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Before the  
Federal Communications Commission  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
 )  
Public Interest Obligations ) MM Docket No. 99-360  
of TV Broadcast Licensees )  
 )

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

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## Executive Summary

The National Association of Broadcasters (“NAB”) submits these reply comments in the Commission’s proceeding on the public interest obligations of television broadcasters as they transition to digital transmission technology.

As an initial matter, NAB reemphasizes that the Commission should avoid the premature imposition of new and expansive public interest requirements on nascent digital television (“DTV”) services. In particular, NAB strongly believes that the transition to DTV should not be burdened by the imposition of additional public interest requirements that are not reasonably germane to digital broadcasting or technology. There is also no basis for imposing expansive new public interest obligations as a *quid pro quo* for the broadcasters’ temporary loan of additional spectrum during the digital transition, especially in light of Congress’ intent in the 1996 Telecommunications Act to preserve and promote the competition of free, over-the-air broadcast stations.

In accordance with the terms of Section 336 of the Communications Act, any ancillary or supplementary services offered by DTV broadcasters (such as datacasting or Internet access) should be subject to the same public interest obligations as comparable services offered by non-broadcasters. If a DTV broadcaster offers an ancillary or supplementary program service (*i.e.*, subscription video), then NAB opposes applying existing program-related obligations (such as political candidate’s access rights) to it, as the Commission has already expressly determined that subscription video services are *not* broadcasting services subject to Title III obligations. More generally, NAB believes that the Commission should decline to impose expansive public interest requirements on DTV broadcasters that are not applicable to other service providers against whom broadcasters will be competing in a converging digital marketplace.

Additional public interest duties on DTV broadcasters are unnecessary because broadcasters are continuing to serve the public interest. Earlier this month, NAB released an updated report on the community service provided by local broadcasters. Based on a survey of all commercial television and radio stations in the United States, this report concluded that, over a 12-month period in 1998-99, local broadcast stations contributed \$8.1 billion in community service nationwide. In light of such evidence, NAB asserts that there is no basis for the imposition of additional public interest obligations, particularly since the commenters supporting such expanded obligations have ignored the significant costs that imposition of their proposals would impose on broadcasters.

NAB additionally argues that, due to the vast increase in the number and variety of media outlets, there is no need for each individual broadcast station to “be all things to all people” and for each to be required to provide programming of every conceivable sort. Because the real issue is whether programming of various types is available to consumers across the market as a whole, it would be unnecessary (and, indeed, counterproductive) to attempt to force every DTV broadcaster to offer required amounts of specified types of programming. Consistent with its recently stated goals of reducing direct regulation and managing its transition from an industry regulator to a market facilitator, the Commission should rely primarily on marketplace forces, rather than inflexible regulation, in overseeing the transition to DTV.

Finally, NAB objects to proposals requiring broadcasters to provide free air time to political candidates because they single out broadcasters to bear the burden of general political reform. These proposals are, in NAB’s view, unlikely to succeed in ameliorating perceived problems with the current election system, at least in the absence of general campaign finance reform. Free air time requirements are also unneeded, given the voluminous amount of political

and election information available from a plethora of sources in today's media marketplace. Given the detailed statutory provisions establishing a system of political broadcasting based on the purchase of air time at discounted rates, the Commission lacks authority to adopt inconsistent rules requiring the provision of free time by DTV broadcasters. Further, the arguments presented by supporters of free air time proposals -- whether couched in terms of the scarcity or the public ownership of spectrum -- fail to justify impinging so severely on the First Amendment rights of broadcasters.

**Before the  
Federal Communications Commission  
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of TV Broadcast Licensees )

TO: The Commission

**REPLY COMMENTS OF THE  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits this reply to certain comments on the Commission’s *Notice of Inquiry* in this proceeding.<sup>2</sup> In the *Notice*, the Commission requested comment on the public interest obligations of television broadcasters as they transition to digital transmission technology. Comments were submitted in response to this *Notice* by numerous broadcasters, various media, consumer and other advocacy groups, and several research foundations, and they express a wide range of opinions on the Commission’s proposals.

In this reply, NAB wants to emphasize that the Commission should refrain from prematurely imposing new and expansive public interest obligations on digital television (“DTV”) broadcasters, particularly if those obligations are not reasonably germane to digital broadcasting or technology. Indeed, the recent explosion of broadcast and non-broadcast media, and the promise of even greater media abundance in the digital future, would appear to justify a

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<sup>1</sup> NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

<sup>2</sup> *Notice of Inquiry* in MM Docket No. 99-360, FCC 99-390 (rel. Dec. 20, 1999) (“*Notice*”).

*decrease* in Commission regulation of broadcasting, and greater reliance on an increasingly competitive media marketplace to insure service to the public. Particularly in an era of convergence and eroding technological and regulatory distinctions between various media, NAB asserts that the imposition of expansive new requirements on DTV broadcasters will ultimately make free, over-the-air broadcasting less competitive with other media and services that are unencumbered by such requirements. NAB believes that this outcome would be contrary to the Commission's goals in the digital television proceeding and to the public interest.

