

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)

FCC 99-390

Public Interest Obligations)
of TV Broadcast Licensees)

MM Docket No. 99-360

**REPLY COMMENTS OF THE ALLIANCE FOR BETTER CAMPAIGNS,
THE BENTON FOUNDATION, THE BRENNAN CENTER FOR JUSTICE AT
NEW YORK UNIVERSITY SCHOOL OF LAW, CAMPAIGN FOR AMERICA,
THE CENTER FOR MEDIA EDUCATION, COMMON CAUSE, THE CREATIVE
COALITION, DEMOCRACY 21, THE INTERFAITH ALLIANCE, KIDSVOTING USA,
THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, THE MEDIA
ACCESS PROJECT, THE NATIONAL CIVIC LEAGUE, THE NATIONAL
COUNCIL OF CHURCHES OF CHRIST OF THE USA, PEOPLE FOR THE
AMERICAN WAY FOUNDATION, PUBLIC CAMPAIGN, PUBLIC CITIZEN,
ROCK THE VOTE, and USPIRG**

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SUMMARY

In its initial comments, the Alliance for Better Campaigns, *et al.*, urged the Commission to adopt a rule requiring broadcasters to provide free air time for legally qualified candidates during election season. The Alliance demonstrated that a free time requirement would further important First Amendment rights of the American public and that a requirement would be constitutional. Most of the comments from the broadcast industry, however, object to a free time requirement on constitutional grounds that seem motivated primarily by the broadcasters' quarrel with the regulatory scheme under which they have operated for almost a century. The Alliance submits these reply comments in response to the broadcasters' arguments.

Red Lion and its progeny make clear that the First Amendment rights of the public — not those of the broadcasters — are “paramount” in the regulation of broadcasting. A free time requirement would make a significant contribution to the public's First Amendment rights by ensuring that everyone has access to candidates' speech and debate during election season and it is likely to improve the quality of the political debate. In addition, a free time requirement would not improperly infringe on the editorial discretion of broadcast journalists.

The broadcasters' First Amendment and policy objections to a free time requirement rely on an analysis that ignores the public's rights and their own public interest obligations.

As it manages the transition to digital technology and revisits the public interest obligations of broadcasters, the Commission is in an optimum position to enact regulations ensuring that broadcasters contribute to the development of a well-informed electorate. A free time requirement would constitute a significant and constitutional step in this direction.

TABLE OF CONTENTS

INTRODUCTION
2

ARGUMENT
5

I. A Free Time Requirement Would Not Violate the First Amendment;
It Would Encourage a Richer Debate and Facilitate Universal Access
To the Debate
5

A. A Free Time Requirement Would Further Important Government
Interests in Enhancing Access to Candidate Speech and Raising the
Level of Public Discourse in Campaigns 6

B. A Free Time Requirement Respects the Editorial Discretion of
Broadcast Journalists
11

C. A Quantitative Requirement Does Not Violate the First
Amendment
14

II. Congress and the Courts Have Anticipated Further Agency Action in
Regulating Access for Political Candidates 15

III. A Free Time Requirement Is Not a Fifth Amendment Taking. 16

CONCLUSION
18

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REPLY COMMENTS OF ALLIANCE FOR BETTER CAMPAIGNS, et al.

The Brennan Center for Justice at New York University School of Law respectfully submits these reply comments on behalf of itself, the Alliance for Better Campaigns, the Benton Foundation, Campaign for America, the Center for Media Education, Common Cause, the Creative Coalition, Democracy 21, the Interfaith Alliance, KidsVotingUSA, the League of Women Voters of the United States, the Media Access Project, the National Civic League, the National Council of Churches of Christ of the USA, People for the American Way Foundation, Public Campaign, Public Citizen, Rock the Vote, and USPIRG (the “Alliance”) in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Inquiry on the Public Interest Obligations of TV Broadcast Licensees (FCC 99-390).

