previous reaffirmation that "digital broadcasters remain public trustees

---

<sup>3</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994).

<sup>4</sup> 47 U.S.C. § 336(d).

with a responsibility to serve the public interest” and that “existing public interest requirements continue to apply to all broadcast licensees.”<sup>5</sup> This provision also is the premise for the current NOI, but it is a faulty premise, one that not only does not follow from the statutory language but is contrary to the entire purpose and thrust of the Act. The FCC has chosen to adopt a misguided position, one that the Commission can and should abandon in favor of a deregulatory agenda.

This provision of the Act does not itself affirmatively enact, adopt, or continue any regulation or charge the Commission with doing so. Rather, the negative phraseology of the statutory language simply means that Congress itself through this broad legislation was not undertaking to alter any specific, current regulatory or statutory public interest obligations. Indeed, it would have been implausible for Congress to undertake such a detailed task in this panoramic, policy-oriented Act.

The Commission misreads this negative language as affirmatively stating that all current public interest obligations must extend into the digital age. Congress, however, was not in one sentence indirectly codifying the entire panoply of FCC rules and regulations nor at all constraining the FCC from reducing or eliminating administratively imposed requirements. This would be directly counter to the pervasive deregulatory, pro-competitive thrust of the entire Act including the broadcasting provisions. As the Supreme Court has characterized the Telecommunications Act of 1996, it was “an unusually important legislative enactment” whose “*primary purpose was to reduce regulation* and encourage ‘the rapid deployment of new telecommunications technologies.’”<sup>6</sup> Indeed, in the section of the Act on broadcast ownership, Congress instructed the FCC to biennially review all its ownership rules, stating: “The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.”<sup>7</sup> Congress did not

---

<sup>5</sup> NOI, at ¶ 4, *quoting* 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, 12810-11, 12830 (1997).

<sup>6</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997) (quoting the Act) (emphasis added).

<sup>7</sup> 47 U.S.C. § 161(b).

similarly specifically instruct the FCC with regard to programming regulations, but it hardly precluded such deregulation. At the same time Congress recognized the overriding need for regulatory flexibility with a dynamically evolving broadcasting industry, Congress could not have meant to impose a stagnant public interest regulatory regime based upon decades-old thinking.

The Commission's previous position in its Fifth Report and Order, and the basis now for the current NOI, thus is supported neither by the statutory language, common sense, nor by precedent. To the contrary, clear precedent establishes that the Commission is free to propose, as it should, substantial deregulation of the television industry as we move into the digital era. In 1959 Congress amended Section 315 of the Communications Act to create four categories of news broadcasts exempt from that section's equal opportunities requirements.<sup>8</sup> In doing so, Congress specified that nothing in the amendment "shall be construed as relieving broadcasters ... from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."<sup>9</sup> Many people assumed this negative language amounted to a codification of the Fairness Doctrine precluding the FCC from altering or eliminating the doctrine. There even was some support for that interpretation of the statute in some dicta in the *Red Lion* case.<sup>10</sup> Nonetheless, when the issue was squarely presented, two courts of appeals ruled otherwise,<sup>11</sup> and the Commission eliminated the Fairness Doctrine as unnecessary and inimical to First Amendment values in a modern context of abundant electronic media.<sup>12</sup> Likewise now, the Commission not only has no obligation to propose

---

<sup>8</sup> 47 U.S.C. § 315(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1969).

<sup>11</sup> *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 517 (the Fairness Doctrine is just an "administrative construction, not a binding statutory directive"), *reh'g en banc denied*, 806 F.2d 1115 (1986), *cert. denied*, 482 U.S. 919 (1987); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1437-39 (8<sup>th</sup> Cir. 1993) (accord).

<sup>12</sup> 1985 Fairness Report, 102 F.C.C.2d 145 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Elimination of the Fairness Doctrine removed a significant chilling effect on broadcasters and led to more informational

new obligations for digital television broadcasters, but it is in no way precluded by a similarly unwarranted negative implication from the Telecommunications Act of 1996 from considering and recommending elimination of intrusive and unnecessary content regulation. This is exactly what the Commission now should do.

### III. THE GORE COMMISSION'S FINAL REPORT IS ENTITLED TO ABSOLUTELY NO DEFERENCE

The Media Institute shares the troubling concern expressed by Commissioner Harold Furchtgott-Roth in his Separate Statement about an independent federal agency such as the FCC "taking its 'guidance' and 'focus' from an executive branch Committee and the Vice President on issues that are exclusively within our jurisdiction."<sup>13</sup> As Commissioner Furchtgott-Roth also notes, the appearance of inappropriate influence on the FCC is compounded by Vice President Gore's letter to the FCC, at the beginning of his presidential campaign, urging action on several of the Gore Commission's recommendations immediately followed by the issuance of the NOI.<sup>14</sup> And this unfortunate appearance is now even further exacerbated by the book about to be published by former FCC chairman Reed Hundt who acknowledges that he owed his job to Vice President Gore and unabashedly states that, as Vice President Gore's "lieutenant" at the Commission, his mission was to "effectively implement [the vice president's] agenda."<sup>15</sup> We therefore agree with Commissioner Furchtgott-Roth that such Executive Branch involvement, and the FCC's undue

---

programming. See Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine A "Chilling Effect"?* *Evidence From the Postderegulation Radio Market*, 26 J. LEG. STUDIES 279 (1997).