**I. Commenters Emphasized that the Commission Should Avoid the Premature Imposition of Expansive Public Interest Obligations that are Unrelated to Digital Technology on Undeveloped Digital Services.**

In agreement with NAB, several commenters stressed the imprudence of imposing prematurely new and expansive public interest requirements on nascent DTV services.<sup>3</sup> These commenters emphasized that digital broadcasting is still in its infancy, that the actual uses of digital channels have not yet been determined, and that the imposition of additional regulations on DTV would tend to stifle the development of innovative digital services. In particular, ALTV's comments described in detail the risky and uncertain nature of the DTV transition and the need for broadcasters to focus, at this early stage of the transition, on simply insuring a successful and timely deployment of digital technology.<sup>4</sup> As stated in our comments, NAB believes that the Commission should similarly focus on insuring a successful and expeditious

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<sup>3</sup> See, e.g., Comments of State Broadcasters Associations at 2-7; Association of America's Public Television Stations at 17; Belo at 23-26; Association of Local Television Stations, Inc. ("ALTV") at 3-9.

<sup>4</sup> See Comments of ALTV at 4-7 (noting the debate over the 8VSB and COFDM digital transmission standards; the lack of cable carriage for broadcasters' digital signals; delays in setting standards for and manufacturing digital receivers; the high costs of the digital transition for broadcasters; and competition from other video programming providers that are also implementing digital technology).

digital transition by acting promptly on various matters relating to DTV, such as must carry, receiver standards and interoperability. After all, if the digital transition does not in fact succeed, the entire question of the public interest obligations of DTV broadcasters will be moot.

Beyond being premature, new and expanded public interest obligations are not justified by the mere use of digital, as opposed to analog, transmission technology. In particular, the transition to DTV does not justify the imposition of additional public interest duties that are not reasonably germane to digital broadcasting or technology. Several commenters agreed with NAB that the bulk of the proposals in the *Notice* lack a reasonably direct relationship to the digital transition.<sup>5</sup> NAB strongly believes it is inappropriate to place the burden on broadcasters of pursuing general societal goals not directly related to the digital transition (or even to broadcasting in any form).

## **II. Given the Convergence in Communications Technology, Digital Broadcasters Should Not be Burdened by Unequal Regulatory Treatment.**

As NAB explained in its comments, the convergence of traditionally distinct communications technologies and services was the impetus behind the Telecommunications Act of 1996 (“1996 Act”), which Congress designed to end the legal barriers between various technologies and industries. Given Congress’ clear intent in the 1996 Act to end unnecessary disparate legal treatment of converging communications technologies and services, NAB believes that the Commission’s regulatory treatment of such technologies should converge as well. Thus, any ancillary or supplementary services offered by DTV broadcasters should be subject to the same regulatory treatment (including the same public interest obligations) as

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<sup>5</sup> *See, e.g.*, Comments of CBS Corporation at 35-36; State Broadcasters Associations at 4. As NAB pointed out in its comments, the fact that broadcasters may be transmitting a digital, rather than an analog, signal has no logical connection to, for example, broadcasters’ disclosure obligations, the promotion of diversity of ownership or employment in broadcasting, or reforming the U.S. election system.

comparable services offered by non-broadcasters.<sup>6</sup> Other commenters agreed with NAB's position,<sup>7</sup> explaining that Section 336(b)(3) of the Communications Act expressly requires the Commission to apply to any ancillary or supplementary service "such of the Commission's regulations as are applicable to the offering of *analogous services by any other person.*" 47 U.S.C. § 336(b)(3) (emphasis added). NAB and other commenters also noted that DTV licensees who offer ancillary or supplementary services will be required to pay fees equivalent to the cost of acquiring their licenses to provide such services by competitive bidding. 47 U.S.C. § 336(e). Accordingly, broadcasters providing ancillary or supplementary services should not be subject to public interest obligations more burdensome than any other licensees offering comparable services who may have received their licenses by auction.

Commenters arguing that DTV licensees providing ancillary and supplementary services should be required to satisfy special public interest obligations are simply ignoring the clear terms of Sections 336(b) and (e). Indeed, the Office of Communication, Inc. of the United Church of Christ, *et al.* ("UCC") – while arguing that DTV licensees providing non-programming ancillary services should be required to transmit data on behalf of local public interest organizations or provide Internet access to schools, libraries or community centers – made *no* reference whatsoever to Sections 336(b)(3) and (e). *See* Comments of UCC at 39-41. Because UCC has completely ignored the clear terms of the Communications Act requiring the Commission to apply to any ancillary or supplementary service those "regulations as are applicable to the offering of analogous services by any other person," the Commission should

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<sup>6</sup> For example, if a DTV broadcaster were to offer an Internet access or datacasting service, the public interest obligations applicable to that service should be comparable to those applied to any other licensee's datacasting or Internet service, even if a non-broadcaster.

<sup>7</sup> *See, e.g.* Comments of ALTV at 15-17; Association of America's Public Television Stations at 19-22; CBS Corporation at 40-41.

similarly ignore UCC's comments with regard to non-program ancillary and supplementary services.