In its initial comments, the Alliance urged the Commission to adopt a rule requiring television broadcast licensees to set aside a reasonable amount of time for political candidates to appear free of charge on broadcast stations during the election season. The Alliance focused its comments on demonstrating that such a requirement is within the Commission’s authority, that it is constitutional, and that it furthers important First Amendment values. In these reply comments, the Alliance will focus on addressing several issues raised by commenters from the broadcast

industry¹ on the topic of free time for candidates. The Alliance shows that the broadcasters' argument subverts the proper First Amendment analysis in this context, which instructs, "It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 359 U.S. 367, 390 (1969). In addition, the Alliance shows that a reasonable free time requirement will not improperly interfere with the editorial discretion of broadcast journalists. Finally, the Alliance will reply briefly to the arguments that Congressional legislation in this area prohibits FCC action and that a free time requirement is a Fifth Amendment taking.²

INTRODUCTION

A free time requirement would make a substantial contribution to our democratic discourse by establishing a means for all voters to hear from candidates during election campaigns. The requirement will improve the quality of campaign discourse by providing

¹ The Alliance will primarily address the comments of CBS, the National Association of Broadcasters ("NAB"), and the Radio-Television News Directors Association ("RTNDA") (collectively, "the broadcasters").

² Because the Alliance is focusing its reply on arguments specifically related to the constitutionality of free time for candidates, the Alliance refers the Commission to the reply comments of UCC, *et al.*, for a more thorough analysis of the Commission's broad authority to adopt additional public interest obligations for digital broadcasters, including an argument demonstrating the continued vitality of the scarcity doctrine.

candidates with opportunities beyond the 30-second ad and the 8-second sound bite to discuss issues in a format that can reach their entire constituency — not just the handful of voters who stumble across a cable news show. The near universal accessibility provided by broadcast television is critical during election season, when every American should have the opportunity to be informed, including those who are not internet users or cable subscribers. While the free time requirement would make a substantial contribution to the nation’s discourse during presidential campaigns and other high-profile races, its contribution to the enrichment of political discourse would be even greater in the lower profile races that receive little, if any, coverage by broadcast television or radio.

The Alliance urges the Commission to hold hearings to determine how to structure the free time requirement so that it will promote political discourse and improve the public’s access to candidate debate as effectively as possible. Any effective structure will leave substantial discretion with the broadcasters to determine which races should receive time and what issues should be addressed. In addition, the obligations of the free time requirement should be clear enough that broadcasters will not have any difficulty determining how to comply.

Despite this opportunity to make a significant contribution to public debate and democratic governance, the broadcasters object to any free time requirement and are even dismissive of the voluntary efforts of some broadcasters.³ The real motivation for their objection — under the distracting fireworks about the First Amendment and editorial discretion — is a

³ Although the broadcast industry as a whole opposes a free time requirement, twenty-four broadcast stations have volunteered to provide five minutes a night of free time for candidates during the thirty days preceding an election. The Alliance and numerous others applaud those efforts.

fundamental quarrel with the public trustee system under which they have received their licenses to broadcast. (See NAB at 57-58, CBS at 55-56, and RTNDA at 15-18) In other words, the broadcasters are making the same objections they have been making since they began to broadcast. As then-Judge Warren Burger complained 34 years ago, “After nearly *five decades* of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.” *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1004 (D.C. Cir. 1966) (emphasis added).

This historical reluctance to accept their public interest obligations in some contexts is often paired with the broadcasters’ eagerness to embrace these obligations as a justification for special treatment in relation to other media. The broadcasters’ lobbying record on just about any legislation will reveal this contradiction. *See, e.g., Broadcasting & Cable Magazine*, June 6, 1994 at 50 (the National Association of Broadcasters argued that because they serve the public interest, broadcasters should not be required to pay a fee for using the spectrum). The industry also emphasized its public interest obligations when it convinced Congress to enact the must-carry regulations of the Cable Television Consumer Protection Act in 1992.⁴ Thus, when seeking to avoid specific public interest obligations, the broadcasters complain, as they do here, that regulation is unconstitutional — but when the same broadcasters want special protection in the media market, they eagerly grab their public interest obligation as a shield.