<sup>13</sup> NOI, Separate Statement of Commissioner Harold Furchtgott-Roth, concurring in part and dissenting in part (hereafter NOI, Furchtgott-Roth Separate Statement).

<sup>14</sup> *Id.*

<sup>15</sup> Reed Hundt, *YOU SAY YOU WANT A REVOLUTION*, \_\_\_ (Yale, 2000) (<[www.yale.edu/yup/chapters/083645chap.htm](http://www.yale.edu/yup/chapters/083645chap.htm)>, at 6). Mr. Hundt also apparently now admits that his political obeisance to the Administration affected, for example, his push to regulate children's TV programming: "I believed we were helping the President and Vice President win re-election." *This Hundt Was Doggedly Partisan*, THE WEEKLY STANDARD, FEB. 28, 2000, at 3.

reliance on the Gore Commission Report, can only undermine the FCC's action in this matter. On this "procedural" basis alone, the Gore Commission Report should be accorded no weight.

Moreover, the substance of the Gore Commission's recommendations should be substantially discounted given the many failings of that body. The Gore Commission members certainly were well-meaning, competent, hardworking, and conscientious in performing their public service, and The Media Institute certainly means no criticism of them individually. But this Advisory Committee was poorly and inappropriately comprised, lacked adequate resources, and was unable or unwilling to address the central, difficult issues necessary to establish a basis for its Final Report. Before its recommendations -- merely an entirely unsubstantiated wish list by pro-regulatory special interests -- are allowed to develop a life of their own with an unwarranted, authoritative imprimatur, it is important that the process that produced the Final Report, as discussed in this section, be well understood.

The formal impetus for creation of the Advisory Committee in the spring of 1997 was the provision in the Telecommunications Act of 1996 for the transition from current analog broadcast television to "advanced television services" using digital technology to take advantage of the many presumed benefits of the new technology.<sup>16</sup> In fact, however, the more specific impetus for creation of the Gore Commission arose from the Administration's desire to institute some form of campaign finance reform and, in particular, deal with the burgeoning costs of television advertising time for political candidates. As President Clinton made clear as he created the Gore Commission, he expected this body to recommend, and the FCC then to implement, a program for government-mandated free television air time for candidates for political office,<sup>17</sup> a pragmatically and constitutionally dubious idea.<sup>18</sup> Indeed, the President appointed as co-chair of the Commission

---

<sup>16</sup> 47 U.S.C. § 336.

<sup>17</sup> See William J. Clinton, *Remarks to the Conference on Free TV and Political Reform and an Exchange With Reporters* (March 11, 1997), 33 Weekly Compilation of Presidential Documents, March 17, 1997, at 330, 334; BROADCASTING & CABLE, Feb. 9, 1998, at 80.

<sup>18</sup> See *infra* Part VI D.

Norman Ornstein, a well-known political scientist who long has been a champion of free broadcast time for candidates.<sup>19</sup>

As the remaining members of the Commission were appointed in the fall of 1997, it quickly became apparent that they were representatives of a narrow array of special interests -- a "Noah's Ark" theory of representation according to one member<sup>20</sup> -- each with his or her own stake in some form of continued government regulation of broadcasting. The 22 members included a few broadcasters, including co-chair Leslie Moonves, president of CBS Television. But the strong regulatory interests represented included the founder of Action for Children's Television; the chairman and CEO of the Benton Foundation, "a leading advocate for communications in the public interest"; the executive director and founding member of Native American Public Telecommunications, Inc.; the former executive director of the National Latino Communications Center; the former executive director of the National Asian American Telecommunications Association; Newton Minow, who, as chairman of the FCC in the Kennedy Administration, famously excoriated broadcasters as purveyors of a "vast wasteland"<sup>21</sup>; legal counsel for telecommunications policy for the National Association of the Deaf; the president of the National PTA; and the executive director of the Media Access Project.<sup>22</sup>

---

<sup>19</sup> See *Ornstein on Obligations*, BROADCASTING & CABLE, July 14, 1997, at 24. For an informative debate on free air time for candidates see Norman Ornstein and Barbara S. Cochran, *Slate Dialogue: Air Time for Candidates* (Aug. - Nov. 1997) <[www.slate.com/Code/DDD/DDD.asp?file=Airtime&iMsg](http://www.slate.com/Code/DDD/DDD.asp?file=Airtime&iMsg)>. See also *Radio Address of the President to the Nation* (June 28, 1997) <[www.whitehouse.gov/WH/html/1997-06-28.html](http://www.whitehouse.gov/WH/html/1997-06-28.html)> ("For years, I have supported giving candidates free time ... [and today] I'm appointing two distinguished Americans to lead a commission that will help the FCC decide precisely how free broadcast time can be given to candidates, as part of the broadcasters' public interest obligations.").

<sup>20</sup> Ken Auletta, *What Will Broadcasters Have To Give Up for Free TV?*, THE NEW YORKER, Nov. 9, 1998, at 34, 35 (quoting Gore Commission Member Newton Minow).

<sup>21</sup> Newton Minow, *Speech to the National Association of Broadcasters*, May 9, 1961, reprinted in Newton N. Minow & Craig L. LaMay, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* (1995). In his recent book, Mr. Minow makes clear his view that television has only deteriorated; the emptiness of the television wasteland has been filled with "toxic waste." *Id.* at 7.

