

secret that regulators have only vaguely defined these obligations, and broadcasters have met their requirements in a variety of, and sometimes disingenuous, ways: "FCC regulation of broadcasting [is] a charade—a wrestling match full of fake grunts and groans but signifying nothing."⁴ For example, I do not believe shows like "The Jetsons" and "Wheel of Fortune 2000" are quite what we had in mind when mandatory children's programming was imposed upon broadcasters. Similarly, I do not think that "The Little Mermaid" meets the definition of educational programming because it teaches girls how to be leaders. Yet these are exactly the types of arguments that broadcasters are advancing. Another example is that broadcasters are "expected" to air public-service announcements. However, there are no guidelines that outline how many of these announcements broadcasters are to air or how often.

Once it has been established, and it has, that the television spectrum is public property and that broadcasters use it for free in exchange for serving "the public interest, convenience and necessity," public interest programming should actually mean something. In short, the public should get the "benefit of its bargain." The Gore Commission Report noted that "[t]he foundation of the American system of broadcasting is that

³ Statement of Commissioner Ervin S. Duggan, 8 FCC Rec. at 5340 (1993).

⁴ Henry Geller, Public Interest Regulation in the Digital TV Era, 16 Cardozo Arts & Ent. L.J. 341, 344 (1998).

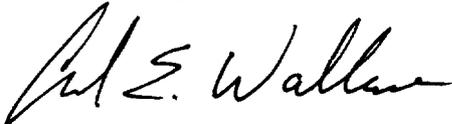
Congress placed the basic trust and responsibility for all matters broadcast to the public in the hands of the station licensee." However, as the above discussion indicates, some broadcasters have not accepted this duty with the requisite degree of care. Having failed with the looser standards, the time has come for the Commission to flex its regulatory muscle either in the form of tighter control or mandates.

And why is it that broadcasters' public interest obligations are so loosely defined? And why are they able to meet their requirements so easily? The answer to both questions is that broadcasters are a powerful political group with a powerful lobby. This is why past efforts by government to require broadcasters to air more public interest programming have failed and similarly why government is reluctant to revoke the licenses of those broadcasters who do not meet their obligations. But to the average American, this reality may be hard to reconcile with the results of a recent poll by the Benton Foundation: "80 [percent] of those polled said that broadcasters should fulfill public interest obligations in exchange for free use [of the public airwaves], and 84 [percent] said they would like to see more children's programming."⁵ Assuming the poll is representative of the American public, the question becomes: How can the voice of commercial television broadcasters speak louder than 80 percent of the people?

CONCLUSION

With these comments, I, as a citizen, have voiced my beliefs about how the public will be better served with the coming of digital television. With all due candor, I will leave it to those with the technical know-how to comment on the means with which to implement the various proposals the Commission will inevitably receive. In accord with the intent of public interest obligations, broadcasters should be subject to more obligations in the digital television era because digital technology greatly expands their capability. That fact alone should mandate increased public interest obligations and not just increased revenue potential for broadcasters. In addition, existing or any new obligations should be enforced in a way that reflects what society envisions when they think of the phrase "public interest obligations." Thank you for your time and consideration.

Sincerely,



Chad E. Wallace

⁵ Robin Brown, *Hollywood Reporter* 64(1) (Jan. 15, 1999).

To: William E. Kennard, Chairman Federal Communications Commission

RECEIVED

From: Tausha Carmack

MAR 23 2000

CC: Glenn H. Reynolds

FCC MAIL ROOM

Date: March 17, 2000

Re: Comments on how broadcasters can best serve the public interest as they transition to digital transmission technology

Dear Chairman Kennard:

In response to the Federal Communications Commission's request for comments, 65 FR 4211, (January 26, 2000), on how broadcasters can best serve the public interest during and after the transition from analog to digital technology, I would like to share my opinions as both a broadcast television viewer and as a concerned member of the public. My comments will focus on the need for improving standards and requirements for children's television, providing greater opportunity for political discourse, and employing the expanded capabilities of digital technology in providing greater access to disabled persons.

Introduction and Background

Television is an integral part of American society. As stated in the Federal Communication Commission's (FCC) Notice of Inquiry regarding broadcasters' public interest obligations in relation to digital technology, "(t)elelevision is the primary source of news and information to Americans, and provides hours of entertainment every week."¹ Understanding the impact of television upon our society, it is essential to begin planning for the future of television and ensuring that it adequately addresses the needs of the public interest. It would appear

that the future of television is here, today, with the advent of digital technology. To promote the transition from analog to digital television technology, "the FCC reserved an extra allotment of public spectrum for the exclusive use of each existing television owner."² According to Jeffery Chester, Executive Director of the Center for Media Education, "broadcasters received extremely valuable public property – worth as much as \$70 billion – and paid nothing."³ Referring to the additional spectrum as a "public gift," Chester equated it with giving broadcasters "free beachfront property on the Information Superhighway."⁴ With this information in mind, the old adage that "to whom much is given, much is expected" would be an appropriate standard in establishing the obligations of broadcasters to the public interest. And while it may be argued that public interest obligations are already in place for broadcasters in the television industry, the obligations and standards are based on analog technology. If digital technology is the way of the future, then public interest standards and requirements should be based on the expanded capabilities digital technology will provide television broadcasters.