The Alliance urges the Commission to keep these contradictory positions in mind as it

⁴ Edward Fritts, president of the NAB, has even argued that the Commission should do more to assure that the public interest programming aired by broadcasters should be more accessible. *See* Gretchen Craft Rubin, *What Broadcasters Really Want*, 66 *Geo. Wash. L. Rev.* 686, 695 n. 73 (1998) (quoting a May 30, 1997, letter from Fritts to Reed Hundt, chairman,

considers the broadcasters' comments.

FCC).

ARGUMENT

I. A FREE TIME REQUIREMENT WOULD NOT VIOLATE THE FIRST AMENDMENT; IT WOULD ENCOURAGE A RICHER DEBATE AND FACILITATE UNIVERSAL ACCESS TO THE DEBATE.

When the broadcasters assert their First Amendment right to do as they please with their license, they ignore the mandates that govern all First Amendment analysis in this area:

- “It is the right of the viewers . . . *not* the right of the broadcasters, which is paramount.” *Red Lion*, 359 U.S. at 390 (emphasis added).
- “[T]he interest of the public [not the broadcasters] is our foremost concern” in regulating the broadcast industry. *CBS v. DNC*, 412 U.S. 94, 122 (1973).

The broadcasters flip this analysis on its head by discussing only their First Amendment interests. *See, e.g., CBS v. FCC*, 453 U.S. 367, 396 (1981) (upholding a regulation that furthers the First Amendment interests of candidates and voters even if it implicates the First Amendment rights of broadcasters); *Time Warner Entertainment Co. v. FCC*, 93 F.2d 957, 975 (D.C. Cir. 1996) (noting that broadcasting regulations are generally upheld when they further the First Amendment interests of the public even if they have an effect on broadcasters’ rights). The broadcasters urge the Commission to apply “intermediate scrutiny” to a free time requirement in a rigid and inapt manner that disregards the extent to which the rights of public should motivate any analysis of speech regulations in this area.⁵ *See Red Lion*, 359 U.S. at 390. As the

⁵ The level of constitutional scrutiny applied to a regulation is critical to its survival. It is clear that the Supreme Court applies a very “relaxed standard” to broadcast regulations designed to further speech. *See Turner Broadcasting Syst. v. FCC*, 512 U.S. 622, 639 (1994) (describing the relaxed standard before applying intermediate scrutiny to cable regulation). The Court has actually applied a balancing test to regulations that enhance speech, *see CBS v. FCC*, 453 U.S. 367, 395 (1981), and has explicitly applied “intermediate scrutiny” in broadcast cases only when

broadcasters analyze whether a free time requirement is “narrowly tailored to further a substantial government interest” — the formula for intermediate scrutiny — they misconstrue the government interest at stake and overstate the effect of a free time requirement on the broadcasters’ editorial discretion.

The Alliance urges the Commission to reject the constitutional analysis recommended by the broadcasters and to conduct an investigation in which it will provide full factual support for the government’s interest in a free time requirement while inviting broadcast journalists and others to assist with structuring a requirement that will maximize the effectiveness of the proposal and preserve maximum editorial discretion.

A. A Free Time Requirement Would Further Important Government Interests in Enhancing Access to Candidate Speech and Raising the Level of Public Discourse in Campaigns.

As the Alliance argued in its initial comments, “a free time requirement would ‘make a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary to the effective operation of the democratic

the regulation limits speech. *See, e.g., FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 380 (1984) (applying intermediate scrutiny in striking provisions of the Public Broadcasting Act that barred public stations from editorializing).

In addition, because the broadcasters object to the 75-year regulatory structure, they contend that “strict scrutiny” should actually apply. Their application of intermediate scrutiny is clearly informed by their belief that strict scrutiny should apply.

process.” (Alliance Comments at 13, quoting *CBS v. FCC*, 453 U.S. at 396). The government’s interest in ensuring that “candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities before choosing among them on election day,” *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976), is almost beyond question in a democratic nation.