<sup>22</sup> See Final Report, at 146 (App. G), for biographies of Gore Commission members.

The sole academic and constitutional law expert on the Commission was Cass R. Sunstein, a distinguished and prolific scholar at the University of Chicago Law School. Professor Sunstein, however, is well known for advocating a “New Deal” for speech and considerably greater government regulation of all media, including “more intrusive strategies” for regulating broadcasting, in the name of promoting his notion of deliberative democracy and political equality.<sup>23</sup> As Professor Sunstein acknowledges, his approach would place “severe strain” on “some of the core commitments of current First Amendment law.”<sup>24</sup> His idiosyncratic views had considerable influence on the Commission but were not balanced by a more mainstream approach to First Amendment jurisprudence. In particular, the Gore Commission included no strong voice for *deregulation* of broadcasting and greater First Amendment freedom for broadcasters more on a par with that for print media. This imbalance in membership alone undermines the entire Final Report.

We wish to be quite clear that, in our view, none of these special interest voices was *per se* illegitimate for hearing before or representation on the Commission; they certainly deserved to be heard. But the tremendous imbalance on the Commission was both striking and unfortunate. The Commission’s Charter called for “balanced representation,”<sup>25</sup> and even the statutory authority for

---

<sup>23</sup> See Cass R. Sunstein, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, at 82 (1993); Cass R. Sunstein, *A New Deal for Speech*, 17 *HASTINGS COMM. & ENT. L.J.* 137 (1994); Cass R. Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255 (1992); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757 (1995) For some, among many, contrary views, see Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein’s DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 62 *U. CHI. LAW R.* 423, 433 (1995) (“I find Professor Sunstein’s thesis unworkable, unnecessary, and dangerous”); Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 *HASTINGS COMM. & ENT. L.J.* 247 (1994); J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *YALE L.J.* 1935, 1955 (1995) (“Sunstein’s ‘Madisonian’ theory of the First Amendment is about as Madisonian as Madison, Wisconsin”); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 *U. CHI. L. REV.* 49 (1996); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 *DUKE L.J.* 899 (1998). See generally *The Law and Economics of Property Rights to Radio Spectrum*, 41 *J. LAW & ECON.* (Pt. 2) (1998) (symposium issue).

<sup>24</sup> *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, at 50. See also *id.* at xi, xviii, xix.

<sup>25</sup> U.S. Department of Commerce, Charter of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (April 22, 1997), Final Report, at 143 (App. F).

such an advisory committee requires the membership to be “fairly balanced in terms of the points of view represented.”<sup>26</sup> Nominees for the Gore Commission were to be evaluated in part on their “[u]nderstanding of the dramatic changes in the interpretation of the public interest standard over the past ten to fifteen years.”<sup>27</sup> These criteria were blatantly disregarded. Simply including several broadcaster members, some of whom understandably might have had their own interests primarily at stake,<sup>28</sup> did not add meaningful diversity of opinion. Indeed, it was a broadcaster who championed the chilling idea of imposing a new set of minimal public interest obligations on all broadcasters.<sup>29</sup> And while three broadcasters did join in a partial dissent to the Commission’s Final Report,<sup>30</sup> as a political reality no broadcaster subject to current government regulation could risk appearing to disavow concern for the “public interest.”<sup>31</sup>

Ironically, then, there was less diversity as to regulatory ideology on the 22-person Gore Commission than there is among the five current members of the FCC. Considering the composition of the Gore Commission, The Media Institute formed its own Public Interest Council (PIC) to monitor and comment on the work of the Commission. Members of the PIC<sup>32</sup> and

---

<sup>26</sup> 5 U.S.C., App. 2, § 5(b).

<sup>27</sup> Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Instructions for Nomination of Members, <[www.ntia.doc.gov/pubintadvcom/ACINST.htm](http://www.ntia.doc.gov/pubintadvcom/ACINST.htm)>.

<sup>28</sup> See *infra* note 100.

<sup>29</sup> *A Proposal for a Minimum Level of Public Interest Requirements for All Stations and A Voluntary Broadcaster Code of Conduct*, Submitted by James F. Goodmon, President and Chief Executive Officer, Capitol Broadcasting Company, Inc. (June 8, 1998).

<sup>30</sup> Separate Statement of Robert W. Decherd, Harold C. Crump, and William F. Duhamel, Ph.D., Final Report, at 77.

<sup>31</sup> Operating in a regulated industry, broadcasters all too often feel the need to inappropriately compromise their editorial freedom to stay in government’s good graces. See, e.g., Marc Lacey and Bill Carter, *In a Deal With the TV Networks, Drug Office Is Reviewing Scripts*, N.Y. TIMES, Jan. 14, 2000, at 1; *Television’s Risky Relationship*, N.Y. TIMES, Jan. 18, 2000, at A26. FCC Commissioner Michael K. Powell recently acknowledged this unfortunate tendency in his Oct. 20, 1999, Acceptance Speech for The Media Institute’s Freedom of Speech Award, <[www.fcc.gov/commissioners/powell](http://www.fcc.gov/commissioners/powell)>.