Improving Standards and Requirements for Children's Television

The quality of children's television is not a new issue. In fact, Congress, enacted the Children's Television Act (CTA) in 1990 "in response to the failure of the broadcast television industry to serve the educational and informational

¹ FCC Public Interest Obligations of Television Broadcast Licensees Notice of Inquiry, 65 FR 4211 (2000)

² Gigi B. Sohn. *Pretty Pictures or Pretty Profits: Issues and Options for the Public Interest and Nonprofit Communities in the Digital Broadcasting Debate* (visited Mar. 11, 2000) <http://www.benton.org/Library/Pretty_Pics/working13.html>.

³ *Digital Broadcasting Must Serve Public Interest* (News Release) (visited Mar. 11, 2000) <<http://www.cme.org/press/991215pr.html>>.

needs of children,⁵ but this legislation seems to have missed its mark. Under the CTA passed in 1990, television stations were required “to demonstrate how they were serving the educational and informational needs of children.”⁶

However, according to a study conducted in 1992 by the Center for Media Education and Georgetown University School of Law’s Institute for Public Representation, television stations were satisfying the requirements of the CTA by “re-labeling old reruns such as *The Jetsons*, *The Flintstones*, and *Leave it to Beaver* as ‘educational’.”⁷

In an effort to strengthen the Children’s Television Act, the FCC created new standards in 1996. Included in the new FCC rules was a three hour minimum requirement of “core educational programming each week” for stations that wanted automatic renewal of their licenses.⁸ In clarifying the new standards, educational programming was defined as “any television program which is directed to an audience of children who are 16 years of age or younger and which is designed for the intellectual development of these children.”⁹ Despite these new requirements and standards, limited progress has been made in the area of children’s television programming. In researching this issue, I called a television station in my area and spoke with the Director of Programming about

⁴*Digital Broadcasting Must Serve Public Interest* News Release) (visited Mar. 11, 2000) <<http://www.cme.org/press/991215pr.html>>.

⁵ *A Field Guide to the Children’s Television Act* (visited Mar. 13, 2000) 1, 1 <<http://www.cme.org/ctatool/fguide.html>>.

⁶ *A Field Guide to the Children’s Television Act* (visited Mar. 13, 2000) 1, 1 <<http://www.cme.org/ctatool/fguide.html>>.

⁷ *A Field Guide to the Children’s Television Act* (visited Mar. 13, 2000) 1, 2 <<http://www.cme.org/ctatool/fguide.html>>.

⁸ *A Field Guide to the Children’s Television Act* (visited Mar. 13, 2000) 1, 3 <<http://www.cme.org/ctatool/fguide.html>>.

⁹ 47 U.S.C.A. § 394 (West Supp. 1999).

children's programming for the station. In response to my inquiries about the three hour minimum requirement, I was told that the station's designated times for children's programming were Saturday from 10:00am-12:00pm and Sunday from 11:00am-12:00pm. Consulting a local television guide, I found the programs scheduled during the station's designated times for children's programming were Animal, Wild America, Saved by the Bell, One World, Hang Time, and City Guys. I have seen these so-called educational shows, and, in my opinion, the educational value of most of them is comparable to that of The Flintstones and The Jetsons. Statistics indicate that "the average American child is exposed to 25 hours each week and some children are exposed to up to 11 hours per day."¹⁰ With the present rules requiring broadcasters only to provide three hours of educational programming each week, I question what the "average child" is watching the other 22 hours he or she is spending in front of the television screen if shows like Hang Time and Saved by the Bell are considered educational. While these shows may be humorous, I do not believe they are intellectually stimulating nor do I believe they are what the FCC intended when crafting the standards for children's programming.

In the ten years since the passage of the original Children's Television Act, television broadcasters are still failing in their public interest obligations to children. The need for quality educational programming will continue to be overlooked by television broadcasters if the FCC does not strengthen its stand on this issue as we enter the digital era. Digital technology will provide

¹⁰ *Broadcast Spectrum and the Debate on the Future of Television* (visited Mar. 11, 2000) 1, 5 <http://www.benton.org/Library/TV_broadcastspectrum.html>.

broadcasters the opportunity to more effectively address the educational and informational needs of children but clear standards and guidelines must be developed and enforced by the FCC. I believe broadcasters should be required to offer an increased number of hours for children's programming. In addition, with the ability to multicast television broadcasters could offer entire channels dedicated to innovative and educational programming for children with limited commercial exposure.

