

period in that proceeding ended only last week, and no such rules have been adopted, let alone implemented.⁷³ Thus, it seems wildly premature for the Commission to consider digital video description requirements in this general public interest proceeding.

However, to the extent that the Commission can take useful action now with regard to digital video description, NAB urges the Commission to focus on promoting the development of digital equipment that will fully accommodate video description. There is no assurance that, even though the ATSC DTV system provides for multiple audio services (as needed for the provision of video description), DTV receiver manufacturers will actually implement this feature so that all digital televisions fully support multiple audio channels. Given this uncertainty, the Commission should concentrate its efforts with regard to video description on promoting the manufacture of DTV receivers that will be able to support video description, now and in the future. *See* Comments of NAB in MM Docket No. 99-339 at 21-33 (filed Feb. 23, 2000).

Similarly, NAB believes it is premature to consider rules pertaining to the accessibility of ancillary and supplementary services that DTV broadcasters might offer. At this time, it remains unknown what types of ancillary services will eventually be offered (if, indeed, any are offered). Because the types of ancillary services that could be offered vary widely (*e.g.*, from Internet access to audio signals), any discussion of how to make these services accessible to visual or hearing impaired persons would be more theoretical than real.⁷⁴

⁷³ A number of commenters in that proceeding moreover questioned the statutory authority of the Commission to even adopt rules mandating the provision of described programming. *See, e.g.*, Comments of NAB in MM Docket No. 99-339 at 2-10 (filed Feb. 23, 2000).

⁷⁴ The Advisory Committee Report specifically suggested that any DTV broadcaster who provides ancillary and supplementary services not impinge on the 9600 baud bandwidth currently set aside for closed captioning. *See Notice* at ¶ 25. NAB sees no problem in this regard, as the ATSC DTV standard, as adopted by reference by the Commission, mandates that the 9600 baud bandwidth always be reserved.

Moreover, NAB wishes to emphasize that it would be pointless to require broadcasters to make ancillary or supplementary services accessible to visual or hearing impaired persons, if DTV receivers on the market are unable to receive and support the information in the DTV signal allowing for such accessibility. As a general matter, the ATSC DTV system is technically extremely complex, and, unlike the much simpler NTSC system, the data needed to support extra services (such as those for the hearing or visually impaired) can be encoded in DTV signals in any number of places and in any number of ways. For any DTV-based services to be fully available to the public, however, DTV receivers must have the capability to receive and decode the relevant information in the DTV signal, as well as the flexibility to allow consumers to easily access the services. Implementing the suggestions of the Advisory Committee with regard to disability access will consequently require cooperation and coordination between broadcasters, broadcast equipment manufacturers, and receiver manufacturers. The Commission therefore cannot simply require broadcasters to provide new DTV-based services for the disabled community (or to consumers generally), without also considering DTV receiver issues. Indeed, to ensure that members of the disabled community have access to all types of DTV programs and services, the Commission will likely be forced to establish DTV receiver specifications, just as the Commission previously required the inclusion of closed captioning decoders in analog television sets.⁷⁵

H. The Promotion of Diversity in Broadcasting Appears Largely Unrelated to Digital Technology.

The *Notice* (at ¶¶ 29-33) discussed at some length the Commission's traditional goal of promoting diversity of ownership, employment and viewpoint in broadcasting. The Commission

⁷⁵ NAB has consistently argued that the Commission should act to define receiver standards generally, as part of an effort to encourage the overall DTV transition. *See, e.g.*, Comments of

then specifically asked how it could encourage diversity in broadcasting, consistent with relevant constitutional standards, and sought comment on ways “unique to DTV” that the Commission could use to encourage diversity in the digital era. *Id.* at ¶ 33. NAB is hard pressed to suggest ways “unique to DTV” for promoting diversity of ownership or employment, given the lack of any connection between these aspects of diversity and either digital technology or broadcasters’ programming-related public interest obligations.

Digital broadcasting could, however, enhance the diversity of programming formats or content, especially if multicasting proves commercially viable. As discussed in Section II.A., multicasting could increase the number and variety of programming options available to viewers. Multicasting could also allow broadcasters to provide more specialized programming options that appeal to more narrow or specific audiences, such as minorities. In addition, multicasting should increase the need of stations for programming, thereby producing new opportunities for program producers, including members of minority groups or women.⁷⁶

Although multicasting should increase the total number and variety of programming options for viewers, NAB does not believe that the Commission can act effectively to promote program diversity in this regard. It is the marketplace that will determine whether multicasting succeeds or fails, not the Commission.⁷⁷ If multicasting ultimately proves to be commercially viable, then an increase in the total number and types of programs offered will follow. In this regard, the Commission need only refrain from taking actions that inhibit the development of

NAB in CS Docket No. 98-120 at Appendix G (filed Oct. 13, 1998).

⁷⁶ Obviously, if a broadcaster offers three, four or five programming streams for even part of the broadcast day, that broadcaster will have an increased need for programming of various types.