In addition, UCC contends that certain existing program-related obligations (particularly those concerning political candidate's access rights and children's television advertising limits) must be applied to all ancillary and supplementary *program* services.<sup>8</sup> See Comments of UCC at 33-38. In making this assertion, UCC again ignores the fact that any DTV broadcasters providing ancillary or supplementary services (whether program or non-program) will be obliged to pay fees equivalent to the cost of acquiring licenses to provide such services at auction. See 47 U.S.C. § 336(e). As CBS pointed out (*see* comments at 40), imposing public interest obligations on ancillary and supplementary services would "in effect, [be] taxing broadcasters' provision of these services twice, once in the form of fees and then again by the imposition of affirmative obligations." Such "double taxation" would tend to discourage DTV broadcasters from offering new and innovative services and would make the ancillary and supplementary services of broadcasters less competitive than similar services offered by non-broadcasters.

Moreover, with regard to ancillary and supplementary program services such as subscription video, the Commission has previously expressly determined that subscription video services are *not* broadcasting services subject to Title III broadcasting obligations.<sup>9</sup> In its *Subscription Video Order*, the Commission specifically recognized that "classification of subscription program services as non-broadcast will have other regulatory consequences,"

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<sup>8</sup> Ancillary and supplementary services offered by broadcasters may include a number of non-program services (such as Internet access, computer software distribution, data transmissions, teletext, aural messages, and paging) or may also include program services such as subscription video.

<sup>9</sup> See *In the Matter of Subscription Video*, 2 FCC Rcd 1001 (1987) ("*Subscription Video Order*"). This decision was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

including taking “such services out of the purview of sections 315 and 312(a)(7) of the Communications Act.” *Id.* at 1005. Consistent with its earlier determination, the Commission must therefore reject UCC’s specific contention that Sections 315(a) and 312(a)(7) should apply to all program services, even subscription ancillary and supplementary services. *See* Comments of UCC at 33-38. Contrary to UCC’s assertions, the Commission has already determined that “Congress did not intend sections 312(a)(7) and 315 to apply to subscription services” and that “there does not appear to be any substantial policy justification for applying section 315 to subscription television services.” *Subscription Video Order* at 1005. There is also no need for the Commission to reconsider here its long-standing treatment of subscription video services as non-broadcasting services that are not subject to Title III obligations.

Beyond the specific question of ancillary and supplementary services, however, NAB finds it curious that the Commission failed to address the general issue of the convergence of broadcasting with other technologies and services in a digital environment. As one commenter wrote, the *Notice* “focuses only on digital television broadcasters as if digital cablecasters, digital direct satellite broadcasters, and digital webcasters do not exist.”<sup>10</sup> Indeed, given the digital revolution, it will likely be meaningless in the relatively near future to differentiate between the programming that consumers receive through devices traditionally known as televisions and devices previously known as computers.<sup>11</sup> This technological convergence is rapidly undermining the rationale for much of the distinct regulatory treatment of broadcasting.<sup>12</sup>

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<sup>10</sup> Comments of The Progress & Freedom Foundation at 4.

<sup>11</sup> The Commission itself has acknowledged these developments in another proceeding. The *Sixth Annual Video Programming Report* noted that both “[b]roadcast and non-broadcast networks are also offering increased amounts of [Internet] streaming video” and that media companies are providing “increasing amounts of video over their Web sites in the expectation that the pictures will be acceptable for the intended use or eventually improve to broadcasting or VCR quality.” *Sixth Annual Report* in CS Docket No. 99-230 at ¶¶ 15, 114, FCC 99-418 (rel. Jan. 14, 2000).

Given the lessening distinctions between various types of media and the increasing competition between traditionally distinct service providers, the Commission should decline to impose expansive new public interest requirements on DTV broadcasters that are not applicable to other service providers against whom broadcasters will be competing. Indeed, if the Commission still wishes “to promote the success of a *free*, local television service using digital technology,”<sup>13</sup> it must refrain from subjecting broadcasters to unequal regulatory burdens (including expansive public interest duties) that their competitors in a converging marketplace are not required to bear. In this regard, the Commission should reject the proposals by some commenters for imposing unprecedented regulatory obligations on broadcasters that would ultimately undermine their ability to compete effectively and continue to provide free, over-the-air programming in the digital marketplace.<sup>14</sup>

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<sup>12</sup> As one commenter asked, “would all internet programmers providing video streaming anywhere in the world be subject to children’s programming rules simply because their video programming might be delivered over a DTV signal as opposed to a DSL telephone line?” Comments of State Broadcasters Associations at 5. Another commenter asserted that the Commission could not conceivably (or constitutionally) “consider imposing on ‘Internet video’ providers, under the public interest standard, the same type of content requirements that it proposes for broadcasters.” Comments of The Progress & Freedom Foundation at 15.

<sup>13</sup> *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12820 (1997).

<sup>14</sup> *See, e.g.*, Comments of People for Better TV at 23 (digital broadcasters should be required to provide one public service announcement for every four commercials); UCC at 28-32 (multicasting broadcasters should be subject to additional public interest obligations that could be satisfied by dedicating an entire channel to public interest programming; leasing at below market rates an entire channel to a small disadvantaged business (“SDB”) or noncommercial educational (“NCE”) programmer; airing one hour of additional public interest programming for every five hours of multicasted programming; leasing time by the hour at below market rates to a SDB or producer of NCE programming; or by paying fees equivalent to 1% of their total annual gross advertising revenues or 5% of annual gross revenues derived from multicasting); Children Now at 34-36 (multicasting broadcasters should not only be required to air significant additional children’s educational programming, but broadcasters must also calculate how their programming overall is distributed across a number of possible technical formats and must apportion their increased children’s educational programming in the same proportion as their programming overall).