According to a study published in the American Psychological Association's *Journal of Educational Psychology*, "across the board, children who watched the television news reports recalled more of what they viewed than the children who read the printed versions (which carried no photos or illustrations)."¹¹ Digital television could prove a valuable tool in the classroom if broadcasters would honor their commitment to the public interest by providing children's television that was truly educational and informational in nature. The impact television has on children is evident. As television transitions from analog to digital technology, this impact will increase, and the FCC must act accordingly to ensure that it is a positive impact.

Providing Greater Opportunity for Political Discourse

Currently, the American people are in the middle of preparing for the upcoming presidential election. We are already being inundated with campaign ads and political sound bytes; however, it seems that's all we are getting from the television. According to a study conducted by Alliance for Better Campaigns,

¹¹ *Children Unlike Adults. Recall More of What They See on Television Than What They Read, Study Finds* (News Release) (visited Mar. 13, 2000) <<http://www.apa.org/release/tv.html>>.

“(d)espite competitive races for both the Democratic and Republican presidential nominations, the three national broadcast networks have been airing an average of just 34 seconds a night in candidate discourse since the February 1 New Hampshire primary.”¹² In fact, the Center for Media and Public Affairs asserts that “coverage of the presidential campaign on the three network newscasts is down by nearly half in 1999/2000 from what it was at the same stage of the race in 1995/1996.”¹³ Because of statistics like those mentioned above, I believe that television broadcasters need to re-assess their role in providing useful and informative campaign coverage. I agree with the appeals made by individuals like former Presidents Jimmy Carter and Gerald Ford and anchorman Walter Cronkite calling for the “television industry to air five minutes of ‘candidate-centered discourse’ - such as issue forums or candidate interviews- every night in the month before primary and general elections.”¹⁴ In my opinion, this proposal would allow the public to hear the issues, familiarize themselves with candidate platforms, and arrive at their own judgement without the political bias that accompanies most campaign advertisements.

The high cost of political campaigns is already proving to be a hot topic in the upcoming presidential race. As a voter, I am very concerned with campaign finance reform and ensuring that elections stay in the hands of every citizen and not just the hands of those citizens who make the largest campaign contributions.

¹² *Network Viewers Get Fleeting Glimpses of Presidential Hopefuls, Study Finds* (News Release) (visited Mar. 13, 2000) <<http://www.bettercampaigns.org/document/rele022300.html>>.

¹³ Paul Taylor, *Democracy is More than Niche Programming...* (visited Mar. 13, 2000) <<http://www.bettercampaigns.org/STANDARD/2000febdir.htm>>.

¹⁴ *Alliance for Better Campaigns Urges National Broadcast Networks to Air Candidate Issue Forums Before March 7 National Primary* (News Release) (visited Mar. 13, 2000) <<http://www.bettercampaigns.org/documents/release207.HTM>>.

The notion of campaign finance reform might be advanced by providing free air-time to candidates. It is estimated that "(b)roadcast stations are expected to sell a record \$600 million worth of political advertising this year." How can we hope to eliminate the influence of soft money on elections until we provide candidates with reasonable alternatives for getting their messages out to the public?

According to an article by Janet H. Brown, Executive Director of the Commission of Presidential Debates, "(n)inety-seven million people watched the final general election debate in 1992."¹⁵ Yet, in the 1999/2000 race, out of the "20 presidential debates that have been carried on television so far in the presidential nomination season, just two have aired on a national broadcast network, neither of them in prime time."¹⁶ In the end, most Americans will rely on the information they receive from the television, and I believe that broadcasters have an obligation to the public to provide greater opportunities for political discourse, enabling the public to make more informed decisions at the ballot box.

Employing the Expanded Capabilities of Digital Technology in Providing Greater Access to Disabled Persons

The potential of digital technology is tremendous, and I believe it is important for television broadcasters to recognize the impact digital technology could have on the lives of disabled persons, especially the hearing and vision impaired. The Advisory Committee on Public Interest Obligations of Digital Television Broadcasters suggests in its executive summary the "gradual

¹⁵ Janet H. Brown, *Televised Debates Empower the Public* (visited Mar. 13, 2000) <<http://www.bettercampaigns.org/STANDARD/2000febctrpt.htm>>.

