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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Public Interest Obligations
Of TV Broadcast Licensees

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MM Docket No. 99-360

NOTICE OF INQUIRY

REPLY COMMENTS OF THE CONSUMER FEDERATION OF AMERICA

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I. INTRODUCTION

The Consumer Federation of America (CFA) is the nation's largest consumer advocacy organization. CFA is a non-profit association of 260 state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations. CFA represents consumer interests before Congress and federal agencies and assists its state and local members in their local jurisdictions.

In initial comments, the Consumer Federation of America laid out a detailed and comprehensive description of the economic and technological basis for the imposition public interest obligations on digital television (DTV) broadcasters. The National Association of Broadcasters (NAB) has asserted a series of general precepts that would virtually absolve DTV of any new obligations. The NAB then follows up with the rejection of specific obligations contemplated by the Commission in its Notice.

In our initial comments we presented the evidentiary and intellectual basis to rebut each of the claims of the NAB. In these reply comments we proceed with a point-by-point response to the NAB comments. We deal only with the economic and regulatory issues that were raised in our initial comments. The NAB has presented nothing in terms of evidence to challenge our initial conclusion. Their general precepts are wrong as is the rejection of specific proposals.

II. THE NEW MEDIUM AND ITS EXPANDING PUBLIC INTEREST OBLIGATIONS

The traditional obligations that public policy has properly asked broadcasters to shoulder as the means of mass communications are intersecting with the traditional obligations that public policy has asked telecommunications companies to shoulder as the means of interactive communications. The traditional limits that have been placed on advertisers and markets must

be extended, and perhaps expanded, to apply to this new more powerful marketing medium. We believe that the public interest obligations that should fall on this new medium of communications should be commensurate to the immense economic and political power that it will possess.

We see very powerful economic forces creating huge commercial opportunities and potentially significant social problems (see Exhibit 1). We believe that the Commission has more than adequate authority to define an aggressive public policy that will allow the new industry to develop while preserving and advancing the fundamental goals of consumer protection, civic discourse, and social responsibility.

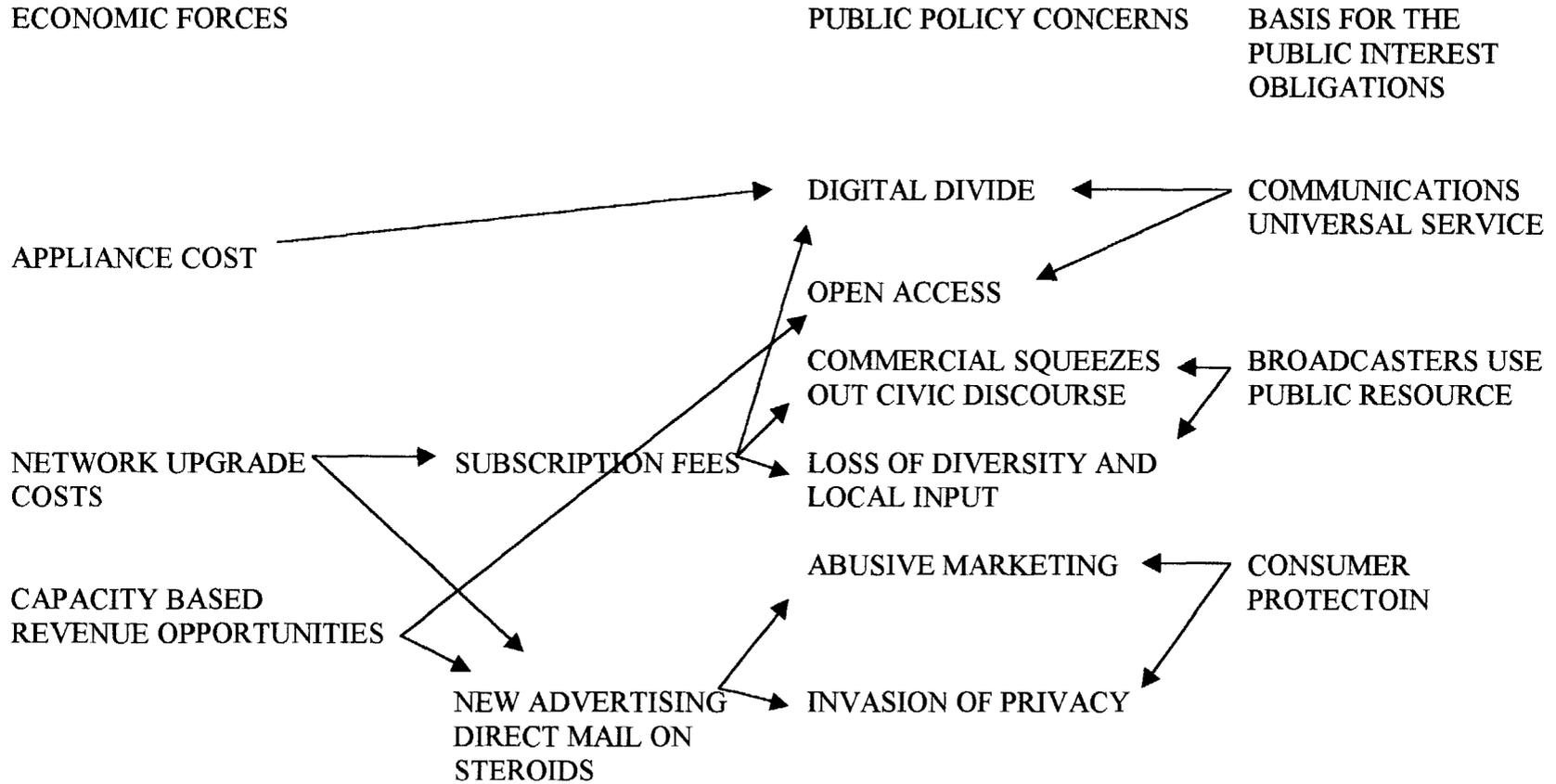
A. Invasion of Consumer Privacy and the Abuse of Information to Oversell Increase the Need for Consumer Protection in Digital Communications Media