⁷⁷ As previously described, multicasting might not increase a station’s existing audience and therefore might not have additional revenue producing potential.

innovative multicasting services (such as by prematurely imposing expansive public interest obligations on multicasting broadcasters or by denying must carry status to multicast programming). *See* discussion in Section II.A. above.⁷⁸

Moreover, NAB notes that the digital transition will ultimately produce additional opportunities for new DTV stations, in a way unrelated to the public interest obligations of existing broadcasters. In expanding the DTV “core” spectrum to include channels 2-51, the Commission added approximately 175 additional channels, many of them in major markets.⁷⁹ These new channels will be licensed through competitive bidding procedures in which the Commission will presumably offer bidding credits or other special measures to new entrants and, if constitutionally permitted, to members of minority groups or women.⁸⁰ Thus, in this manner, the digital transition should produce a more competitive broadcasting environment, with new owners and new programming options.

⁷⁸ The Commission must certainly refrain from trying to mandate the provision of certain types of programs by multicasting broadcasters. Any misguided effort to promote diversity of programming by mandating the content of programming will improperly infringe on the editorial discretion of licensees and implicate serious First Amendment concerns. *See Lutheran Church*, 141 F.3d at 354 (in discussing the Commission’s interest in fostering “diverse programming,” the court stated that any “real content-based definition” of the term “diverse programming” “may well give rise to enormous tensions with the First Amendment”).

⁷⁹ *See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order* in MM Docket No. 87-268, 13 FCC Rcd 7418 at ¶45 (1998).

⁸⁰ Under *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), any governmental action based on race will be subjected to strict judicial scrutiny. NAB notes that the Commission has for some time been attempting to complete evidentiary studies concerning the barriers encountered by small, minority- and women-owned businesses in the telecommunications markets and the auctions process. It remains to be seen whether these studies, when completed, will provide the type of evidentiary record required to support the adoption of special measures for minorities or women under *Adarand* or *United States v. Virginia, et al.*, 518 U.S. 515 (1996).

Given the constitutional difficulties experienced by some of the Commission's previous efforts to promote diversity in broadcasting,⁸¹ NAB finally notes that the most effective methods to promote diversity in ownership and employment may include voluntary industry efforts or incentive programs requiring congressional action. For example, the broadcast industry has voluntarily created an investment fund, which will provide up to \$1 billion in buying power to media businesses owned by minorities and women. Broadcast groups and NAB also administer education and mentoring programs to bring minorities and women into the broadcast business and to help them move ahead in their broadcasting careers. In addition, NAB supports legislation that would give companies tax credits if they sold broadcast properties to minorities or women.⁸²

In sum, NAB respectfully disagrees with the supposition that the utilization of digital technology by broadcasters is germane to most efforts to enhance "diversity" in broadcasting. Moreover, attempts to tie broadcasters' program-related public interest obligations to the promotion of diversity will be unavailing in so far as these duties have no connection to the ownership or number of broadcast facilities or to the recruitment of employees for those stations. NAB and the broadcast industry do reiterate their support for voluntary efforts to promote all aspects of diversity in broadcasting and reemphasize their commitment to these efforts in the digital era.⁸³

⁸¹ See, e.g., *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (preference for women in comparative broadcast licensing proceedings held to violate constitutional equal protection principles).

⁸² Such legislation would reinstate in somewhat altered form the Commission's previous tax certificate program, which NAB regards as one of the more effective policies in promoting minority ownership of broadcast outlets.

⁸³ For example, earlier this year NAB pledged \$1.25 million for two new diversity funds. The Gateway Fund will provide a 50% match to help cover the cost of providing training for entry-

I. Efforts to Enhance Political Discourse Are Unrelated to Digital Technology, Appear Unnecessary, and Raise Serious Statutory and First Amendment Concerns.

In its final paragraphs, the *Notice* asked for comment on how “broadcasters’ public interest obligations can be refined to promote democracy and better educate the voting public.” *Id.* at ¶ 34. The *Notice* (at ¶¶ 35-38) discussed ways that the Commission could promote voluntary efforts by television broadcasters to enhance the political debate, and offered proposals to encourage or require broadcast licensees to provide free air time to candidates.

1. Whether Voluntary or Mandatory, Free Air Time Proposals Have No Connection to Digital Broadcasting, Are Unlikely to be Effective in Improving Political Discourse, and Are Not Needed to Ensure the Broadcast of Campaign Information.

In addressing these various free time and other proposals relating to political discourse, NAB notes that they aim at promoting goals unrelated to digital television or even to broadcasting generally. Rather, these proposals address perceived problems with the current election system and the supposedly pernicious influence of money on politics. NAB objects to this effort to use broadcasters to achieve an end (however worthy such political reform may be) when broadcasters are only tangentially related to the problem being addressed. As even the Advisory Committee recognized, “no reasonable campaign finance reform can focus on television alone, or put the central burden for improving our political system on the backs of broadcasters.” Advisory Committee Report at 56.⁸⁴

level broadcast industry employees, with employers covering the other half of the expenses. The Broadcast Leadership Training Program will provide training for members of groups that are underrepresented in the ranks of broadcast ownership.

⁸⁴ See also Reed Hundt, FCC Chairman, *The Hard Road Ahead—An Agenda for the FCC in 1997* (Dec. 26, 1996) (“broadcasters should not be required to shoulder the financial burden of political time themselves,” but the “[p]rovision of time should be combined with other innovations to make up for the expense to broadcasters”).