¹⁶ Vidya Krishnamurthy, *News Release: Network Viewers Get Fleeting Glimpses of Presidential Hopefuls, Study Finds* (visited Mar. 13, 2000) <<http://www.bettercampaigns.org/document/rele022300.html>>.

expansion of captioning on public service announcements, public affairs programming, and political programming."¹⁷ In addition, I think broadcasters should pursue the capability of digital technology to offer enhanced video description services. By expanding closed captioning and video description services, the disabled could benefit from televised disaster warnings or other emergency transmissions, which have been previously unavailable to this sector of the population. Increased closed captioning and video description services could be instrumental in ensuring all Americans have the opportunities to be better informed and to enjoy greater options in television programming.

Conclusion

Digital technology will prove to be a valuable tool for television broadcasters. It is important that television broadcasters use this technology to fulfill their public interest obligations by improving the quality of educational programming for children, expanding the opportunity for political discourse, and providing increased services to disabled persons. The Federal Communications Commission should implement standards and requirements that are consistent with the expanded capabilities of broadcasters to ensure that everyone in society benefits from the transition from analog to digital technology.

¹⁷ *PLAC Legacy Project: Executive Summary* (visited Mar. 13, 2000) <<http://www.benton.org/PLAC/summary.html>>.

RECEIVED

MAR 23 2000

C O M M E N T

To: Magalie Roman Salas, Secretary— Federal Communications Commission
From: Heather L. Flory
CC: Professor Glenn H. Reynolds
Date: March 17, 2000
Re: Comments on Proposed Public Interest Standards for Television, 65 Fed. Reg. 4211-01, (January 26, 2000).

FCC MAIL ROOM

Dear Secretary Salas,

I am your typical television viewer. Twenty pounds overweight with a pale complexion and bad eyesight, I am a product of the TV era. From approximately age 3 to present, I have spent thousands of hours personally observing/studying the television medium. These numerous years of often in-depth research have made me somewhat of an expert on the range of offerings available on broadcast television.¹ Since cable is not within my immediate grasp, the future of broadcast television in the digital era is therefore of particular importance to me.

With this background in mind, I am writing to express my opposition to imposing minimum weekly and/or daily public interest requirements on digital broadcasters as proposed by People for Better TV(PBT) and other like-minded interest groups. While television may in fact be a virtual wasteland for the most part, providing such fare as Jerry Springer and Baywatch re-runs in lieu of educational, political, or community based programming, additional regulation is not the answer to what ails the broadcast industry. Rather, as we make the transition from analog to digital television, we must use this opportunity to re-evaluate the effectiveness of current and past regulatory efforts, in the process exploring alternatives to traditional methods of government intervention. At the conclusion of this soul searching, it must be determined whether more regulation will actually improve the television offerings. Ultimately, my years of personal research indicate otherwise.

INTRODUCTION & BACKGROUND

People for Better TV and other interest groups have called for minimum substantive public interest requirements akin to those in the Children's Television Act of 1990, e.g., 15% of the broadcast day (6 a.m. to

¹ As a graduate student, I am unable to afford the "luxury" of cable television.

However, unlike “natural” resources, broadcast airwaves are not consumed but merely occupied. As such, the real limits on television are not consumption oriented but technological.⁵ This is a critical distinction between TV and other “vital”resources that PBT ignores. The advent of digital technology demonstrates the significance of this distinction. Specifically, with DTV technology, the broadcast television industry’s current requirement for 402 megahertz of spectrum will be reduced to 252 megahertz, saving up to 150 Megahertz of prime spectrum for other uses.⁶ Under these guidelines, scarcity is not an issue.

Ultimately, as the House Commerce Committee indicated during the drafting the Telecommunications Act of 1996, “due to significant changes in the audio and video marketplace over the past 50 years, the scarcity rationale for government regulation no longer applies.”⁷ Arguably, with developments in digital technology, including the capability of providing multiple free broadcast stations, it is time to stop sacrificing the first amendment in the name of scarcity.

DIGITAL TV & OTHER CONSOLATION PRIZES: THE GIFT RATIONALE

Another frequent argument for imposing additional public interest standards now is that the government has given broadcasters use of the digital spectrum for free. ⁸ With the value of the digital spectrum estimated at anywhere from \$11 to \$70 billion dollars,⁹ the issuance of digital licenses to current analog licensees at no cost appears to be quite a windfall. However, what PBT and other proponents of the “giveaway” theory fail to take into account are the costs associated with the transition from analog to digital television. According to conservative

⁵ Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 342, 347 (1998).

⁶ Testimony of Larry Irving, Asst. Sec. of Commerce, before the Senate Commerce, Science and Transportation Committee (Sept. 8, 1997).

⁷ H.R. Rep 204, 104th Cong. 1st Sess. 54 (July 24, 1995).

⁸ As one commentator has observed, “These public interest obligations can be justified as an in-kind payment— a quid pro quo— for the right to use the spectrum.” Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1731 (1997).