### **III. The Extraction of Further Public Interest Concessions from Digital Broadcasters on the Basis of a *Quid Pro Quo* Is Unwarranted.**

A number of commenters supported their proposals for new and expansive public interest obligations on the erroneous assumption that broadcasters were given valuable digital spectrum for free and that, in return, they should be made to pay in the form of the additional requirements.<sup>15</sup> As explained in our comments, there is no basis for imposing expansive new public interest obligations as a *quid pro quo* for the temporary receipt of additional spectrum during the digital conversion, especially in light of Congress' intent in the 1996 Act to preserve free television and to "promote the competitiveness of over-the-air broadcast stations." H.R. Rep. No. 204, 104th Cong., 2d Sess. 48 (1995).

Other commenters similarly contended that the digital spectrum "giveaway" is a myth and fails to provide a legitimate rationale for burdening television broadcasters with additional public interest duties.<sup>16</sup> As Belo and NAB both explained in detail in their comments, DTV channels have merely been loaned to broadcasters for a limited period during which consumers will adopt digital technology. During this "loan" period, broadcasters will be required to invest billions in their transition to digital, even without any guarantee of recovering these costs in the form of additional revenues.<sup>17</sup> The financial burden of the digital transition will, moreover, fall most heavily upon small, independent television stations that are least able to afford them.<sup>18</sup>

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<sup>15</sup> See, e.g., Comments of Children Now at 6; People for Better TV at 4; UCC at 3.

<sup>16</sup> See, e.g., Comments of Belo at 18-21; National Minority T.V., Inc. at 2-3.

<sup>17</sup> See Testimony of Josh Bernoff, Principal Analyst at Forrester Research to Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (Jan. 16, 1998) (at conclusion of digital transition, broadcasters will have invested billions and lost market share from their present position).

<sup>18</sup> See Comments of National Minority T.V., Inc. at 2 (transition to digital is very costly endeavor, particularly for a small minority-owned company, and it remains unclear what

Contrary to the assertion of UCC (*see* comments at 3) that DTV broadcasters are the only clear beneficiary of the transition to digital, the public interest will clearly be served by a successful transition to DTV. Specifically, as Belo pointed out (*see* comments at 19), the public will receive substantial benefits in the form of free, over-the-air broadcasting services with greatly improved signal quality (*e.g.*, high definition television), expanded programming choices through multicasting, and an array of new ancillary services, such as datacasting, paging or Internet access. In contrast, at the end of even a completely successful digital transition, broadcasters will be left with the same single six MHz channel they now possess. Thus, no evidence exists that the temporary loan of an additional channel to broadcasters for the digital transition represents a “giveaway” or any form of unjust enrichment that would warrant the extraction of expansive new public interest obligations in return.<sup>19</sup>

**IV. Additional Public Interest Duties Are Unjustified Because the Existing Public Interest Standards Are Entirely Adequate, Broadcasters Continue to Serve the Public Interest, and No Showing Has Been Made that the Benefits of New Obligations Would Outweigh their Costs.**

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benefits, if any, broadcasters will receive after expending the money necessary to implement digital).

<sup>19</sup> People for Better TV attached to their comments a survey purporting to show the public’s support for requiring broadcasters to increase their public service in return for receiving their digital channels for free. All of the questions in this survey were, however, biased in the way they were asked. (Specifically, the questions were set up for people to express their opinions as to *what* broadcasters “should give back to the public in return for free use of the airwaves,” and not *whether* broadcasters should be required to give anything back.) In fact, as reprinted in the attachment, the survey questions state that the FCC “recently GAVE broadcasters access to FREE additional public airwaves in order to develop new technology called digital television. The public now has an opportunity to say what broadcasters should give back to the public in return for free use of the airwaves.” (emphasis in original). The surveyor then read a number of public service proposals to the persons being interviewed, and asked how important each one was to the interviewees personally. No serious researcher would phrase survey questions in this manner to obtain unbiased results, so the Commission should give little, if any, credence to the results of this survey.

As NAB argued in its comments, additional public interest duties on broadcasters can be justified only if the evidence demonstrates that the existing public interest standards are inadequate and that the new duties would address these inadequacies. Rather than showing failures by broadcasters to serve the public interest, NAB asserted that, to the contrary, broadcasters take their public service obligations very seriously and provide literally billions of dollars in community service. As set forth in detail in NAB's 1998 Report, the nation's broadcasters provided \$6.85 billion in community service in 1996.<sup>20</sup> The comments submitted by People for Better TV included an attachment by the Project on Media Ownership ("Project") purporting to identify several methodological flaws in the 1998 Report. NAB has reviewed this attachment and concluded that the criticisms primarily show that the Project is unfamiliar with conducting survey research.<sup>21</sup>

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<sup>20</sup> See *Broadcasters, Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service* at 2 (April 1998) ("1998 Report").