NAB particularly objects to singling out broadcasters to bear the burden of general political reform when such efforts are unlikely to succeed. If the goal is to truly reform the current election system – with its lack of restrictions on “soft” money and the activities of “independent” campaign committees – then merely increasing the television air time of candidates will be hopelessly inadequate. Without comprehensive campaign finance reform, encouraging or requiring broadcasters to provide more free time to political candidates will have little effect on the conduct of campaigns.⁸⁵ NAB additionally believes that the effectiveness of any free time proposals could be impeded by practical difficulties in implementation and administration.⁸⁶

NAB also challenges the assumption underlying the various free air time proposals that “more” automatically means “better.” The *Notice* sought comment “on ways that candidate access to television *and thus the quality of political discourse* might be improved.” *Id.* at ¶ 34 (emphasis added). But even if broadcasters were required to provide free time – in addition to the considerable amounts of both paid and free air time candidates currently have – the “quality

⁸⁵ For example, even if broadcasters provide additional free time to candidates, this will not reduce the incentives for candidates to raise money to buy even more air time or for a myriad of other purposes. The role of soft money (funds contributed to parties that is used to finance individual campaigns) and political action committees will also remain unchanged. Because the provision of some additional free air time will not lessen the need of candidates to raise as much money as possible, the public perception of the corrupting influence of money and large campaign donors will not be reduced.

⁸⁶ Other countries that mandate free time are generally parliamentary democracies. By contrast, the U.S. system has far more political races (*e.g.*, national, state and local), our campaigns last for months instead of a few weeks, and our candidates are under far less party control. These differences raise a number of difficult practical questions regarding implementation of any free time requirement. For example, would a requirement apply to all candidates in all races (federal, state and local) and for all candidates (even “fringe” parties)? If so, would this place an unfair burden on broadcasters, especially those with geographically large markets covering a number of congressional districts and parts of several states (all of which would have separate federal and state races)?

of political discourse” might not improve. Indeed, if a free time requirement resulted in an increase in the amount of air time devoted to various forms of “negative campaigning,” then the quality of political discourse could actually decline. As the Commission has recognized in other contexts, quantity does not necessarily guarantee quality.⁸⁷

In any event, NAB questions the assumptions that there is a lack of political coverage in this country, and that simply more coverage is needed (questions of quality aside). For example, broadcasters donated over \$148 million in free air time for campaigns and candidate coverage in 1996. *See* NAB Report at 10. Significantly, stations report that many offers of free time are turned down by candidates – as much as \$15.1 million worth of air time in 1996, based on the average air time values of events that were actually held. *Id.* The fact that candidates not infrequently decline offers of free time indicates that candidate access to television and radio is adequate.

For the 2000 election cycle, broadcasters have continued to provide substantial amounts of free time for candidates, in addition to news and other coverage of campaigns.⁸⁸ Moreover,

⁸⁷ *See, e.g., Comparative Renewal R&O*, 66 FCC 2d at 427 (increasing amount of certain categories of programming “would not necessarily improve the service a station provides its audience”); *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 991 (1981) (the focus of any allegation that a station is doing very little, or nothing, to address through its programming issues facing the community “should not be on the mere amount of programming”; a station with less non-entertainment programming may “be doing a superior job” compared to a station airing more non-entertainment programming, depending on the quality of the programming and the issues addressed).

⁸⁸ For example, Hearst-Argyle Television, Inc. has launched “Commitment 2000.” This initiative involves Hearst’s 24 television stations and its four news radio stations, and will include: targeted web sites; extensive daily campaign reports, debates, forums and town meetings; voter registration announcements; and one-hour per week minimum candidate round tables with local, state and federal candidates hosted by station personnel. E.W. Scripps, as part of its “Democracy 2000” initiative, will make five minutes of free time available to candidates on its nine stations during evening newscasts each of 30 days before local primary and national elections. In response to low voter turnout in recent elections, the New Hampshire Association of Broadcasters is spearheading “Project Vote 2000,” a public service campaign of television and

available evidence indicates that voters believe broadcaster campaign coverage is more than sufficient. For example, in a February 1, 2000 poll of New Hampshire voters conducted by Wirthlin Worldwide, 50% of voters felt that local broadcasters provided about the right amount of time covering the state's presidential primary and 37% believed local stations devoted too much time. Only 6% of those polled believed that local broadcasters gave too little time to covering the primary. In another poll conducted by Wirthlin Worldwide, over 85% of polled voters from five states participating in the "Super Tuesday" primaries on March 7, 2000, said that local broadcasters had provided the "right amount" or "too much" coverage of the presidential primaries. Only 7% of voters surveyed said that not enough time was devoted to the campaigns. Perhaps this extensive coverage explains why candidates continue to decline offers of free air time from broadcasters.⁸⁹

Thus, based on available evidence, NAB disputes the *Notice's* underlying assumptions that political candidates lack access to the nation's airwaves, that there is too little political coverage by broadcasters, and that the public desires more coverage of campaigns and elections. The *Notice* (at ¶ 36) cites figures purporting to show that a number of television broadcasters provide scant coverage of local public affairs and that some stations provide no local news at all. These figures do not, however, demonstrate that local news and public affairs (including political) coverage are not available to viewers on a market basis. NAB sees no cause for alarm if, for example, the sixth-rated television station in a market does not provide local news

radio spots that urge people to vote. Participating stations intend to donate \$1 million in airtime by this September.