⁹ Ellen P. Goodman, *Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation*, 49 FED COMM. L.J. 517 (1997).

estimates, each station will have to spend somewhere from two to seven million dollars to “go digital.”¹⁰ This does not even include the costs of digital production, estimated at around \$15 million.¹¹ Ultimately, calling digital television a windfall is analogous to buying someone a birthday gift and putting it on their credit card. Neither scenario is a true gift— all the strings (or wires) attached cancel out any benefit.

Ultimately, when Congress chose to give away digital licenses to existing analog broadcasters, they did so not out of charity, but because it was the only way to ensure that digital television would be a success.¹² As Congress recognized, digital TV would not make it unless broadcasters, electronic manufacturers, and the public were all on board the “digital express.” In the long run, it didn’t matter how many people bought digital television if none of the networks were producing any programming. With this in mind, Congress structured a deal whereby Congress agreed to give away the digital spectrum and broadcasters agreed to a rapid conversion schedule. Broadcasters did not agree however, to have this “freebie” held over their collective heads for eternity. Today, PBT may demand minimum public interest standards as a token for this \$70 billion “gift” but what about ten years down the road when they ask for commercial free television in exchange or simulcasting in Swedish?

“NEW TECHNOLOGY, NEW STANDARDS”

Related to the “gift theory” is the “new technology, new standard” rule. The fact that Digital TV is a new, improved television delivery system has been used by PBT and other interest groups to justify treating digital differently, i.e., regulating them to death.¹³ While digital television opens up many opportunities for closed captioning, emergency communications, and other technological enhancements, a clearer, better quality picture of Bill Nye the Science Guy will not make our kids smarter. The fact that digital television is different from its predecessor does not in itself justify new content-specific regulations. Instead of adding to broadcaster’s

¹⁰ Julie Macedo, *Meet the Television of Tomorrow: Don’t Expect to Own it Anytime Soon*, 6 U.C.L.A. L. REV. 283, 285 (1999).

¹¹ *Id.* at 286.

¹² *Id.*

¹³ Mike Snider, *FCC Urged to Make Broadcasters Do Better*, USA TODAY, May 3, 1999, at 6D, available in 1999 WL 6841406.

regulatory burden, I would argue that existing regulations, from the Children's Television Act to license renewal procedures should simply carryover into the digital age.¹⁴

VANNA WHITE, FRED FLINTSTONE & OTHER REGULATORY "SUCCESSSES"

Justified or not, PBT and other organizations continue to lobby for additional regulations on the basis that such standards are authorized pursuant to the Communications Act of 1996.¹⁵ Just because the FCC has the authority to add new standards, however, does not mean it should.¹⁶ As it is now, current regulations often go unchecked. This is demonstrated by the current Lowest Unit Charge rules for politicians. According to these standards, stations are supposed to give candidates the lowest available advertising rates to assure everyone access to the airwaves. However, as the FCC's own audits have shown, more than 80% of TV stations failed to give candidates the lowest available rates, effectively undermining the regulations.¹⁷

The Lowest Unit Charge rules are not the only example of good intentions gone awry. In an attempt to encourage local programming, the FCC adopted the Financial Interest and Syndication Rules ("fin-syn") and Prime Time Access Rules (PTAR).¹⁸ Instead of in-depth public affairs programming, however, these rules brought us Vanna White spinning letters on Wheel of Fortune, high brow trivia via Jeopardy, and John Tesh's in-depth

¹⁴ Arguably, DTV is not different enough to justify new standards. When the FCC decided to limit initial eligibility for the advanced television licenses to existing broadcasters, they did so on the basis that DTV would not constitute a new service. Rather, it would "revamp and supplant" the public's existing broadcast service. Ellen P. Goodman, *Digital Television and the Allure of Auctions: The Birth and Stillbirth of DTV Legislation*, 49 FED. COMM. L.J. 517, 524 (1997).

¹⁵ 47 U.S.C. § 336 (d).

¹⁶ As Michael K. Powell has indicated, when confronted with public interest regulations, it is important not only to determine whether the commission has the authority to do what is asked but also to consider the following questions: (1) whether it is better to leave the matter to Congress or await more specific instruction, (2) if the issue is best addressed by a state agency or other federal agency, and finally (3) whether the action taken would be constitutional? Michael K. Powell, *The Public Interest Standard: A New Regulator's Search for Enlightenment*, 16 COMM. L.J. 1 (1998).

¹⁷ Prepared Statement of Reed E. Hundt., Federal Communications Commission on Digital Television, before the Committee on Commerce, Science, and Transportation (Sept. 17, 19997).