<sup>32</sup> Members of the PIC were: Robert Corn-Revere, Esq., a partner at Hogan & Hartson LLP; Professor Robert M. O’Neil, Founding Director, The Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia; J. Laurent Scharff, Esq.; and Laurence

Institute senior staff attended all public meetings of the Commission, participated in conferences designed to provide input for the Commission, and submitted four formal statements to the Commission addressing important issues in the ongoing proceedings.<sup>33</sup> After observing the Commission's first two meetings, the PIC urged without success that the president better diversify the Commission, and increase its credibility, by adding a constitutional scholar with a mainstream approach to First Amendment jurisprudence, an economist, a journalist with a strong news management background, and a technology expert.<sup>34</sup>

The huge imbalance in membership on the Gore Commission then was compounded by the Commission's lack of resources for adequate professional or legal assistance in vital research and analysis; the Commission depended on the financial generosity of its members, even to bear their own travel expenses.<sup>35</sup> Instead, The Aspen Institute's Communications and Society Program, with support of The Markle Foundation,<sup>36</sup> convened three meetings during 1998 on options for broadcast regulation in the digital era. Gore Commission co-chair Ornstein attended all these

---

H. Winer, Professor of Law and Faculty Fellow, Center for the Study of Law, Science and Technology, Arizona State University College of Law.

<sup>33</sup> These were: Rodney A. Smolla, *Free Air Time for Candidates and the First Amendment*, Paper No. 2 in the series ISSUES IN BROADCASTING AND THE PUBLIC INTEREST; Laurence H. Winer, *Public Interest Obligations and First Principles; Deficiencies of the "Aspen Matrix"*; and *Thinking Outside the Regulatory Box*; Papers No. 1, 3, and 4, respectively, in the series ISSUES IN BROADCASTING AND THE PUBLIC INTEREST.

<sup>34</sup> Letter from Patrick D. Maines, President, The Media Institute, to President William J. Clinton, Dec. 29, 1997.

<sup>35</sup> See Final Report, at vii; Charter, *supra* note 25.

<sup>36</sup> The goal of the Aspen Institute's Communications and Society Program is "to promote integrated, thoughtful, values-based decision making in the communications and information policy fields." See Aspen Institute Communications and Society Program, <[www.aspeninst.org/dir/polpro/CSP/C%26S1.html](http://www.aspeninst.org/dir/polpro/CSP/C%26S1.html)>. In Fall 1997, former FCC chairman Reed Hundt became chairman of the Program's Forum on Communications and Society. See Hundt Release, <[www.aspeninst.org/dir/polpro/CSP/Press%20Releases/Hundt%20Release](http://www.aspeninst.org/dir/polpro/CSP/Press%20Releases/Hundt%20Release)>.

For a description of The Markle Foundation and its extensive involvement with communications policy see Preface, *A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY* (Roger G. Noll and Monroe E. Price, eds.; 1998).

meetings,<sup>37</sup> but this private effort was no proper substitute for a balanced and adequately funded public Advisory Committee.<sup>38</sup>

As of its very formation, then, the Gore Commission was ill equipped for the tasks it should have undertaken. In his keynote address at the Commission's first meeting, Vice President Gore stated that he did not want to "pre-judge or pre-ordain" the outcome of the Commission's deliberations. Rather, he expected the Commission's work to be "broad" and to begin with "first principles." Indeed, the vice president charged the Commission with the "paramount obligation ... to sustain and strengthen the First Amendment freedoms that are so critical to all media."<sup>39</sup> The Commission, unfortunately, did not take this mandate at face value. The Commission never seriously considered *any* deregulation of broadcasting; from the very beginning a majority did not want to "spend any time" discussing first principles of whether there should be any such obligations and why.<sup>40</sup> Early in the Commission's deliberations a frustrated broadcaster member suggested the Committee needed to hear a range of opinions from a diverse panel of First Amendment experts, only to be brushed aside.<sup>41</sup>

---

<sup>37</sup> One member of the PIC attended two meetings, and another member of the PIC was invited to the last.

<sup>38</sup> The Aspen initiative also took a decidedly pro-regulatory approach that heavily influenced the Gore Commission's deliberations and its Final Report. See Final Report, at 130 (App. D). *But see* Laurence H. Winer, *Deficiencies of the "Aspen Matrix,"* Paper No. 2 in the series ISSUES IN BROADCASTING AND THE PUBLIC INTEREST (April 1998). Of the 14 reports and papers that comprise The Aspen Institute's final report on its conferences, only one by PIC member Robert Corn-Revere can be described as advocating deregulation. See DIGITAL BROADCASTING AND THE PUBLIC INTEREST: REPORTS AND PAPERS OF THE ASPEN INSTITUTE COMMUNICATIONS AND SOCIETY PROGRAM (The Aspen Institute, 1998) (Charles M. Firestone and Amy Korzick Garmer, eds.).

<sup>39</sup> Remarks as Prepared for Delivery by Vice President Al Gore, Presidential Advisory Committee on Public Interest Obligations for Digital TV (Oct. 22, 1997) <[www.ntia.doc.gov/pubintadvcom/vp102297.htm](http://www.ntia.doc.gov/pubintadvcom/vp102297.htm)>.

<sup>40</sup> Open Meeting of Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (Oct. 22, 1997), online transcript, at 52 <[www.ntia.doc.gov/pubintadvcom/octmtg/transcript](http://www.ntia.doc.gov/pubintadvcom/octmtg/transcript)> (hereafter "Transcript") (comments of Commission Member James Goodmon).

<sup>41</sup> Transcript, Dec. 5, 1997, at 257-59 (comments of Commission Member William Duhamel).