As digital television expands the capacity to deliver programming, and the convergence of communications, computing and television entertainment takes hold, pay television services are expected to increase in number and price.

The drive to fill more advertising space and sell more products over the digital communications network and the ability of that network to gather information in an interactive context raises concerns about the use of private information for marketing. On the interactive network, programmers and system operators can know what people watch and what they buy with remarkable detail. This information is extremely useful in targeting advertising and increasing sales. Since there is a strong need to sell more, it is hard to imagine that digital broadcasters will not exploit this information to the fullest.

EXHIBIT 1:

THE EXPANDING ROLE OF DIGITAL TV AND THE BASIS FOR PUBLIC INTEREST POLICY



The result will be an electronic “direct mail on steroids” pumped up by the ability of viewers to click through digitally inserted advertising for purchases. The advertising will be targeted at demographically compatible viewers identified by detailed information on viewing patterns and past purchases. This information will be embedded in programming, as suggested by an intuitive programming guide and/or restricted by the affiliate relationships of the broadcaster or cable provider.

Digital television also presents the likelihood of extremely aggressive advertising and “overselling” on a scale that has never occurred, not even on the Internet. The ability to distinguish advertisements from entertainment programming and to exercise informed choice will be undermined in this new media environment, especially for children. As advertising becomes more immediate through the use of interactive technology, consumers are disarmed. Electronic transactions that provide little opportunity for consumers to reflect on the purchase and make post-purchase remedies more uncertain increase concerns about overselling.

B. Powerful Commercial Forces Driving Digital Media Increase the Need for Public Policy to Prevent the Digital Divide from Widening and to Keep Communications Networks Open to All Consumers and Information Service Providers

The commercial model that is driving digital TV leads directly to a second public policy concern. The expense of equipment, the cost of services, and the targeting of marketing points to a commercial model in which high-value, high income consumers participate and are targeted.

If digital TV were just a luxury diversion for the rich, its potential cost might not be a great source of concern to consumers and consumer advocates. However, television is the primary source of news and information dissemination in our country and consumers rely on television as their primary source of gathering information. Broadband services, delivered over digital TV, hold the potential to increase the power of the TV medium by adding interactivity

and much higher visual quality to a medium that already has great communicative power due to its reach, immediacy and real time delivery. Its role in e-commerce and political expression may be unprecedented.

The merging of informational, educational and employment opportunities over the Internet with the commercial activities of interactive TV raises concerns that the commercial model might further isolate those who have been disadvantaged by the digital divide.