¹⁸ Fin-Syn and PTAR were originally enacted to foster a more competitive and diverse programming climate, wherein program producers with unique ideas would be able to have those ideas showcased on a national network without surrendering valuable syndication rights. Marc L. Herskovitz, *The Repeal of the Financial Interest and Syndication Rules: The Demise of Program Diversity and Television Network Competition?* 15 CARDOZO ARTS & ENT. L.J. 177, 179 (1997).

reporting on Hollywood.¹⁹ As the FCC itself conceded, “there was no credible evidence that the rules have . . . increased the diversity or competitiveness of the program supply market.”²⁰

Finally, prior to the enactment of the Children’s Television Act, broadcasters were classifying GI Joe and the Flintstones as educational television based on the fact that they “included a variety of generalized pro-social themes.”²¹ Putting aside the issue of whether shows which feature men with guns or children armed with bats and a two word vocabulary (Bam-Bam) are educational, most children’s shows weren’t even accessible. The majority of broadcasters aired the programs in the pre-7 a.m. time slot when children weren’t even awake.²² These examples demonstrate a pattern of flagrant abuse by the broadcast industry. As Lawrence Grossman, former president of NBC News and PBS surmised, “broadcasters are very good at giving people what they want and little of what they need because you can make money from giving the people what they want, but it costs money to give people what they need”²³ Right or wrong, broadcasters have put profits before the public interest, resisting additional regulations, particularly in the area of free political air time and other unfunded mandates. With such opposition, it is unlikely that requiring two hours of political broadcasting a week would result in two hours of quality political broadcasting.²⁴ Instead we would have Saturday Night Live skits and debates moderated by Regis Philbin hounding George W. Bush— “George, you say taxes are (d) really bad, is that your final answer?” Entertainment would ultimately prevail over education.

Principle, rhetoric, and good intentions aside, enforcing strict, weekly public interest requirements would be an immense task. Upholding such standards under the current postcard renewal process would be virtually impossible. Indeed, as it is, under the “postcard renewal” system, broadcasters must only notify the FCC that

¹⁹ *Id.*

²⁰ Tentative Decision, 94 F.C.C.2d 1019, 1094 (1983).

²¹ Policies and Rules Concerning Children’s Television Programming Revision, 8 F.C.C.R. 1841, 1842 (1993).

²² *Id.*

²³ Symposium, *The First Amendment and The Media*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 461, 471 (1999).

²⁴ As Grossman indicated later in his statement, public interest “standards never work because eventually broadcasters end up doing whatever they want, anyway.” *Id.* at 493.

records of their public interest efforts are in a public file located at the station. It is up to the viewing public to (1) look at the files, and (2) complain, in order for any action to be taken against the station.²⁵ To say this occurs infrequently is an understatement. While the web and other advancements may provide additional opportunities for public feedback, there are currently over 1600 television stations,²⁶ and only a limited amount of FCC personnel responsible for processing applications and resolving disputes.²⁷ Upholding specific public interest requirements across the board would be virtually impossible without additional FCC staff and resources.

As the past sixty years of regulation have demonstrated, broadcasters have continually twisted, manipulated, and essentially avoided existing public interest regulations, giving us GI Joe for educational programming and Wheel of Fortune for “diversity.” If past regulatory efforts have demonstrated anything, it is the futility of providing for the public interest by imposing more regulations on the broadcast industry.

HOW IS THIS CURRENT REGULATORY SCHEME ANY DIFFERENT?

In light of these past regulatory efforts, we must consider whether increasing the quantity of public interest programs will improve the quality of network television. Based on my years of personal, in-depth research, I think not. Research aside, there are two major reasons why *more* public interest programming may not necessarily be *better*.

1. The Lowest Common Denominator Factor: It was Walter Cronkite who said that broadcasters “pander to the lower common denominator taste.”²⁸ As offensive as this statement may be, it is certainly true on some levels. We may cry for more educational programming, but for the past several weeks, “Who Wants to Be a Millionaire” has taken the top one, two, and three spots in the weekly ratings. While we bemoan the violence and

²⁵ Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 344 (1998).

²⁶ Jube Shiver, Jr., *FCC Looks at Making TV Stations Give Political Candidates Free Time*, HOUSTON CHRONICLE, Dec. 17, 1999, available in 1999 WL 24279617.

²⁷ The FCC staff was reduced by approximately one-third between 1979 and 1989 alone. Janine S. Natter, *Scarcity of the Airwaves: Allocating and Assigning the Spectrum for High Definition TV*, 13 HASTINGS COMM. & ENT L.J. 199, 231 (1991).

²⁸ Kathy Chen, *Issue of TV Air Time for Public Affairs is Raised Anew*, Wall St. J., Dec. 15, 1999, at B4, available in 1999 WL-WSJ 24925826.

scandal on local news, we tune into Cops or Jerry Springer instead. Sex, violence, and mindless TV sells, and since broadcasters are in the business of selling, entertainment ultimately wins out over education.