If the era of big government truly is over,<sup>42</sup> that message never reached the Gore Commission. For while the Commission's Final Report acknowledges that "the television medium ... [is becoming] more versatile, flexible, and abundant,"<sup>43</sup> it then ignores the import of this basic fact that undermines the need for, and appropriateness of, government regulation. The Final Report includes 10 specific recommendations for increased regulation of broadcasting but not a single suggestion of where regulation could be reduced or eliminated. Given the technological explosion in new forms of mass media, it is astonishing that the Commission could not find, in the plethora of existing broadcast regulations,<sup>44</sup> a single example of regulation that goes too far, is too invasive of fundamental principles of a free press, and therefore should be eliminated. Such tunnel vision is compelling evidence of the disutility of the Commission's Final Report.

#### IV. THE FCC FACES A DAUNTING IF NOT IMPOSSIBLE TASK IN TRYING TO JUSTIFY ANY ADDITIONAL REGULATION OF BROADCASTING

With its current NOI, the FCC now must undertake the same daunting task on which the Gore Commission entirely defaulted.<sup>45</sup> The FCC now must fully justify all new (or old) regulation of broadcasting in an empirically and logically consistent way that takes full account of the radically transformed digital information age of the 21<sup>st</sup> century with an ample, diverse abundance of electronic media. Wax museum arguments from an earlier age will no longer do to perpetuate a pervasive regulatory system that has outlived any purpose it once may have served.

---

<sup>42</sup> President William J. Clinton, *State of the Union Address* (Jan. 23, 1996), 32 Weekly Compilation of Presidential Documents, Jan. 29, 1996, at 90.

<sup>43</sup> Final Report, at 44.

<sup>44</sup> See NOI, at ¶ 2.

<sup>45</sup> See 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, *Notice of Inquiry*, 13 FCC Rcd 11276, 11301 (1998), Separate Statement of Commissioner Harold Furchtgott-Roth (stating the FCC is now obliged to review the factual underpinnings of the spectrum scarcity rationale); Michael K. Powell, *Willful Denial and First Amendment Jurisprudence*, speech delivered to The Media Institute (April 22, 1998) <[www.fcc.gov/commissioners/powell](http://www.fcc.gov/commissioners/powell)> ("[T]he time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace.").

Having purposely ignored the major “first principle” facing it, the best the Gore Commission could do was to dust off the hoary scarcity rationale and assert that “[a]s a free and ubiquitous medium, over-the-air television has been and will continue to be a central, defining force in American society” and therefore (in a major *non-sequitur*) needs to be regulated.<sup>46</sup> The NOI does no better in merely stating that “[g]iven the impact of their programming and their use of the public airwaves, broadcasters have a special role in serving the public,”<sup>47</sup> presumably as mandated by the FCC. In fact, the continuing role and impact of broadcast television in the 21<sup>st</sup> century is highly uncertain. But to the extent broadcasting remains an important part of the mass media, that is precisely why broadcasting, like the rest of the press, must be free of government control. Any argument that uses the importance or effectiveness of a medium of communication as a basis to justify government regulation of the medium stands the First Amendment on its head.<sup>48</sup>

A. The FCC Must Consider the Appropriate Media Marketplace

The FCC must not repeat the error of the Gore Commission that asked simply whether “the broadcast marketplace *by itself* is not adequately serving public needs.”<sup>49</sup> It is troubling enough for a governmental entity to inquire into such a sensitive question about a segment of the ostensibly free press. A presidential Advisory Committee concerned with broadcasting as one component of a revolutionary new media era of proliferating forms of electronic digital communications, with exponentially increasing choices and opportunities for consumers, should have urged that all aspects of government regulation for all such media be re-examined together in this transformed context. If the FCC pursues such an inquiry, as presumably it must under the NOI, the

---

<sup>46</sup> Final Report, at 1.

<sup>47</sup> NOI, at ¶ 1.

<sup>48</sup> See *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

<sup>49</sup> Final Report, at 17 (emphasis added).

Commission at least should ask the only meaningful question: Are those needs being met in the *entire* media marketplace?<sup>50</sup>

An appropriate and accurate definition of the market is the essential first step in any evaluation of government regulation. The FCC now must do what the Gore Commission never bothered to do, namely take account of the FCC's own readily available statistics as to the overall video marketplace and the ever more limited role broadcasting plays in a modern environment of numerous multichannel video programming distributors (MVPD) including: cable, direct broadcast satellite (DBS), home satellite dishes (HSD), wireless cable (both multichannel multipoint distribution service (MMDS) and local multipoint distribution service (LMDS)), the instructional television fixed service (ITFS), satellite master antenna television (SMATV), the Internet, and home video sales and rentals.<sup>51</sup>

Of the 98 percent of American homes that are "television households," 81.4 percent subscribed to one or another of the MVPD services as of mid-1999, a yearly increase of 3.2 percent.<sup>52</sup> Thus less than 19 percent choose to rely on traditional, terrestrial over-the-air broadcasting.<sup>53</sup> And this is a meaningful choice. DBS is available everywhere in the continental United States and increased its subscribership by 40 percent (from 7.2 million to 10.1 million) in the last year alone.<sup>54</sup> Cable also is virtually universally available, passing 98 percent of television

---

<sup>50</sup> See Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, and Television Satellite Stations Review of Policy and Rules, MM Docket No. 87-8, *Report and Order*, 14 FCC Rcd 12903, 13001 (1999), Dissenting Statement of Commissioner Harold Furchtgott-Roth (stating the FCC "has taken an excessively narrow view of the communications outlets that qualify to be counted under its ownership rules").