A free time requirement will further this interest in a direct and pointed manner. It will guarantee the public’s access to substantive statements by candidates during a short time period just before an election. It will give candidates — often in elections that receive little coverage on news programs or in paid commercials — the opportunity to make statements to the public in time periods longer than a sound bite.⁶ More importantly, a free time requirement will give the public the opportunity to hear from these candidates in settings other than short ads or quick takes on news shows.

Not only does the government have an undeniable interest in enhancing the political debate, the government also has an important and recognized interest in protecting broadcast television’s role as an “essential part of the national discourse” and in protecting non-cable households’ ability to receive important information. *Turner Broadcasting Syst. v. FCC*, 520 U.S. 180, 190, 194 (1997) (“*Turner II*”). The *Turner II* Court recognized that the government has a substantial and valid interest in preserving broadcast television’s role as the one medium that

⁶ Of course, candidates in non-federal elections often cannot buy air time for commercials, 30-second or otherwise. Even congressional candidates often cannot afford to buy air time during their elections.

reaches everyone.

This remains true today. Broadcasters still have almost universal reach, and even as information outlets have multiplied, broadcast continues to serve as the medium that draws the general interest audience, as opposed to the special interest audiences of cable. And, broadcasters have a unique form of community identification. The broadcasters themselves routinely stress these qualities⁷ — and did so in the *Turner* cases. Arguing in support of the “must carry” rules at issue in *Turner* and again with satellite broadcasting, the broadcasters reminded the regulators that only they provide free programming that is accessible to almost every person in the country, and that they can almost guarantee some local programming.

The broadcasters contend that there is no government interest in giving candidates free air time because there is plenty of election coverage already available — particularly when cable and the internet are taken into account. (NAB at 50-51; CBS at 63). In support of their arguments, they cite polls of New Hampshire voters and Super Tuesday voters who said they were satisfied with the coverage that the election received. (NAB at 50; RTNDA at 9).

It is, of course, debatable whether the “public interest” should be determined by polling data, particularly considering that broadcasters provided very little coverage of the campaign — of the 22 televised debates involving Democratic and Republican candidates for president, all but two were on cable. Peter Marks, *Networks Cede Political Coverage to Cable*, New York Times, April 7, 2000, at A18. RTNDA offers the polling data as evidence that broadcasters are doing a

⁷ As the broadcasters themselves argue when seeking special treatment: “Broadcasting provides a service — news, weather, public affairs — that no one else provides to every community in the country. We did it totally free, totally unsubsidized.” Paul Fahri, *Their Reception’s Great*, The Washington Post, Feb. 16, 1997, at H01 (quoting NAB spokesperson

good job covering campaigns, but the poll only speaks to the public's declining appetite for politics.⁸

Even if we accept the polling data as evidence that broadcasters in New Hampshire and the Super Tuesday states provided adequate coverage of the primary campaigns, the information says nothing about the dearth of coverage of other races or broadcastings' declining political coverage over all. The New Hampshire and Super Tuesday primaries involved heated contests in both parties for the nomination for president. If they are going to cover any politics at all, the broadcasters will cover early, hot-contested presidential primaries. Their coverage of these races does not indicate adequate coverage of governors' races, senate races, house races, and other state races, for instance.

Finally, the polling data says nothing about the on-going process of broadcasters' ceding political coverage to cable and the internet. While the broadcast business executives may be untroubled by this shift, their own journalists are questioning it. CBS anchor Dan Rather, for

Walt Wurfel).