2. Remote Phenomenon: Inherently related to the lowest common denominator factor is the remote phenomenon. In the old days (circa 1964), people actually tuned into political coverage. Today, with the advent of the remote control and the growth in cable and satellite television, people can just change the channel when confronted with public affairs, educational, or other programming that is “good for them.” This is demonstrated by the ratings of the president’s most recent state of the union address. While this important annual address to the nation was carried on all three major networks, only 31.5 million Americans tuned in, the lowest ratings in the history of the broadcast. Compare this to Regis Philbin’s “Who Wants to Be A Millionaire” which attracted 30 million viewers the same night on just one network.²⁹ Political factors aside, this demonstrates a significant trend. Just because political, educational, or other community programming is on, does not mean people will take advantage of it. As a result, the “if you put more public interest programming on the air, they will watch it” theory no longer seems convincing.

A L T E R N A T I V E S

Considering the failure of past regulatory efforts, should we simply step back and let “Who Wants to Be a Millionaire” and Jerry Springer take over network television? Not yet. While commercial televisions are good at avoiding their public interest obligations, one network has distinguished itself in voluntarily providing exceptional educational, political, and community programming— PBS, dubbed by some as “our nation’s greatest resource.”³⁰ Unfortunately, funding issues continually plague this resource. As we prepare to make the transition to digital television, perhaps the best way to ensure that future generations have access to free, high quality educational and community programming is to strengthen public broadcasters, in the process relieving PBS of the duty to beg for money via the oft-mocked pledge drive. This can be done in one of several ways.

²⁹ Lisa de Moraes, With 3 Millionaires and a Super Bowl, ABC Rakes in the Ratings, WASHINGTON POST, c7, Feb. 2, 2000, *available in* 2000 WL 228326.

³⁰ Fred Rogers, aka Mr. Rogers, PBS Pledge Drive, March 6, 2000.

Several commentators have suggested a “pay or play” approach, whereby broadcasters who neglect their existing public interest obligations must pay a fine that would go into a public trust fund to support public broadcasting. Other options include setting up a trust funded by spectrum license fees, the money broadcasters will pay when using their digital lines for ancillary services such as subscription video, data transfer, or audio signals.³¹ If 1% of the spectrum fee were dedicated to this purpose, PBS would raise about \$300 million for additional public interest programming above and beyond its current offerings.³² Another source of potential revenue is the analog spectrum auction currently slated for September 30, 2002. This auction is anticipated to bring approximately \$132 billion in profits.³³ While, Congress has plans to use this money to pay down the debt, a portion of it (1% to 5%) could be set aside to support public broadcasting. Finally, under the Dekard Proposal, many have supported letting broadcasters forego the auction and simply retain their analog spectrum to broaden their educational, informational, and public affairs offerings, e.g., devoting one channel to Sesame Street, another to adult education, and a third to arts & entertainment.³⁴

Whatever the source of funding, preserving public broadcasting is probably our best hope for expanding educational and other community oriented programming in the twenty first century.³⁵ Only in this way can we ensure that every American with a digital television has access to high quality local, educational, and public affairs programming.

³¹ A FCC rule adopted in late 1998 requires 5% of the gross revenues generated by “feeable ancillary or supplementary services to be paid by broadcasters to the FCC.” Julian L. Shepard, *New Technologies Challenge FCC Rulemakers*, DIGITAL TELEVISION at 9, 10 (Jan. 1999).

³² Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 364 (1998).

³³ Richard E. Wiley, *Weekly Letter*, DEVELOPMENTS IN COMMUNICATIONS LAW, Nov. 1997, at 73.

³⁴ Media Institute’s Public Interest Council Press Conference (Dec. 18, 1998).

³⁵ As Chairman Hundt has recognized, “Studies show that virtually all the programs aired for children on PBS were judged to be of high quality and educational; only a third of those aired on the Big Three networks fell into the same category.” Indeed, PBS has no commercial motivation. 1997 State of Children’s Television Report: Programming for Children over Broadcast and Cable Television at 11 (The Annenberg Public Policy Center of the University of Pa).

CONCLUSION

As we face the advent of digital television, we must be wary of regulating it to death (literally). In order for digital television to catch on, overcome competition from computers, the internet, and other technological advances still unheard of, it must be allowed to develop unhindered.

If past regulatory efforts have taught us nothing else, it is that the major networks are good at providing semi-entertaining, somewhat informative, commercial programming. However, they have often resisted and even undermined mandatory minimum programming requirements. Similarly, while the public has called for more children's programming, less violence, and campaign reform, viewers continue to choose "World's Most Dangerous Car Crashes" over presidential debates.