<sup>51</sup> See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Sixth Annual Report*, at 3-4 (Jan. 14, 2000). See generally Bruce M. Owen, *THE INTERNET CHALLENGE TO TELEVISION* (Harvard, 1999).

<sup>52</sup> *Sixth Annual Report*, at 4.

<sup>53</sup> This figure might be slightly larger as a few households may subscribe to more than one MVPD service.

<sup>54</sup> *Sixth Annual Report*, at 4. This increase in subscribership occurred even without DBS's ability to provide local broadcast signals within local television markets. As of Nov. 29, 1999, a revised Satellite Home Viewer Act, Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501, now enables such service.

households, and continued its substantial growth in virtually all respects.<sup>55</sup> Few need rely on terrestrial broadcasting. While subscribing to an MVPD is not free in the same sense as is broadcasting, neither is subscribing to most print media, and there is no compelling reason why media access generally must be free. Moreover, the cost of an MVPD is not much different from the full expense involved in one or two outings per month by a couple or family for a movie, sports event, or other substitute entertainment. It therefore is not surprising that the vast majority of Americans willingly use a portion of their discretionary spending for some form of MVPD service.

Broadcasting, however, continues its decline in viewership. Once overwhelmingly dominant, the four major networks (ABC, CBS, NBC, and Fox) had a combined share of only 52 percent of prime time viewing among all television households during the 1998-99 television season, a drop of 3 percent, while the two newest networks (UPN and WB) dropped a point with a combined 8 percent share.<sup>56</sup> For cable subscribers, non-premium cable networks and pay cable services now account for about 57 percent of 24-hour viewing, a point ahead of programming originating on local broadcast television stations.<sup>57</sup> In attracting both viewers and advertisers, broadcasters clearly are feeling the competitive pinch.<sup>58</sup>

And then there is the wondrous phenomenon of the Internet, strangely entirely absent from the Gore Commission Report purportedly focusing on the digital age of electronic communication. By July 1999, 42 million households were connected to the Internet and more than 100.7 million adults used the Internet.<sup>59</sup> Without doubt these numbers have increased markedly even since then

---

*See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations, MM Docket 93-25, Report and Order, 13 FCC Rcd 23254 (1998) (declining generally to impose broad public interest obligations on DBS providers).*

<sup>55</sup> *Sixth Annual Report*, at 6-7, 11.

<sup>56</sup> *Id.* at 49.

<sup>57</sup> *Id.* at 49-50 (audience shares exceed 100 percent due to multiple set viewing).

<sup>58</sup> *Id.* *See* Bill Carter, *TV Networks Are Scrambling to Deal With Era of New Media*, N.Y. TIMES, May 17, 1999, at A17.

<sup>59</sup> *Id.* at 53 n.407.

and will continue to do so as the cost tumbles. Last year one could buy an Internet-ready computer and subscribe to an online service for less (about \$500) than it costs to buy many a television and subscribe to an MPVD.<sup>60</sup> Now, a simple, inexpensive (about \$99) device allows people to connect to the Internet without a full-fledged personal computer, and even this hardware can be “tweaked” for an additional \$100 in parts to work “like a fancy PC.”<sup>61</sup> In the past year, “the most significant convergence of service offerings has been the pairing of Internet service with other service offerings.”<sup>62</sup> Additionally, 73 percent of the nation’s public libraries, including branches, now offer basic Internet access to their patrons.<sup>63</sup>

Any modern discussion of public interest regulation of broadcasting must seriously and thoroughly consider the dramatically evolving nature of the electronic media cornucopia. This is the essential context for evaluating the need for such continued regulation of broadcasting -- what, if anything, actually will be accomplished by such government oversight -- and the various costs of such government regulation, not least in terms of continued denigration of First Amendment principles of a free press.

#### B. Scarcity Is As Dead As Rosencrantz and Guildenstern

Up to now the only rationale for virtually all public interest regulation of broadcasting (aside from the discrete issue of indecency) has been the supposed physical scarcity of the broadcast spectrum that for much of its history was the only electronic medium of mass communication.<sup>64</sup> Physical scarcity was asserted to be the unique, distinguishing characteristic of

---

<sup>60</sup> Peter H. Lewis, *Good Enough Computers*, N.Y. TIMES, Feb. 18, 1999, at D1.

<sup>61</sup> Amy Harmon, *Courtesy of Amateurs, a \$99 Personal Computer*, N.Y. TIMES, March 18, 2000, at B1.

<sup>62</sup> *Id.* at 5. See also *infra* note 119. See generally Bruce M. Owen, *THE INTERNET CHALLENGE TO TELEVISION* (Harvard, 1999).

<sup>63</sup> John Carlo Bertot and Charles R. McClure, *the 1998 National Survey of U.S. Public Library Outlet Internet Connectivity* (ALA Office of Information Technology Policy, October 1998).