<sup>21</sup> For example, in the attachment the Project contended that:

- (i) the 1998 survey was "self-reported." NAB wonders how else such a survey could have been conducted. To find out about the activities of broadcast stations, one must ask them.
- (ii) the 1998 survey was not independently verified. To conduct the survey, NAB used the nationally known survey firm of Public Opinion Strategies, which has a professional reputation to maintain, and, in any event, survey research is not routinely "audited," like, for example, financial statements. The Project also asked whether Public Opinion Strategies was "an independent party." The Project could have answered this question themselves with a little research, and apparently only asked the question in an attempt to suggest impropriety.
- (iii) there was "no analysis deriving the appropriate sample size." This statement indicates a lack of understanding of survey research. The 1998 Report attempted a *census* of all NAB and state broadcast association members. When undertaking a census, there is no "appropriate sample size," because samples are used only when the surveyor lacks the resources to conduct a census.
- (iv) the 1998 Report "extrapolated" results from the "data of broadcasters that actually completed the survey" to "all broadcasters that received the survey." In fact, this is what survey research is all about. The surveyor attempts to obtain responses from the entire target group, and then multiplies the average results obtained from those who responded to the survey across the total number of those the surveyor tried to contact.
- (v) most public service announcements "are run in non-prime-time hours." The Project has no basis for this assertion. In fact, PSAs were run evenly across the four six-hour blocks that the 1998 survey asked about.

Moreover, earlier this month, NAB released an updated report on the community service provided by local broadcasters.<sup>22</sup> Based on a survey of all commercial television and radio stations in the United States, the 2000 Report concluded that, over a 12-month period in 1998-99, local radio and television stations contributed \$8.1 billion in community service nationwide. This amount includes \$5.6 billion in air time for public service announcements (“PSAs”), \$2.3 billion in funds raised for charities, and \$187 million in funds raised for victims of natural disasters. With regard to PSAs in particular, the 2000 Report showed that the average television station ran 142 PSAs per week and the average radio station 152 PSAs per week. Nearly two thirds (65%) of these PSAs aired by radio stations, and 56% of the PSAs aired by television stations, were about local issues. In addition, 65% of television stations, and 61% of radio stations, aired local public affairs programs of at least 30 minutes in length every week.

The comments submitted by Belo also demonstrate the seriousness with which broadcasters take their public interest responsibilities. A programming study recently undertaken by Belo shows that broadcasters, in a wide range of markets, provide very substantial amounts of non-entertainment programming, including newscasts, news/information programs, public affairs shows, instructional programs, children’s educational programming and religious programs. Specifically, this study revealed that the major network affiliates in the surveyed markets dedicated about *one-third of their total broadcast hours* to non-entertainment programming. The majority of the Belo stations surveyed aired 72 or more hours per week of non-entertainment

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(vi) the 1998 survey did not attempt to quantify broadcaster activities on certain issues either in airtime minutes or dollar terms. The survey did not ask for specific dollar amounts and minutes for all the topics that broadcasters cover in their public service activities because, to improve the response rate of any survey, it is important to make the questions manageable in length and easy for the respondents to answer.

<sup>22</sup> See *Local Broadcasters, Bringing Community Service Home: A National Report on Local Broadcasters’ Community Service* (April 2000) (“2000 Report”). The 2000 Report is also being submitted for the record in this proceeding.

programming, while all of the Belo stations surveyed aired over 60 hours per week of non-entertainment programming. *See* Comments of Belo at 6-9 and Appendix A. These amounts of non-entertainment programming being provided by broadcasters are significantly above the 10% benchmark for non-entertainment programming set by the Commission for television broadcasters in 1973 (and eliminated as unnecessary in 1984).<sup>23</sup>

Belo's study showing the broadcast of substantial amounts of non-entertainment programming is supported by other sources, which report broadcasters providing higher amounts than ever of news and other non-entertainment programming. For example, the amount of news and public affairs programming offered by CBS tripled in the period between 1979 and 1990 alone.<sup>24</sup> In addition, after the Fairness Doctrine was abolished in 1987, the supply of informational programming formats (news, talk, news/talk, and public affairs) on AM and FM radio exploded both absolutely and as a proportion of all formats. In percentage terms, informational formats in AM radio increased nearly 21% between 1987 and 1995.<sup>25</sup>

Given the very high amounts of PSAs and non-entertainment programming offered by broadcasters (both television and radio), the Commission cannot seriously contend that broadcasters are failing to serve the public interest by providing insufficient amounts of informational programming. Indeed, even the criticisms offered by supporters of expanded public interest obligations focus not on the failure of broadcasters to provide non-entertainment programming, but on the specific content or perceived quality of that programming. For

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<sup>23</sup> *See also* Comments of CBS Corporation at 9-11 (detailing community service activities of its owned and operated stations).

<sup>24</sup> *See* T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 302-303 (1994).

<sup>25</sup> Hazlett and Sosa, *Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*, Cato Policy Analysis No. 270 at 16 (1997).

example, the Benton Foundation (*see* comments at 4) contended that broadcasters are “not providing *quality* local television news,” citing a study that faults local news broadcasts for a lack of “investigative stories, special series or tough, high-quality interviews.” Similarly, People for Better TV (*see* comments at 22) complained that current news programming, while perhaps “entertaining,” focuses too much on crime, accidents, sports and entertainment, and does not include enough coverage of local public affairs and local government.