⁸⁹ For instance, prior to the California presidential primary this year, the California Broadcasters Association offered a 90-minute prime-time live debate to the McCain and Bush campaigns and to the Gore and Bradley campaigns. The offer included free uplinks to all television and radio stations in America that wanted to run the debates. All four candidates declined this offer.

programming, assuming the top five television stations in a market do so, particularly since lower-ranked stations often lack the economic resources to provide significant local news programming.⁹⁰ The fact that some individual television stations do not provide extensive local news or public affairs programming does not, however, imply that the public suffers from a lack of political coverage that a “free time” requirement would solve. Viewers are able to obtain campaign and candidate information from a plethora of broadcast outlets, numerous cable channels (*e.g.*, CNN, CSPAN, MSNBC and local access), many newspapers and magazines, and, of course, the Internet.⁹¹ Given this myriad of resources available, NAB respectfully submits that there is no lack of political news and information available for persons who have any interest in obtaining such information. Thus, a voluntary or mandatory requirement for broadcasters to offer additional free time for political candidates is unnecessary.

NAB also wishes to express its reservations about the concept of a “voluntary” free time commitment. Of course NAB supports its members and all broadcasters who have in the past and continue today to provide free time to candidates on a truly voluntary basis. However, if the Commission were to establish any sort of “recommendation” or “guideline” for broadcasters to

⁹⁰ The Commission has specifically recognized that lower-rated television stations with limited financial and other resources often do not have significant local news programming, “given the costs involved.” *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 66 (1999).

⁹¹ Indeed, the Internet’s role in elections, for both candidates and the public, is steadily growing. *See, e.g.*, Washington Post, at A19 (March 12, 2000) (record turnout reported in Arizona’s Democratic presidential primary, which was the first binding election for public office allowing voters to use the Internet to cast ballots from their homes); Los Angeles Times, Part B at 1 (March 6, 2000) (Internet, by offering cheap access to voters, has opened political arena for third parties and alternative candidates, whose numbers have increased); Los Angeles Times, Part A at 20 (Feb. 10, 2000) (Internet now used by campaigns to recruit volunteers, spread candidates’ messages, get voters to the polls and to solicit contributions); New York Times, Section A at 19 (March 17, 1999) (Steve Forbes became first presidential candidate to formally announce candidacy on Internet).

provide a certain amount of free air time, then such provision of free air time will no longer be truly voluntary. For example, several public interest groups have filed an informal objection against the pending CBS/Viacom merger. See Feb. 2, 2000 Letter from Alliance for Better Campaigns, *et al.* to Chairman Kennard. This letter refers to the “recommendation” by the Advisory Committee that television stations “voluntarily” provide five minutes a night of candidate-centered discourse prior to primary and general elections. However, the letter then charges that CBS has not honored its “commitment” in this regard, and that, as a result, the Commission should find that the CBS/Viacom merger would not serve the public interest.⁹² Thus, a mere *recommendation* from the Advisory Committee – one that the Commission has not even adopted – for broadcasters to *voluntarily* provide free air time to candidates has become the basis of an objection filed against a multi-billion dollar merger.

NAB believes that any similar “recommendation” or “guideline” adopted by the Commission would inevitably become a *de facto* requirement because a broadcaster’s alleged failure to meet the so-called “voluntary” guideline would come under the Commission’s scrutiny during renewals and station transfers and would result in complaints and petitions being filed against the broadcaster. In this way, a “voluntary” standard adopted by the Commission with regard to broadcasters providing free air time would be about as voluntary as the requirement for young men to register with the Selective Service. As a practical matter, moreover, NAB doubts

⁹² Indeed, the letter goes on to say that Commission approval of all applications for broadcast license renewals and station transfers should in the future be conditioned on the record of licensees in providing a minimum amount of air time to candidates.

that the Commission wants to engage in a dispute over the voluntary or involuntary nature of a free air time guideline.⁹³

There is, however, one step that the Commission could take to encourage broadcasters to provide the nightly five minutes of “candidate-centered discourse” recommended by the Advisory Committee. Specifically, NAB urges the Commission to rule that these five minute broadcasts qualify as “on-the-spot coverage of bona fide news events” under Section 315 of the Communications Act. Thus, broadcasters who voluntarily provide this time would be exempt from equal opportunity requirements. Such an exemption would allow broadcasters greater flexibility in selecting formats and would permit broadcasters to continue to provide candidate-centered discourse even if one of the candidates in a race declined to participate.

2. Requiring Broadcast Licensees to Provide Free Air Time to Candidates Would Exceed the Commission’s Statutory Authority.

The *Notice* (at ¶ 38) asks for comment on the Commission’s authority to require broadcasters to provide free air time to political candidates. The Commission cites no specific provisions of the Communications Act that would grant it the authority to impose free political time requirements. NAB presumes that the Commission intends to rely on its general public interest authority.⁹⁴ NAB does not believe that this general authority permits the Commission to

⁹³ As history has shown, the Commission must be cautious in any attempt to persuade broadcasters to “voluntarily” take particular actions regarding their programming. *See Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C. D. Cal. 1976) (district court found that, *inter alia*, the Commission violated the First Amendment by recommending, through informal influence and pressure, that broadcasters adopt the “family viewing policy”). Although this decision was vacated on procedural grounds on appeal, 609 F.2d 355 (9th Cir. 1979), this case illustrates the dangers inherent in attempting to influence programming by “voluntary” guidelines or standards.