<sup>64</sup> See *Turner Broadcasting*, 512 U.S. at 637-38, 640.

broadcasting that allowed it to be regulated in ways that could not be tolerated under the First Amendment for other media. The scarcity rationale always has been a highly dubious and problematic notion both empirically and in theory<sup>65</sup> with respect to: (i) the empirical nature and extent of any such scarcity; (ii) why this asserted scarcity, even if actual and physical in nature, should be a predicate for regulation since scarcity in some form is *the* basic economic fact of life affecting all media and as such cannot justify selective regulation; and (iii) even if broadcasting suffers some special form of scarcity, specifically how does this justify each particular aspect of regulation, especially that which is content-based? Scarcity now can have no further talismanic significance given the ongoing explosion in new forms of electronic media and new sources of information. Courts, commentators, members of the Gore Commission, and even some FCC Commissioners realize this,<sup>66</sup> and accept the obvious fact that, whatever legitimate life it once may have had, and whatever some might wish to imagine about its continued vitality, spectrum scarcity

---

<sup>65</sup> The classic critique goes back to Nobel Laureate Ronald Coase's seminal papers, Ronald H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959); Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). See Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J. LAW & ECON. 393, 419 (1995) ("The broadcast spectrum holds a special, almost holy, place in the economic analysis of law and the economics of property rights."); Ronald H. Coase, *Law and Economics at Chicago*, 36 J. LAW & ECON. 239, 248-50 (1993) (describing the issue of property rights in the electromagnetic spectrum as being central to development of law and economics analysis at the University of Chicago).

<sup>66</sup> See, e.g., *Turner Broadcasting*, 512 U.S. at 637-39; *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984); *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc, with whom Edwards, C.J., and Silberman, Ginsburg, and Sentelle, J.J., concur); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting); *id.* at 684 (Wald, J., dissenting), *cert. denied sub nom. Pacifica Foundation v. FCC*, 516 U.S. 1043 (1996); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442-43 (8<sup>th</sup> Cir. 1993) (Arnold, C.J., concurring in the judgment); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 493 U.S. 1019 (1990); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987).

Two members of the FCC have noted the Commission's obligation to review the empirical basis of the spectrum scarcity rationale as the underlying premise of much of the FCC's regulatory scheme. See 1998 Biennial Regulatory Review, *supra* note 45, Separate Statements of Commissioners Harold Furchtgott-Roth and Michael Powell.

as a justifying rationale is now dead, if not quite yet buried.<sup>67</sup> Those who would continue to rely on a concept of scarcity first must carefully define the concept they would invoke -- for example, is it allocational scarcity, numerical scarcity,<sup>68</sup> or some other concept. Next they must demonstrate that it exists to a significant and unique degree in those media they would regulate. Then they must establish a close nexus between the condition and the regulation it supposedly supports.<sup>69</sup> No such plausible argument can be fashioned; only those desperate to maintain government regulation of broadcasting hang on to the discredited anachronism of scarcity out of the justifiable fear that there is nothing to replace it to achieve the desired regulatory end. But this approach just demonstrates the bankruptcy of such an enterprise.<sup>70</sup>

There is no need here to replay the death of scarcity. An FCC that must look to the digital, electronic future that already includes broadcasting, cable, satellite, microwave, VCRs, new telephone technologies, and the Internet -- not to mention the next revolutions sure to emerge from the laboratory -- cannot be so wedded to the past.

So, if the shibboleth of scarcity can no longer be relied on, the central question becomes whether the Commission can develop and support any other rationale that adequately justifies regulation -- especially content-based programming regulation -- of broadcasters under the amorphous notion of the "public interest." The heavy burden to do so clearly lies on the Commission;<sup>71</sup> the strong presumption must be that broadcasters, like all other members of the

---

<sup>67</sup> "[S]carcity is gone ... as a basis for government regulation of broadcasting. The courts have been very clear on that." Gore Commission Member Professor Cass Sunstein, Transcript, Oct. 22, 1997, at 133.

<sup>68</sup> See *Syracuse Peace Council*, 867 F.2d at 682-84 (Starr, J., concurring).

<sup>69</sup> See *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 883 (D.C. Cir. 1999).

<sup>70</sup> See Michael K. Powell, *supra* note 31 (describing the "scarcity fiction" as a "willful denial of reality in order for government to retain the power to control speech, unimpeded by the First Amendment, [that is] a subversion of the Constitution").

<sup>71</sup> See *Radio-Television News Directors Association*, 184 F.3d at 887-88 (holding that FCC has not yet satisfied its burden of justifying non-repeal of personal attack and political editorializing rules).

press, are protected by the First Amendment from such government regulation. Thus, in advance of the FCC's attempt to articulate a convincing theory of regulation, there is no need to address all the imaginable possibilities. But to illustrate the daunting task the Commission faces whatever theories it advances, consider the slogan implicit in the NOI -- the idea that broadcasters use the "public airwaves" and that therefore the content of their programming can somehow be peculiarly regulated in the name of the public interest.