NAB does not believe that such opinions about the content and quality of local news and informational programming are relevant to this proceeding. For example, the Commission has inquired whether mandatory minimum public interest obligations for DTV broadcasters should be imposed. But, as shown above, it is clear that regulations requiring broadcasters to provide a certain minimum quota of news or non-entertainment programming are unnecessary, because broadcasters already provide very substantial amounts of such programming. The Commission obviously cannot respond to the opinions of commenters such as People for Better TV and the Benton Foundation by adopting regulations requiring all local news to be “hard” rather than “entertaining,” or preventing local newscasts from including more than a certain limited number of stories devoted to sports, entertainment, crime or other disfavored categories. “No regulation can make local news harder and better, whether it is on a local station or in the local newspapers.”<sup>26</sup> And the Commission cannot satisfy those commenters criticizing the types of stories (*e.g.*, too much crime and not enough government) contained in local informational programming without venturing into very specific – and unconstitutional – content mandates.<sup>27</sup>

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<sup>26</sup> Krattenmaker and Powe, *Regulating Broadcast Programming* at 311.

<sup>27</sup> *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (“FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations”).

Moreover, NAB does not believe that the provision of one particular type of programming should be regarded as the *sine qua non* of the public interest standard, as People for Better TV apparently believes, in proposing that all DTV broadcasters should be required to provide one hour a day of local public affairs programming. See Comments of People for Better TV at 16-19. Even in past years when the Commission attempted to identify the types of programming that contributed to the public interest, the Commission never singled out local public affairs programs and never required stations to carry any such programs.<sup>28</sup> Indeed, even the author of the study submitted by the Benton Foundation purporting to show the dearth of local public affairs programming wrote:

Of course, public affairs programming represents just one of many types of programming that have traditionally been associated with serving the public interest. Other types of programming, such as news, educational children's programming, and public service announcements, also contribute to the public service dimension of commercial broadcasting. The results presented here should not be generalized to these other forms of public interest programming.<sup>29</sup>

NAB wholeheartedly agrees.

As clearly shown by the evidence submitted for the record in this proceeding, television broadcasters continue to serve the public interest by airing very substantial amounts of news, other non-entertainment programming, and PSAs, the majority of which concern local issues.

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<sup>28</sup> For example, in 1960 the Commission adopted a statement identifying 14 diverse programming elements that had been recognized as contributing to the public interest, including, among other things, the "opportunity for local self-expression," programs for children, religious programs, educational programs, public affairs programs, agricultural programs, news programs, weather and market reports, and sports programs. *En Banc Programming Inquiry, Report and Statement of Policy*, 44 FCC 2303, 2314 (1960). The statement did not indicate that any stations would be expected to air all of these types of programs. The guidelines adopted by the Commission in 1973 also did not require broadcasters to air any particular amount of local public affairs programs, but only specified a certain amount of non-entertainment programming generally. *Amendment of Part 0 of the Commission's Rules*, 43 FCC 2d 638, 640 (1973).

<sup>29</sup> Napoli, *Market Conditions and Public Affairs Programming: Implications for Digital Television Policy* at 15-16 (attached to comments of Benton Foundation).

Broadcasters also serve the public interest by significantly aiding local and national charities and by helping victims of natural disasters in their communities. In light of this evidence, NAB believes there is no basis for the imposition of additional public interest obligations, particularly since the commenters supporting such expanded obligations have completely ignored the costs that imposition of their proposals would impose on broadcasters. Given the greatly increased competition television broadcasters face in a converging media marketplace, NAB believes it especially important for the Commission to assess realistically the relative costs and benefits of any expanded public interest proposals. And unless the Commission can demonstrate that the benefits generated by its proposals are sufficient to justify the costs imposed on broadcasters, then the Commission must refrain from imposing these additional public interest obligations.<sup>30</sup>

**V. Due to the Increasing Competitiveness of the Media Marketplace, the Commission Should Avoid Inflexible Regulation and Rely Primarily on Marketplace Forces.**

As explained in detail in NAB's comments, the Commission has tended to decrease its regulation of the broadcast industry as the number of information sources has increased. Given the explosion of both broadcast and non-broadcast media in recent years, there is, NAB believes, less need than ever for the Commission to intrusively regulate the media marketplace. The transition to digital technology and the growth of the Internet would in fact seem to justify a further decrease in Commission regulation, rather than the adoption of new and expansive public interest obligations.

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<sup>30</sup> Faced with the evidence that television broadcasters are providing local, diverse programming to their communities, advocates of new regulations fall back on arguments that attribute these programs to "good" broadcasters, claiming that rules are needed to insure service by supposedly "bad" broadcasters who ignore these obligations. First, the widespread existence of these "bad" broadcasters who wholly ignore public service has never been established. Second, the issue for the Commission in this proceeding is not the actions of any particular station, but whether the needs of the public are being served by free, over-the-air television. If news, public affairs, and other public interest programming is being aired in a community, that should satisfy the Commission's concerns, regardless of whether one or more stations airs less than others.