As digital television expands the capacity to deliver programming, and the convergence of communications, computing and television entertainment takes hold, pay television services are expected to increase in number and price. There is nothing inherent in the digital transformation that will alleviate the problem of information “haves and have-nots” and much that could exacerbate it. The digital transformation does nothing to reduce the economic, personal and social barriers. As the effects of the digital transformation spread, those who do not have command of the technology become marginalized.

C. The New Commercial Model Increases the Threat To Programming Diversity And Civic Discourse

Because of the development of powerful commercial models that exploit the new capabilities of digital TV, it will likely take vigorous public policy intervention to ensure that digital TV serves the public interest with diverse program choices and socially relevant content and access to the means of public expression of views. The need to produce and sell commercial programming may squeeze out educational, cultural and informational programming or cause this type of programming to be sold on a pay-per-view basis, limiting its availability to part of the population.

Because policymakers recognize the uniquely important role that broadcast media play in civic discourse – radio and later television – policy has sought to prevent concentration of

economic power from controlling the flow of ideas by placing limits on the ownership of media outlets and imposing obligations to expand programming beyond what is simply profitable. The advent of interactive multimedia digital TV increases the power of the medium and the commercial drive of digital TV reinforces that concern.

The traditional public policy debate in the broadcast area has its origins in the longstanding public policy of demanding socially responsible behavior from broadcasters who have used a scarce public resource – broadcast spectrum – at no charge. Although it can be argued that spectrum is no longer scarce, there is no question that it is still very valuable and broadcasters use it without paying for it. The nucleus of the debate remains the same. It focuses on broadcasters receiving their new spectrum free of charge, without restrictions in place to dictate how they can use the fresh channels and airtime. Moreover, with the powerful commercial model that will fill this new space, may do little to expand the space that is available to the economically disadvantaged groups or political ideas that are not in the mainstream. Scarcity is not simply a function of the number channels available but effective access to the airwaves.

D. The New Obligations Can Best Promote the Public Interest by Expanding the Role of Consumers and Citizens in Decisionmaking by Local Broadcasters

Public policy should seek compensation for the use of the broadcast spectrum, which remains a remarkably valuable input into the production of broadcast television. It should seek to balance the powerful forces driving the commercialization of the TV industry by promoting culturally diverse programming that may not be commercially attractive but that is educational and uplifting. Public policy should seek to ensure that this new more powerful medium does not result in the abuse of political power by those who control it and ensure that digital TV does not widen the gap between information “haves” and “have nots.” Obligations should be placed on

those who benefit from the federally mandated transition to digital TV help to narrow the gap that currently exists.

Local broadcasting will play a vital role in the distribution of programming. Ensuring cultural diversity and socially relevant programming is a matter of local programming to meet community needs. The gathering and compilation of viewer information will be a local matter – with information gathered in the set top box and compiled by the local cable operator or the local broadcaster. It is highly likely that the local station will be the one that controls the information for marketing purposes. Public policy should encourage and require local input into these important social, economic and political decisions.

III. DIRECT RESPONSE TO INDUSTRY CLAIMS

Based on these observations about the economic and social impact of the exploitation of the spectrum that has been given to the broadcast industry, we reject the industry claims that it be absolved from new public interest obligations.

NAB assertion: (General) The premature imposition of public interest obligations on undeveloped digital services should be avoided. (Specific) The imposition of public interest rules pertaining to multicasting would be premature.

CFA response: The immediate identification of public interest obligations is necessary to avoid the problem of having to reverse technological designs and embedded commercial relationships in order to impose public interest obligations at a later date. It is far more efficient to impose these obligations as the DTV infrastructure is being rolled out.

NAB assertion: The transition to digital technology does not automatically justify the imposition of new public interest duties, particularly those not reasonably germane to digital broadcasting or technology.

CFA response: The transition to digital transmission justifies the imposition of new public interest duties both because of the extremely potent form of communications that digital TV fosters and because of the immense economic value of the spectrum broadcasters have received without compensating the public. In other words, there are technological reasons to impose new public interest duties. Moreover, the imposition of new obligations does not require only a technological justification, because there is also an economic justification. Finally, as cited by *People for Better TV* in their initial and reply comments, Congress directed the FCC to determine the public interest obligations of digital broadcasters in the 1996 Telecommunications Act. The FCC has previously acknowledged that the development of digital technology has engendered new responsibilities.

NAB assertion: Convergence in telecommunications technology should be accompanied by convergence in regulatory treatment.