⁹⁴ *See, e.g.*, 47 U.S.C. §§ 309(a), 307(c)(1) (Commission shall determine whether grant of applications for new station licenses or for renewal of licenses would serve the “public interest, convenience, and necessity”).

adopt rules requiring free political air time because Congress has already set clear rules in the area of political broadcasting that the Commission is not free to change.

NAB agrees that in many areas the Commission enjoys wide discretionary authority, especially in situations where Congress has not expressly spoken and the Commission is writing on a “clean slate.” In this case, however, Congress has set forth detailed political broadcasting mandates. Specifically, the Communications Act mandates that, with respect to candidate appearances on broadcast stations, the Commission must require broadcasters to provide candidates with “equal opportunities,” must ensure that political messages are not censored, and must require stations to provide “reasonable access” to federal candidates. Most significantly, the Communications Act provides that when candidates buy time, they will be accorded stations’ “lowest unit charge” for the same class and amount of time. 47 U.S.C. §§ 312(a)(7); 315(a)-(b).

Congress’ inclusion of these specific provisions demonstrates that in the area of political broadcasting (and particularly with regard to the rate charged for political advertising), the Commission lacks the power to impose a different and fundamentally inconsistent regulatory regime. Not only does the lowest unit charge provision plainly signify Congress’ contemplation that political advertising time would not be provided for free, the “reasonable access” requirement in Section 312(a)(7) of the Communications Act also specifies that broadcasters can meet their obligations by permitting the “*purchase* of reasonable amounts of time.” (emphasis added). Congress, therefore, provided in the Communications Act for a system of political broadcasting based on the purchase by candidates of time at a discount from ordinary rates.

Congress most clearly did *not* establish a regime of political broadcasting based on the provision of free time by broadcasters.⁹⁵

This inclusion by Congress of statutory provisions establishing a system based on the purchase of air time at specified rates implies, under the elementary maxim of *expressio unius est exclusio alterius*, that Congress denied the Commission authority to adopt other, inconsistent rules.⁹⁶ Indeed, the “circumstances of this inquiry carry us beyond the rule of *expressio unius est exclusio alterius* . . . and into the domain of inconsistency of purpose.”⁹⁷ Mandating free air time for political candidates would simply disregard the specific statutory regime adopted by Congress. The Commission’s general public interest authority should not, moreover, be

⁹⁵ See 47 U.S.C. § 315(b) (setting forth the exact number of days before primaries and general elections during which the “lowest unit charge” applies and the charges that apply to candidates at any other time).

⁹⁶ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (because a federal rule of civil procedure did not include among its enumerated actions any reference to complaints alleging municipal liability, then, under the doctrine of *expressio unius est exclusio alterius*, such complaints are excluded); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) (the “ancient maxim” of *expressio unius est exclusio alterius* means that, “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode”) (quoting *Botany Worsted Mills v. U.S.*, 278 U.S. 282, 289 (1929)); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (under the statutory construction principle of *expressio unius est exclusio alterius*, the “mention of one thing implies the exclusion of another thing”); *American Methyl Corp. v. EPA*, 749 F.2d 826, 835-36 (D.C. Cir. 1984) (in interpreting authority of EPA under a statutory provision, court relied on *expressio unius est exclusio alterius*, a “maxim frequently invoked by the Supreme Court in construing statutes”); *Boudette v. Barnette*, 923 F.2d 754, 756-57 (9th Cir. 1991) (the doctrine of *expressio unius est exclusio alterius* “as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions”).

⁹⁷ *Continental Casualty Co. v. U.S.*, 314 U.S. 527, 533 (1942) (“[g]enerally speaking a legislative affirmative description implies denial of the nondescribed powers”).

interpreted to authorize the adoption of free air time requirements because such an interpretation would render the statutory provisions in Sections 312(a)(7) and 315 entirely superfluous.⁹⁸

Furthermore, because requiring broadcast stations to provide candidates with free air time implicates serious First Amendment concerns, the Communications Act cannot be construed to include such power, at least absent a clear congressional statement affirmatively authorizing it. The Supreme Court has made clear that it will construe grants of administrative authority narrowly to bar actions in tension with the First Amendment unless the agency's action is plainly *required* by its governing statute. In *DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), the Court held: “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”⁹⁹

In this situation, not only is there no evidence of an affirmative intent of Congress to require free time, the plain language of the Communications Act shows that Congress adopted an entirely different approach to political broadcasting regulation. The Commission, therefore, does

⁹⁸ See, e.g., *Hohn v. U.S.*, 118 S.Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998) (stating reluctance to adopt a construction of a statute making another statutory provision superfluous).

⁹⁹ See also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (where an agency's “exercise of its jurisdiction . . . would give rise to serious constitutional questions . . . we must first identify the ‘affirmative intention of the Congress clearly expressed’ before concluding that the Act grants jurisdiction”) (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)).

not have the authority to rewrite the Communications Act and impose a free political time requirement contrary to Congress' specification of public policy in this regard.¹⁰⁰

3. Requiring Broadcast Licensees to Provide Free Air Time to Candidates Would Be Contrary to the First Amendment.

As described in detail above (*see* Section I.G.), the scarcity doctrine has been the factual predicate for upholding the government's imposition of regulations on broadcasters that could not constitutionally be applied to other media. Because the scarcity doctrine can no longer be regarded as logically or empirically sound, the legal rationale for upholding regulations that intrude on the First Amendment rights of broadcasters has lost its traditional moorings. If the deficiencies of the scarcity doctrine have in fact removed the justification for affording broadcasters less than full First Amendment protection, then a free air time requirement would clearly be found unconstitutional. But even if *Red Lion* and its progeny were still regarded as fully applicable for evaluating the constitutionality of broadcast regulations, then NAB believes that a free time requirement would nonetheless be found invalid.