In particular, due to the vast increase in the number and variety of media, there is no need for each individual broadcast outlet to “be all things to all people” and for each to attempt to provide programming of every conceivable sort. The real issue is whether programming of various types is offered and available to consumers across the market as a whole.<sup>31</sup> Commenters who insist that each and every station should be required to carry specified amounts of particular types of programming seem to ignore this important distinction. For example, People for Better TV (*see* comments at 16-19) urged the Commission to require *all* DTV broadcasters to provide one hour a day of local public affairs programming. To support its position that local television broadcasters are failing to provide such programming, People for Better TV relies on a study submitted with the comments of the Benton Foundation about public affairs programming. This study, however, actually shows that an average of 3.25 hours per week of local public affairs programs, and 10.6 hours per week of all public affairs programs, were televised in the markets examined.<sup>32</sup> Thus, the fact that individual television stations may not offer as much public affairs or other type of programming that some commenters may wish does not mean that such programming is unavailable, on a market basis, from television broadcasters and a variety of other media.

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<sup>31</sup> The Commission in fact previously recognized that audiences benefit by an increased diversity of program offerings across the market and that individual stations did not necessarily need to present programming of all types. *See Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1087-88 (1984); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983).

<sup>32</sup> *See* Comments of Benton Foundation at 3. It should also be noted that these figures reflect only specific, separate public affairs programs and include no news programs (local or national) or even any public affairs-oriented stories or segments included in local or national news programs. Thus, these figures almost certainly undercount the amount of public affairs programming aired by television stations.

Indeed, NAB observes that those commenters calling for increased programming-related requirements for DTV broadcasters tend to ignore the availability of news and information from sources other than broadcast television and appear to imply that consumers have no sources of information except for their local television broadcasters.<sup>33</sup> In fact, of course, consumers today have access to an unprecedented number and variety of media outlets (along with the virtually unlimited resources of the Internet). These other media are, moreover, clearly significant sources of news and information for consumers. For example, in a major poll about talk radio, the Times Mirror Center for the People & the Press reported that one in six adults regularly listens to radio talk shows about current events, issues and politics. One in four adults had listened to a talk show the day Times Mirror called or the day before, and another quarter said they sometimes listen.<sup>34</sup> Thus, in considering calls for requiring all DTV broadcasters to air specified amounts of public affairs or other types of programming, the Commission should consider whether there really is a lack of such programming for consumers across the media marketplace as a whole.

NAB also wants to emphasize the difficulty with requiring every single DTV broadcaster to offer specified amounts of certain types of programming.<sup>35</sup> Consider, for example, the position of a low-rated and unaffiliated television station struggling to compete in a market with major network affiliates. NAB sees no point in forcing a financially struggling station to provide

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<sup>33</sup> See, e.g., Comments of People for Better TV; Benton Foundation. The Commission itself appeared to make such assumptions in the *Notice* by discussing only DTV broadcasters and their public interest obligations, with little reference to other broadcast, electronic and print media, or the marketplace in which they all compete.

<sup>34</sup> Hazlett and Sosa, *Chilling the Internet?* at 15. And of course radio offers high quality national news, as well as local news on all-news stations such as WTOP in Washington, D.C. Cable television is also a growing source of local news coverage, with channels such as “Newschannel 8,” a local all-news cable channel available on cable systems in Northern Virginia.

<sup>35</sup> See, e.g., Comments of UCC at 14-16 (urging FCC to adopt processing guidelines requiring three hours per week of local news and three hours per week of locally originated or locally oriented educational and/or public affairs programming outside of local news).

specified amounts of particular types of programming, such as local news or public affairs. The Commission has recognized that lower-rated television stations with limited resources are simply unable to offer significant local news programming, due to the costs involved.<sup>36</sup> The consumers in such a market will of course have access to ample news and other local coverage through the more financially stable television stations (and other media) in the market.<sup>37</sup> Particularly given the difficulty that low-rated, unaffiliated and/or less profitable stations may have bearing the costs of converting to digital technology generally, the Commission should not compound these difficulties by requiring all DTV broadcasters to air certain specified programming. Such a requirement would impose an undue burden on a number of television stations and is not necessary to insure that consumers have access to a variety of non-entertainment programming.

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. It is on this basic assumption where NAB disagrees with certain commenters. For example, UCC (*see* comments at 8) stated that a digital broadcaster's duty to provide programming responsive to its community "is far too important to leave to the vicissitudes of the market." NAB conversely believes that the marketplace – while not perfect – is more effective than the alternative (*i.e.*, regulation) in providing programming that satisfies consumers. Indeed, it borders on the illogical to assume that the regulatory decisions of a government agency in Washington, D.C. would ultimately produce programming

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<sup>36</sup> *See Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 66 (1999).