### C. There Is No Such Thing As Public Ownership of the Spectrum

Does the public own the electromagnetic spectrum, and does this justify government public interest regulation of broadcasters' use of the spectrum? Well, surely the very concept of spectrum ownership *per se*, public or private, is meaningless and cannot by itself justify anything. Electromagnetic radiation, a fundamental force of nature, is not subject to ownership any more than is gravity; public ownership of the spectrum here is simply a way of stating a predetermined conclusion in favor of government regulation, a conclusion that needs other independent support. No one would assert government ownership of gravity as a justification for regulation -- say, to support a federal excise tax on automobiles for the privilege of keeping a car "on" the road. This is not to say that such an excise tax or traffic control regulation could not be otherwise justified. But the mere assertion of public ownership of the airwaves -- with the corollary notion of broadcasters as public trustees of the frequencies they are allowed to use -- adds nothing to the debate which must proceed on other bases.<sup>72</sup>

After all, newspapers (as well as cable operators) also use public rights-of-way -- the streets and sidewalks -- to distribute their messages. Newspapers also use the spectrum in the form of satellite transmissions to gather the news and sometimes for transmission of page layouts to distant printing plants. News trucks burden the streets, news racks and kiosks burden the sidewalks, and newsprint and newspaper litter burden the environment. Yet no one suggests that

---

<sup>72</sup> See Glen O. Robinson, *Spectrum Property Law 101*, 41 J. LAW & ECON. 609, 620 (1998) ("the public ownership claim here is a trope, a way of reifying the government's claim to regulatory authority").

any of this provides a basis for content regulation of newspapers, even though in some sense such regulation might “improve” the papers and render a public service. Why should broadcasters, or other electronic media, be subject to content regulation any more than newspapers?

Similar careful analysis is necessary whatever other rationales the Commission relies on whether it is: some peculiar, supposed “market failure” in broadcasting;<sup>73</sup> the myth of a “give-away” of digital spectrum with an allegedly resulting *quid pro quo* due from broadcasters in the form of content regulation; the notion of “voluntary” compliance by broadcasters; a “pay-or-play” model that in reality is just coerced, unconstitutional conditions imposed on government largesse; or some idiosyncratic concept of First Amendment “values” to be furthered by government intervention in broadcast programming.<sup>74</sup>

#### D. Any Regulatory Rationales Must Survive Strict Scrutiny

Whatever rationale(s) the FCC now advances to support content-based regulation ultimately will have to survive heightened, strict judicial scrutiny and not merely the “peculiarly relaxed”<sup>75</sup> First Amendment review that has sufficed up to now. The Supreme Court both expressed doubts about continued reliance on scarcity and hinted at heightened review in *FCC v. League of Women Voters*.<sup>76</sup> In *Turner*, the Court further acknowledged its doubts about scarcity and emphasized the “limited” and “minimal” control the Commission can exercise over broadcast programming.<sup>77</sup> The Commission must demonstrate that its regulation furthers a compelling state interest that cannot be

---

<sup>73</sup> The Court in *Turner Broadcasting*, 512 U.S. at 640, rejected the mere assertion of dysfunction in a speech market as an adequate regulatory rationale.

<sup>74</sup> Justice Stewart once presciently warned of “the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its ‘values.’” *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

<sup>75</sup> *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc).

<sup>76</sup> 468 U.S. 364 (1984) (invalidating a statutory ban on editorializing by public broadcast stations that receive federal funds from the Corporation for Public Broadcasting).

<sup>77</sup> *Turner Broadcasting*, 512 U.S. at 649-52.

adequately addressed by other, less speech-restrictive means.<sup>78</sup> Importantly, mere assertions to this effect are not enough; the FCC must actually demonstrate that these conditions are met.<sup>79</sup> The only way to do this is to concretely establish, with clear and convincing evidence, the logical and empirical link between each specific regulation and the compelling interest it allegedly serves while, at the same time, eliminating any reasonably available less speech-restrictive alternative.

In other words, the FCC can no longer rely on rote invocation of the “public interest” standard to sustain broad content-based regulation of broadcasting as, in effect, a public utility.<sup>80</sup> This is true for three reasons. First, as the Supreme Court has noted, “the ‘public interest’ standard necessarily invites reference to First Amendment principles.”<sup>81</sup> And this involves not only the interests of broadcasters as speakers but also the public’s interest in a free and unfettered press, not one managed by a government agency even for ostensibly good purposes. “Serving the public interest” is not synonymous with government-mandated content controls and compelled speech.

Second, notions of the public interest in broadcasting necessarily change over time, especially as this concept has never been defined with any precision. Not long ago the FCC’s Fairness Doctrine was “the single most important requirement of operation in the public interest -- the ‘*sine qua non*’ for grant of a renewal of license.”<sup>82</sup> A decade later a forward-looking,

---

<sup>78</sup> See Michael K. Powell, *supra* note 31 (“the governor should not imbibe the wine of content control without deeply compelling justifications”).

<sup>79</sup> *Turner Broadcasting*, 512 U.S. at 664.

<sup>80</sup> Indeed, continued unsupported invocation of a vague and undefined “public interest” standard may create problems under reinvigorated attention to the non-delegation doctrine. A federal agency such as the FCC must regulate only pursuant to “intelligible principles” to avoid an unconstitutional delegation of legislative power. See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); *American Trucking v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1257); See generally *The Phoenix Rises Again: The Nondelegation Doctrine From Constitutional and Policy Issues*, 20 CARDOZO LAW REV. 731-1018 (1999) (symposium issue); Gary Lawson, *Delegation and the Constitution*, 22 REGULATION No. 2, at 23 (1999).

<sup>81</sup> *CBS v. Democratic Nat’l Comm.*, 412 U.S. at 122.

<sup>82</sup> Fairness Report, 48 F.C.C.2d 1, 10 (1974) (quoting Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 292 (1970)).