Assuming that, given the logical and empirical shortcomings of the scarcity doctrine, the full level of constitutional protection applies to broadcasters, then any free air time mandate would be subject to strict First Amendment scrutiny and struck down by the courts.¹⁰¹ For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court held that a state statute, which required newspapers assailing the character of a political candidate to afford free space to the candidate for reply, violated the First Amendment. The Court unequivocally stated that any "compulsion" by the government on newspapers requiring

¹⁰⁰ *See Chevron*, 467 U.S. at 843 (an agency "must give effect to the unambiguously expressed intent of Congress").

¹⁰¹ Strict scrutiny requires the government to prove a compelling interest, directly advanced by the least restrictive regulatory means. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997).

them “to publish that which reason tells them should not be published is unconstitutional.” *Id.* at 256. The Court also added that, even if a newspaper would incur no additional costs to comply with a compulsory access law and would not be forced to forgo publication of other news by the inclusion of a reply, the state statute failed “to clear the barriers of the First Amendment because of its intrusion into the function of editors.” *Id.* at 258. Any free air time requirement would similarly constitute a “compulsion” by the government on broadcasters to air “that which reason tells them should not be” aired, and would intrude into the editorial function of broadcast journalists. Thus, under a strict First Amendment analysis as applied to print media, any requirement forcing broadcasters to provide free air time would be held unconstitutional.

If, however, despite the infirmities of the scarcity doctrine, a reviewing court were to afford lesser scrutiny to a free air mandate imposed on broadcasters, such a requirement would still be found unconstitutional. Even under so-called intermediate scrutiny, the government must still prove that its regulation directly and materially advances a substantial governmental interest by means no more extensive than necessary.¹⁰² Assuming that the government could demonstrate a substantial interest in reforming the current system of elections and campaign finance, a free air time requirement could not be shown to directly and materially advance that interest.

As previously discussed in this section, a free air time mandate would not directly and materially advance the general goal of reforming the current campaign system and ending the perceived pernicious influence of money on politics. Indeed, as explained above, requiring broadcasters to provide free time would have little effect on the conduct of campaigns or on the

¹⁰² See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-64 (1994).

need of candidates to raise money. There is also no reason to believe that the “quality of political discourse” would be better on air time forcibly appropriated from broadcasters than on air time purchased by candidates or voluntarily donated by broadcasters. Thus, with regard to a free air time requirement, the government will be unable to prove that “the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner Broadcasting*, 512 U.S. at 664. Certainly a free time requirement will not “advance the asserted state interests [in political reform] sufficiently to justify its abridgement” of broadcasters’ First Amendment rights. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986).¹⁰³

Furthermore, a free air time mandate would fail intermediate scrutiny because of its complete lack of tailoring to the government’s asserted interest in improving the campaign and election system. Various other means exist for the government to pursue its goal of reforming the election process that do not infringe on the First Amendment rights of broadcasters. For example, Congress could decide to publicly finance election campaigns and condition the acceptance of public funds on an agreement by candidates to abide by specified expenditure limitations. Alternatively, Congress could enact stricter limits on contributions to political campaigns, including additional restrictions on contributions from political action committees and “soft” money.¹⁰⁴ In sum, NAB believes that broadcasters cannot be constitutionally compelled to finance political campaigns, given these other, much more direct means that may be used to advance the government’s interest in improving the election process without

¹⁰³ See also BeVier, *Is Free TV for Federal Candidates Constitutional?* at 47-49 (AEI 1998) (challenging the assumption by proponents that free time would in fact help solve various perceived ills in the political system) (attached as Appendix A).

¹⁰⁴ The Supreme Court has upheld the constitutionality of limits on campaign contributions. *Buckley v. Valeo*, 424 U.S. 1 (1976).

implicating First Amendment concerns. Merely because placing the burden of campaign reform on broadcasters might be the most politically palatable alternative does not lend it any constitutional respectability.¹⁰⁵

NAB would also like to point out that, even in the unlikely event that a court would still find *Red Lion* fully applicable today, that case's holding was actually quite limited and would not support the imposition of free time requirements. In fact, *Red Lion* provides that regulations, such as the Fairness Doctrine, are constitutionally permissible only where, in the absence of regulation, certain voices and views would "by necessity, be barred from the airwaves." *Red Lion*, 395 U.S. at 389. The Commission cannot seriously contend that political candidates and their messages are "barred from the airwaves." On the contrary, broadcasters cover political campaigns and candidates in their news broadcasts and voluntarily provide significant amounts of free air time to candidates. As discussed above, federal candidates have a statutory right to "reasonable access" to the airwaves, and, when candidates (federal or state) buy time, they must by statute be accorded special rates. And candidates of course may utilize other media to reach voters and inform the public, including newspapers and magazines, cable and the Internet.¹⁰⁶

¹⁰⁵ In fact, free air time mandates might also raise the constitutional problem of forced speech. The Supreme Court has explicitly held that the First Amendment is implicated when the government attempts to compel expression. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (rights protected by First Amendment include "both the right to speak freely and the right to refrain from speaking at all"). Given that the Supreme Court has found that compelling the addition of the author's name to anonymous campaign literature violates the First Amendment, it would seem that compelling broadcasters to provide air time and broadcast facilities to candidates they do not wish to support also raises First Amendment concerns. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

¹⁰⁶ With regard to the Internet, the Supreme Court has explicitly stated that it cannot be considered a scarce expressive commodity, as it "provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno*, 521 U.S. at 870. Thus, the Internet receives the full level of First Amendment protection applicable to the print media.