⁸ First Amendment scholar Cass Sunstein has argued that consumer broadcast preferences are a "result of the broadcasting status quo, not independent of it. In a world that provides the existing fare, it would be unsurprising if people generally preferred what they are accustomed to seeing. They have not been provided with the opportunities of a better system. Preferences that have adapted to an objectionable system cannot be used to justify that system." Cass Sunstein, *A New Deal for Speech*, 17 *Hastings Comm/Ent. L.J.* 137157 (1994).

instance, has said that the broadcasters “have abrogated the civic trust” by ceding the political realm to cable. *Id.*

The broadcasters’ arguments here are at odds with the government interests approved by the Court and urged by the broadcasters in *Turner II*. Certainly during the election season, the government has a compelling interest to ensure that all of the public has access to the political debate “on an equal footing with those who subscribe to cable.” *Turner II*, 520 U.S. at 194. The regulation at issue here — free time for candidates — explicitly involves a government effort to enhance election speech and to ensure that the entire public has access to the democratic debate that is at the heart of our self-government.

The broadcasters also argue that the government does not have an interest in free time because a requirement will not improve campaign discourse. CBS dismisses the goal of improving the quality of discourse by suggesting that any attempt to improve the quality of debate will be at odds with the First Amendment’s commitment to “uninhibited, robust, and wide-open” political debate. (CBS at 64, quoting *New York Times v. Sullivan*, 376 U.S. 245, 270 (1964)). Of course, the government has an interest in improving the quality of the political debate. *See CBS v. FCC*, 453 U.S. at 396-97. A free time requirement would give candidates the opportunity to make longer, more substantive presentations to the voting public — and it would give the voting public an opportunity to hear these presentations.⁹ This requirement is in service of uninhibited and robust debate. There is nothing about a free time requirement that will turn

⁹ In these comments, the Alliance is not recommending a particular format. There are any number of options that could enhance debate and raise the quality of discourse, while encouraging even more of the rough and tumble. The key is to give candidates more opportunities to go beyond the sound bite and the short advertisement — and to give the public the opportunity to

politics into a place where only the most mannered of debate will occur.

Finally, the broadcasters (NAB at 58, RTNDA at 8) err when they argue that a free time proposal is being offered as a tool, albeit an inappropriate one, to reform the campaign finance system. While an effective free time requirement would provide television exposure to candidates who cannot afford to buy advertising time, as well as those who can, it would in no way substitute for actual campaign reform — and is not intended to. The government’s interest in requiring licensees to provide free time is to improve the public’s access to substantive political debate among candidates for public office. If there are ancillary benefits on the campaign finance reform front, the Alliance welcomes those benefits — but they are not the rationale for the mandate.

B. A Free Time Requirement Respects the Editorial Discretion of Broadcast Journalists.

The Alliance urges the Commission to work with broadcast journalists, among others, in developing the free time requirement so that it is structured in a way that most effectively serves the government’s interests of increasing public access to substantive political debate among candidates and raising the level of discourse. The Alliance recognizes that working news people are often in the best position to recommend formats that will enhance political discourse and to determine which races should receive time allotments during a campaign. The free time requirement should not and need not infringe improperly on their discretion. Despite the faulty assumptions running through the RTNDA’s comment, the free time requirement will not mandate how broadcasters use their news time. It would require only that broadcasters set aside time

see and hear candidates in that format.

within a broadly set time period for candidate speech.

By mandating that the broadcasters set aside time for candidate speech, the FCC will indeed be interfering with the broadcasters' discretion to use their part of the spectrum exactly as they please all the time. But that is not a right the broadcasters have. *Red Lion*, 395 U.S. at 389 (rejecting the broadcasters' argument that they have the right to "continuously broadcast whatever they choose"). While the public trustee system interferes with the editorial autonomy of the businesses that are licensed to broadcast over the spectrum, the trustee system is not at issue here.

Instead, as the Supreme Court in *CBS v. FCC* instructs, a regulation that gives candidates "limited rights of 'reasonable' access" does not improperly infringe on the editorial discretion of broadcasters. 453 U.S. at 396. With regulations that make "a significant contribution to freedom of expression," the broadcasters' discretion would become an issue of constitutional significance only if the regulation "impair[ed] the discretion of broadcasters to present their views on any issue or to carry any particular type of programming." *Id.* at 397. A free time requirement would enhance democratically significant speech but it would have no impact on the broadcasters' own programming.