Nevertheless, where commercial broadcasters have failed, public broadcasters have excelled. In light of these successes, our efforts would best be concentrated in encouraging public broadcasters. Whether this is best done through pay or play measures, a government trust fund, or other methods is unclear. What is clear is that the US is far behind in funding public broadcasting. In the 1990s, Japan spent an average of \$17.71 (per capita), Canada spent \$32.15, and the United Kingdom spent \$38.56. The United States spent only \$1.06.³⁶ In order to "catch up" to other nations, revenue from digital television sources should be used to support public broadcasting.

Respectfully,



Heather L. Flory

³⁶ Quality Time? The Report of the Twentieth Century Fund Task Force on Public Television 152 (Twentieth Century Fund Press, 1993).

RECEIVED

MAR 23 2000

Jennifer C. Suttles
FCC MAIL ROOM

To: Chairman William Kennard, FCC

From: Jennifer C. Suttles

CC: Professor Glenn H. Reynolds

Re: Comment on a Mandate Forcing Broadcasters to Devote Time to Political Campaigns During and After the Transition to Digital Television

Dear Chairman Kennard:

In response to the FCC's request for public comments on how broadcasters can best serve the public interest as they transition to digital transmission technology, 65 F.R. 4211 (January 26, 2000), I am writing to offer suggestions as to how broadcasters can better contribute to political discourse. As an interested and concerned citizen, this year's elections have captivated my attention as I have been berated with advertising financed by Presidential candidates and their supporters. From these commercials, it is quickly evident why the advertising candidate's opponent should not win, but as always, the ads fail to address the "issues." Essentially, it is impossible to understand the particular candidate's ideology, platform, or background from these thirty second (at best) sound bites. In the interest of educating the general electorate and achieving a limited amount of campaign finance reform, broadcasters should have a direct obligation to provide better and cheaper campaign coverage during and after the transition to DTV. Therefore, I am writing to encourage the FCC to take affirmative steps in formulating regulation that forces broadcasters to devote time to political discourse.

Introduction and Background

Simply, self-regulation is not working, and as the industry begins the move to digital

television, the issue is more pressing. Broadcasters have been entrusted with the privilege of serving the public interest, convenience, and necessity, and with this privilege came monetary windfalls for industry insiders. With advances in technology, broadcasters are now being given a greater privilege, digital television. This privilege provides broadcasters with a public commodity, the spectrum, valued at as much as \$70 billion, but it is being licensed to the companies for free.¹

As the capabilities of broadcasters expand in the form of digital television, the amount that they contribute to public interests, specifically, politics, should accordingly expand. However, as technology increases, conglomerates form, and many blame mergers in the industry for the waning devotion to the public interest format and an increased focus on the bottom line.² For example, a study conducted by the Benton Foundation, a Washington-based public-interest group, found that of forty commercial broadcasters in five cities, only 46.5 hours out of a total of 13,250 programming hours were dedicated to public affairs. Specifically, a study conducted in the Baltimore and San Francisco markets showed that top stations gave less than four minutes to election coverage and only thirty seconds to candidate comment on an average night. Still, political-ad sales are expected to top \$600 million.³

¹Kathy Chen, *Issues of TV Air Time for Public Affairs is Raised Anew*, WALL ST. J. (Dec. 15, 1999) at B4.

²Walter Cronkite, honorary co-chairman of the Alliance for Better Campaigns, attributes the trend to increased competitions from satellite and cable television. Analysts blame the wave of mergers which have forced local owners to increasingly focus on the bottom line. *See id.* at B5.

³*See id.* at B5.

Since a duty is imposed on the broadcasters by statute, and studies report that they are not fulfilling their duties, further regulation is necessary to force the broadcasters to comply with the statutory regulations already in place. This regulation would lead to a better educated general electorate, and it would also encourage campaign finance reform. For this reason, the remainder of this comment will focus on these two specific goals.

Educating the Electorate

By mandating that a broadcaster devote a reasonable amount of free air time to national, state, and local elections, the television dependent public will become better educated. By definition, “reasonable” would mean that broadcasters would have a set amount of time that they would be required to devote to political discourse, and this time would only be used during the prime time hours.⁴ However, they would retain autonomy in deciding how the time would be allocated as long as statutory requirements regarding equal distribution are met.

This suggestion is parallel to that proposed by the Advisory Committee on Public Interest Standards of Digital Television in that broadcasters would allot five minutes during the prime time hours to candidates starting thirty days before an election.⁵ Still, the broadcasters could structure the form in which the discourse would take, but they would be required to provide free time, outside of news coverage, to an issue which should be of central importance to all, electing our country’s leaders.

⁴The Gore Commission also recommends that five minutes of nightly free air time be delegated to candidates beginning thirty days before elections. *Gore Proposals Go to White House*, 38 TELEVISION DIGEST (Dec. 21, 1998).

⁵*See id.*