Because political candidates and their messages are not in any way “barred from the airwaves,” and the public can easily receive political information through an ever-increasing variety of media, *Red Lion* cannot properly be regarded as providing a justification for regulations (such as free air time requirements) intruding on the editorial discretion and First Amendment rights of broadcasters. *See id.* at 389-90.

Indeed, NAB also wishes to emphasize that the Supreme Court (even in cases affording broadcasters a lesser degree of constitutional protection due to the presumed scarcity of spectrum) has overturned regulatory schemes that tread unnecessarily on the editorial discretion of broadcasters.¹⁰⁷ The Supreme Court’s upholding of Section 312(a)(7) of the Communications Act concerning access of federal candidates to broadcasting facilities does not, moreover, imply that a free time mandate would be similarly approved. The Court’s opinion in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981), relied heavily on the *Red Lion* scarcity doctrine which, as shown above, is subject to increasing doubt as authority for any content regulation. In addition, the Court stressed the discretion that licensees retained under the “reasonable access” provision, and it upheld Section 312(a)(7) against a First Amendment challenge only because it found that “the statutory right of access” had “properly balance[d] the First Amendment rights of federal candidates, the public, and broadcasters.” *Id.* at 397 (emphasis added).¹⁰⁸

¹⁰⁷ *See, e.g., League of Women Voters*, 468 U.S. at 378 (statute forbidding noncommercial educational broadcast stations that receive grants from the Corporation for Public Broadcasting from engaging in editorializing was found unconstitutional, as it unjustifiably abridged important journalistic freedoms); *Columbia Broadcasting System*, 412 U.S. at 110-126 (Court affirmed Commission’s refusal to require broadcast licensees to accept all paid editorial advertisements, as such requirement would intrude unnecessarily on editorial discretion of broadcasters and risk an enlargement of government control over broadcast content).

¹⁰⁸ A reviewing court might well take a less favorable view of the Commission, without explicit statutory direction from Congress, attempting to go further and instituting a free air time proposal.

CBS v. FCC further involved *paid* time and access rights that were limited both in terms of the number of candidates and by the limitation to access that was “reasonable” in light of the needs of candidates *and* broadcasters. *Id.* at 396 (emphasizing that Section 312(a)(7) created a *limited* right to “reasonable” access). Free time proposals would radically alter that balance. Rather than having to choose candidate paid spots over commercial paid spots, broadcasters would be forced to subsidize political campaigns. Particularly for stations whose service areas may include several states, the amount of free time that candidates could demand might be far greater than now required under the reasonable access provision. This case therefore provides little support for assuming that a *Commission* rule (especially as opposed to a congressional statute) requiring free time would be upheld.

Finally, NAB wants to address briefly other theories that might be advanced to justify a free time mandate. First, it may be asserted that broadcasters’ acceptance of governmental regulation (even of content) is a fair exchange (or *quid pro quo*) for their ability to use the airwaves. The Commission has previously explicitly rejected this argument, “[t]o the extent . . . that such an exchange allows the government to engage in activity that would be proscribed by a traditional First Amendment analysis.” *Syracuse Peace Council*, 2 FCC Rcd at 5055. As the Commission explained, “[i]t is well established that government may not condition the receipt of a public benefit on the relinquishment of a constitutional right.”¹⁰⁹ Thus, even assuming that broadcasters have in fact received a “public benefit” by the temporary loan of an additional six MHz of spectrum for the digital transition (which, as explained in Section I.D. above, is

¹⁰⁹ *Syracuse Peace Council*, 2 FCC Rcd at 5055, 5068 (citing *Perry v. Sinderman*, 408 U.S. 593 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); and *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

doubtful), the receipt of this loaned spectrum in no way justifies the relinquishment of their First Amendment rights.¹¹⁰

It may also be contended that broadcasters have limited First Amendment protections that would not be infringed by a free time mandate because they have few “rights” with regard to licensed spectrum, which is “owned” by the “public.” From this supposed “public ownership” of spectrum, proponents of broadcast regulation attempt to imply that the government, like any other property owner, is essentially unconstrained by the constitution in its control over the spectrum. As explained in detail in the monograph attached as Appendix A, this public ownership assertion is practically and legally “hollow.” BeVier, *Free TV* at 3. Indeed, this ownership assertion is “no more persuasive, factually, than would be an argument that because newspaper newsracks are almost always on public property -- and are as essential to newspaper distribution as is spectrum to the broadcasters -- the newspapers thereby give up editorial control to some form of government regulation.”¹¹¹ But even assuming that broadcast spectrum could or should be regarded as “public domain,” the Supreme Court has specifically held that this fact does “not resolve the sensitive constitutional issues inherent in deciding whether a particular

¹¹⁰ See Smolla, *Free Airtime for Candidates and the First Amendment* at 1-4 (The Media Institute 1998) (attached as Appendix B), for a further discussion of unconstitutional conditions.