The RTNDA's argument that courts have recently afforded broadcasters' editorial discretion "increased constitutional significance" misconstrues the authority. (RTNDA at 12). The exercise of discretion noted by the Court in those cases has no bearing on the constitutionality of a free time requirement.

CBS v. DNC, for instance, is cited by RTNDA for its references to the editorial discretion of broadcasters. The issue in that case, however, was not whether the FCC was infringing on the

rights of broadcasters, but whether the FCC's failure to require broadcasters to accept all editorial advertisements violated the Communications Act or the First Amendment. Although the FCC was justified in finding that decisions to accept editorial advertisements "fell within the area of journalistic discretion" accorded the broadcasters, 412 U.S. at 118, the Court explicitly stated that the FCC's position was not mandated by the Constitution or the Communications Act. Indeed, the Court made clear that the broadcasters' "editorial discretion" was not constitutionally insulated when it recognized that the FCC or Congress had the power to create a right of access. 412 U.S. at 122.

The *League of Women Voters* decision, also cited by RTNDA, involved a regulation that directly interfered with public broadcasters' exercise of editorial discretion over programming content. The Court struck down a government ban on editorializing on public broadcast stations. The Court recognized that broadcasters were subject to more restraints than other media, but distinguished the editorial ban because it was specifically aimed at suppressing a form of speech. 468 U.S. at 381. The Court's expressions of respect for the editorial discretion of broadcasters is easily distinguishable from the situation that would arise under free time. A free time requirement would not "impair the discretion of the broadcasters to present their views on any issue or to carry any particular type of programming." *CBS v. FCC*, 453 U.S. at 397.

Finally, the Court's decision in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), provides little additional instruction on how the Supreme Court would consider a free time requirement. In *Forbes*, the Court rejected a claim from an independent political candidate that his exclusion from a debate sponsored by a public television station violated the First Amendment. The decision turned on an analysis of whether a political debate on

public television was a public forum for which a candidate would have a claim of access.

Although the public broadcaster's selection of participants for a debate is "expressive activity" subject to First Amendment protection, the Court recognized the role that the government can play in regulating even the expressive activity of broadcasters:

This is not to say that the First Amendment would bar the legislative imposition of neutral rules to public broadcasting. Instead, we say that, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.

523 U.S. 666, 676 (1998). In contrast to the issue in *Forbes*, a free time requirement would create a limited right of access to broadcast stations for candidates according to a procedure established by the Commission.

C. A "Quantitative" Requirement Does Not Violate the First Amendment.

The broadcasters also argue that a free time requirement is unconstitutional because it is likely to require a specific time contribution during the election season. (CBS at 57-58; RTNDA at 5). The constitutional authority in this area does not provide that an explicit time mandate would be unconstitutional. To the contrary, as discussed in the Alliance's initial comments, the authority of *Red Lion* and its progeny provides substantial constitutional support for the free time requirement.¹⁰ Indeed, there is some argument that requiring broadcasters to set aside a specific amount of time for candidates is more likely to withstand scrutiny because it makes the broadcasters' obligations very clear.

In addition, the Commission decided that mere "quantification" of a requirement does not

¹⁰ The Commission has the authority to determine whether a licensee has given "suitable

create constitutional problems when it established the core programming requirements for children's educational programming. *See* 47 C.F.R. § 73.671 (adopting a processing guideline requiring three hours a week of "core" educational programming).

time and attention to matters of great public concern." *Red Lion*, 395 U.S. at 394.