CFA response: Convergence in communications and broadcast technology means that public interest obligations should rise to the highest level, not sink to the lowest common denominator. The converged technology not only has the power of various media individually, but, by converging the medium becomes even more powerful. Therefore, the full obligations of each of the media should be combined and imposed on the converged technology. Because the broadcast industry has been the beneficiary of a gift of public property of immense value, it is entirely appropriate that the imposition of improved public interest obligations begin with this industry.

It is interesting to note that the NAB associates the convergence with telecommunications technology. In many respects, telecommunications services have the most demanding public interest obligations. They are subject to universal service and common carriage requirements.

NAB assertion: Extracting additional public interest concessions from DTV broadcasters on the basis of a *Quid Pro Quo* is unjustified.

CFA response: Imposing additional public interest concessions from DTV Broadcasters on the basis of a *Quid Pro Quo* is completely justified because of the immense economic value of the spectrum that has been given, at no charge, to the broadcasters. In its initial comments, CFA documented that the likely commercial model for DTV will be extremely lucrative. Not only are broadcasters likely to multicast on the spectrum that they have been granted but the type of advertising that will be used will be much more powerful. Both developments will lead to a significant increase in advertising revenue. The use of the spectrum that is owned by the people requires compensation and the only form in which that compensation is likely to be paid is in the form of public interest obligations.

NAB assertion: Additional public interest duties on broadcasters cannot be justified unless the evidence demonstrates that the existing public interest standards are inadequate and that the benefits of new obligations clearly outweigh their costs.

CFA response: The evidence clearly demonstrates that the existing public interest standards are inadequate. Comments filed at the Commission demonstrate the gross inadequacy of locally oriented programming, how the DTV commercial model will likely widen the digital divide and further threaten diversity of expression and the need for additional standards to protect consumers from invasion of privacy and marketing abuse. The existing standards will

become even less adequate in quantitative and qualitative terms as the flood of commercial broadcasting and interactive TV services unleashed by DTV grows.

The primary benefits of public interest obligations that we recommend, such as diversity in programming, a better informed citizenry, protections against invasion of privacy and intrusive advertising, are qualitative and social. These are intrinsic values that need not be justified in the simplistic monetary and economic terms implicit in the NAB cost-benefit standard.

NAB assertion: (Specific) The existing disclosure obligations of broadcasters are in no way inadequate.

CFA response: The primary impact of DTV broadcasting and the marketing of ancillary and supplemental services is to carry broadcasters far beyond their traditional role as one-way, mass audience programmers. Interactivity and data gathering activities penetrate much more deeply into the personal and daily lives of viewers and consumers. Therefore, the disclosure requirements must be expanded to reflect this fundamental change.

NAB assertion: In considering any public interest obligations for DTV broadcasters, the Commission should eschew inflexible regulation and rely primarily on marketplace forces:

CFA response: The Commission cannot rely on commercial interests to provide the diversity, local programming, and consumer protection policies that DTV necessitates. Specific obligations must be established, or the highest priced commercial applications will crowd out educational, culturally diverse, and local oriented programming. Marketplace forces will not provide consumer or privacy protection, as the Commission knows all too well. Flexibility in meeting the expanded public interest obligations should be afforded by ensuring a process in which citizens have access to and influence over the local decisions of broadcasters.

NAB assertion: (Specific) Ancillary and supplementary services offered by DTV broadcasters should be subject to the same public interest requirements as comparable services offered by non-broadcasters.

CFA Response: Since broadcasters appear intent on linking at least some ancillary and supplementary services to broadcast DTV programming, there is every reason to impose broadcast public interest obligations on those services. Moreover, non-broadcasters have not been the recipients of the spectrum give-away. Therefore, the beneficiaries of that give-away can reasonably be expected to shoulder a larger obligation.

NAB assertion: Given the deficiencies of the scarcity doctrine, the constitutional implications of any proposed public interest obligations must be carefully considered.

CFA Response: Scarcity is relative to the commercial opportunities and the nature and impact of the medium. Public interest obligations of communications media rest on more than doctrines of scarcity.

NAB assertion: (Specific) The promotion of diversity in broadcasting appears largely unrelated to digital technology.

CFA response: DTV poses a new threat to diversity by highlighting and reinforcing the importance of the most “popular” brands and most “mainstream” ideas which will become the focal point for linked commercial activities. DTV also increases barriers to access of less popular products and ideas because of increases in production costs and greater competition for “eyeballs.”