¹¹¹ DeVore, *The Unconstitutionality of Federally Mandated “Free Air Time”* at 3 n.5 (presented at Advisory Committee meeting on March 2, 1998) (attached as Appendix C). See also Robinson, *Electronic First Amendment* at 911-12 (“The reference to public ownership of the spectrum is a common locution, but it has generally been used as simply another way of articulating the scarcity argument – the notion being that because the frequencies were scarce, their use had to be licensed and the licensing power was tantamount to public ownership of public property. As a mere trope for regulatory power, the reference to ‘public property’ is innocuous; but if it is allowed to float off by itself as an independent ground of regulation, it becomes a mischievous confusion.”); *Time Warner Entertainment*, 105 F.3d at 727 (Williams, J., dissenting from denial of rehearing *en banc*) (“There is, perhaps, good reason for the [Supreme] Court to have hesitated to give great weight to the government’s property interest in the spectrum.”).

licensee action is subject to First Amendment restraints.” *Columbia Broadcasting System*, 412 U.S. at 115. Accordingly, the mere claim that the public “owns” broadcast spectrum clearly cannot be regarded as stripping broadcasters of their First Amendment rights or otherwise justifying the imposition of content regulations on broadcasters.¹¹²

In evaluating the First Amendment standards that should be applied to the broadcast media, NAB agrees with the Commission’s earlier conclusion that such evaluation

should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.

Syracuse Peace Council, 2 FCC Rcd at 5055. The Supreme Court has similarly emphasized the “crucial societal role” of news broadcasters and publishers, in a case addressing an exemption for media corporations from a generally applicable regime of political campaign reform.¹¹³ Given the similar functions of all media in a democratic political system, and the deficiencies of the scarcity doctrine traditionally utilized to justify lesser constitutional protections for only the electronic media, NAB believes that a free air time requirement should be regarded as a violation of broadcasters’ First Amendment rights.

¹¹² Even in a case involving a *state-owned* public television station, the Supreme Court has held that a broadcaster has the journalistic discretion to exclude an independent political candidate from a candidate debate. *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

¹¹³ In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990), the Supreme Court examined a Michigan law restricting the use of corporate funds for expenditures in support of or in opposition to candidates in elections for state office. Media corporations were specifically exempted from this law. The Supreme Court not only determined that this exemption was allowable, but appeared to indicate that the law would not have been upheld had it been applied to the media. This case stressed the “unique societal role” of the press, explaining that the media

III. CONCLUSION

After carefully examining the array of new or expanded public interest duties suggested in the *Notice* for DTV broadcasters, NAB concludes that these additional obligations are generally not justified, for two primary reasons. First, nothing inherent in digital technology requires a different or more expansive public interest analysis than that currently applied to analog television broadcasters. Second, digital television will not benefit broadcasters to such a greater extent than their analog channels that some additional recompense in the form of increased public interest duties should be imposed. Moreover, while many of the specific goals identified in the *Notice*, such as encouraging diversity or promoting democracy (*see id.* at ¶¶ 33-34) might be worthy, they are essentially unrelated to digital broadcasting. Expanding the public interest obligations of DTV broadcasters will therefore not materially advance those goals, particularly in a cost effective manner.¹¹⁴ NAB also contends that the formulation of appropriately tailored and cost effective public interest requirements is unlikely to be accomplished during the current, preliminary stage of the digital transition.

In addition, many of the proposals in the *Notice* appear contrary to the Commission's evolving interpretation of the public interest standard, which shows a clear pattern of decreasing regulation as the number of information sources increases. For example, following the vast increase in the number of radio and television stations in the 1960's and 1970's, the Commission in the 1980's eliminated much of its detailed broadcasting rules (such as ascertainment and

“serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials.”

¹¹⁴ “[I]t is not sufficient for a regulation to articulate desirable goals. The regulation must promise to materially advance those goals, and whatever costs it imposes must be outweighed by the benefits the regulation creates; furthermore, if the goals could be achieved in a less costly manner, then the latter should be the approach selected.” T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 309 (1994).

numerical guidelines for non-entertainment programming). Given the explosion of non-broadcast media in recent years (including various multichannel video programming providers and the Internet), NAB posits that there is less need than ever for the Commission to increase its regulation of the media marketplace. In particular, the transition to digital broadcasting – with its potential for increasing programming and other service options – would appear to justify a further decrease in Commission regulation, rather than new and intrusive public interest requirements. In sum, in an era of digital abundance, NAB believes that the Commission should rely to a greater extent on the discretion of broadcasters and the increasingly competitive media marketplace to insure service to the public.

Finally, NAB reemphasizes that convergence in telecommunications technology has made regulatory distinctions between various media less precise, thereby undermining the rationale for the continued distinct treatment of broadcasting. Given the lessening distinctions between various types of media and the increasing competition between traditionally distinct service providers, the Commission should refrain from imposing expansive new public interest requirements on DTV broadcasters that are not applicable to other service providers against whom broadcasters will be competing, now and in the future. Not only should the Commission refrain from subjecting broadcasters to unequal and burdensome public interest obligations as a matter of policy, but NAB reminds the Commission that the constitutional basis for expanding content-related public interest obligations is uncertain at best. Thus, based on the policy and legal grounds discussed in detail in these comments, DTV broadcasters should be accorded the