II. CONGRESS AND THE COURTS HAVE ANTICIPATED FURTHER AGENCY ACTION IN REGULATING ACCESS FOR POLITICAL CANDIDATES.

Congressional action establishing rules of access to broadcast stations for federal candidates does not preclude agency action in this area. The legislative history section 312(a)(7), which requires broadcasters to allow federal candidates “reasonable access” to their facilities, affirms the agency’s ability to expand the licensee’s duties to provide time for political broadcasts. In 1971, Congress enacted the “lowest unit rate” requirement of section 315(b), and, recognizing that broadcasters might avoid political broadcasts because they would not be as lucrative, Congress enacted section 312(a)(7), the reasonable access requirement. The Senate Report on the reasonable access requirement states:

The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee’s obligation to serve the public interest, and the *FCC should continue to consider the extent to which each licensee has satisfied his obligation in this regard in connection with the renewal of his broadcast license.* Certainly no diminution in the extent of such programming should result from enactment of this legislation.

(No.92-96, 92d Cong., 1st Sess. 28 (1971) (emphasis added).

In addition, the Court in *CBS v. DNC* recognized the broad authority of the Commission to regulate broadcasters even in areas Congress had considered and declined to regulate.

That is not to say that Congress’ rejection of such proposal must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress *has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require.*

412 U.S. at 122 (emphasis added).

Congressional action in regulating access for federal candidates’ paid commercials in no way precludes Commission action on free time.

III. A FREE TIME REQUIREMENT IS NOT A FIFTH AMENDMENT TAKING.

CBS asserts that a free time requirement runs afoul of the Fifth Amendment because it is “a taking of private property for public use without just compensation.” (CBS at 65). When CBS complains that the broadcasters should not have to bear the burden of enhancing campaign discourse, it forgets that the broadcasters have no legally cognizable property interest in their broadcast licenses. Without such a property interest, the broadcasters have no takings claim. Once again, the broadcasters’ objection to a free time requirement is really an objection to the overall regulatory scheme.

Under well-settled law, the broadcasters have no right to the grant of a license or a “property interest” in the use of a frequency. Applicants for a license expressly waive any claim to the use of any particular frequency or the use of the spectrum because of previous use of the frequency. 47 U.S.C. § 304. The Supreme Court has long interpreted this provision as a clear expression of congressional intent that “no person is to have anything in the nature of a property right as a result of the granting of a license.” *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). As the Second Circuit recently reiterated, a “license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance to its terms.” *FCC v. Nextwave Personal Communications (In re Nextwave Personal Communications)*, 200 F.3d 43, 51 (2d Cir. 1999).

Because there is no compensable property interest in a broadcast license, there can be no regulatory taking. *See United States v. Fuller*, 409 U.S. 488, 494 (1973) (grazing permits do not create a compensable property interest even if the existence of the grazing permits raised the value of private property). An interest does not become a compensable property interest simply

because it has economic value to the holder of the interest. Here, Congress made it clear that the grant of a license under the Communications Act does not create a property right. *Sanders Bros. Radio*, 309 U.S. at 475. *See also Fuller*, 409 U.S. at 494 (noting the congressional intent that no property right be created as a result of a grazing permit).

To the extent that the broadcasters have any interest in the use of the license, a free time requirement is not an infringement on that interest because the interest is explicitly limited by the FCC's ability to "impose conditions upon [licensees] in the name of the public good." *Nextwave*, 200 F.3d at 51. The licensees were well aware of this right when they applied for and accepted their licenses. When it awarded new licenses for additional spectrum space, the FCC placed broadcasters on notice that "the Commission may adopt new public interest rules for digital television." *Fifth Report and Order*, 12 F.C.C.R. at 12830. Broadcasters who accept the new license thus accept the public interest obligations — such as a free time requirement.

CONCLUSION

The broadcasters' opposition to a free time requirement is based on a fundamental disagreement with the trustee system under which they have been regulated for almost a century.

The trustee system, which requires the Commission to regulate the broadcasters in the public interest, is still vital. A free time requirement is constitutional and well within the Commission's authority as the regulator of the broadcasters' public interest obligations.

Thus, we respectfully urge the Commission to use its expertise to determine the most effective way of structuring a free time requirement and then to issue a Notice of Proposed Rulemaking on this issue.

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