<sup>37</sup> As Belo's study of several markets showed, major network affiliates dedicate as much as one-third of their total broadcast hours to non-entertainment programming. It seems likely that, if a financially struggling station were required to offer a local newscast, such a program would have difficulty obtaining an audience in competition against better established and financed news programming in the same market.

more responsive to local viewers than would the market-based decisions of broadcasters who are actually operating in communities throughout the country. And it is, after all, the interests of the consumers of programming that are supposed to be paramount under the *public* interest standard – not the interests of government regulators or even the interests of various “public interest” advocacy groups.<sup>38</sup>

In its recent report card on implementing Chairman Kennard’s strategic plan for the agency, the Commission recently stated that, in five years, the communications markets will

be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator.<sup>39</sup>

NAB could not agree more with this statement, but notes that the Commission has apparently failed to follow its own advice in this proceeding. No one can reasonably dispute that the mass media marketplace is today characterized by “vigorous competition” and that the digital revolution and the growth of the Internet will continue to erode competitive and regulatory “distinctions between different sectors of the communications industry.” Thus, the “need for direct regulation” of television broadcasters (and other competitors in the mass media

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<sup>38</sup> See, e.g., Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 209-210 (1982) (“Communications policy should be directed toward maximizing the service the public desires. Instead of defining public demand and specifying categories of programming to serve this demand, the Commission should rely on the broadcasters’ ability to determine the wants of their audience through the normal mechanisms of the marketplace. The public’s interest, then, defines the public interest.”); Krattenmaker and Powe, *Regulating Broadcast Programming* at 315 (“There has been a persistent demand from critics [of broadcasting] for more and better public affairs programming . . . . Behind this, however, is the belief that it is the right of elites to dictate tastes to viewers and listeners that is really paramount.”).

<sup>39</sup> FCC, *Report Card on Implementation of the Chairman’s Draft Strategic Plan* at 1 (March 2000).

marketplace) has been and will continue to be “greatly reduce[d].” The Commission has in this proceeding, however, sought comment on a variety of proposals to *increase* substantially the direct regulation of television broadcasters as they transition to digital transmission technology. NAB recommends that the Commission, consistent with its own general strategic plan, reconsider this overly-regulatory approach and instead rely primarily on marketplace forces in overseeing the transition to digital television.

**VI. Free Air Time Proposals Are Unlikely to Improve Political Discourse, Are Not Needed to Ensure the Wide Availability of Campaign Information, and Raise Serious Statutory and First Amendment Concerns.**

**A. Whether Voluntary or Mandatory, Free Air Time Requirements Will Not Be Effective in Enhancing Political Discourse or in Reducing the Role of Money in Political Campaigns, and Are Unnecessary in a Competitive Media Marketplace.**

As explained in detail in our comments, NAB objects to free air time proposals because they single out broadcasters to bear the burden of general political reform. These proposals are unlikely to succeed in ameliorating perceived problems with the current election system, at least in the absence of comprehensive campaign finance reform. Free air time requirements are also unneeded, given the voluminous amount of political and election information available from a plethora of sources in today’s media marketplace. A review of the comments submitted on these issues only reinforces NAB’s position.

For example, the Radio-Television News Directors Association (“RTNDA”) agreed with NAB in challenging the assumption in the *Notice* that the “quality of political discourse” would be improved by requiring broadcasters to provide free time to political candidates. *Notice* at ¶ 34.<sup>40</sup> RTNDA specifically asserted that requiring broadcasters to provide free air time would not

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<sup>40</sup> The only commenter offering a detailed constitutional defense of free air time requirements simply assumed, like the *Notice*, that such a requirement “would enhance political discourse and better educate the voting public.” Comments of Alliance for Better Campaigns, *et al.* at ii. No support was offered for this assumption.

promote the issue-oriented discourse inherent in debates or interview programs, but would merely “sanction candidate-controlled forums that afford no time for questioning or rebuttal, and facilitate the telling of half-truths.” Comments of RTNDA at 10. RTNDA also noted the “long tradition” of candidates refusing broadcasters’ offers to participate in debates or other forums in which they could be questioned or required to engage in a dialogue. *Id.*

NAB and other commenters also argued that a requirement for broadcasters to provide free air time would be hopelessly ineffective in lessening either the need for candidates to raise money or the public perception of the corrupting influence of money on politics.<sup>41</sup> Indeed, it is instructive to note that candidates were spending millions (and raising concerns about the excessive influence of money in elections) even before the dawn of radio broadcasting. For instance, in 1896, the top Republican political operative Mark Hanna raised and spent \$6-\$7 million – the equivalent of approximately \$100 million today – to insure the election of William McKinley as president.<sup>42</sup> Clearly, the need for political candidates to raise and spend as much money as possible pre-dates the era of broadcasting, and a requirement forcing television broadcasters to provide free air time to candidates will not be effective in severing (or even significantly loosening) this “oldest connection” between money and politics.

Commenters additionally agreed with NAB in contending that there is no lack of political coverage in the U.S. and that the public has, through a myriad of sources (including broadcast outlets, cable channels, newspapers, magazines and the Internet) access to an unprecedented

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<sup>41</sup> See Comments of CBS Corporation at 63-64 (regardless of any free time mandate, “candidates would still have the incentives they have now to raise and spend as much money as they could on behalf of their candidacies”).

<sup>42</sup> See Troy, *Money and Politics: The Oldest Connection*, *Wilson Quarterly* at 22 (Summer 1997) (article surveying the role of money in elections and politics since colonial times and the unsuccessful attempts of reformers to remove the influence of money). Accord Solomon, *Forever Unclean*, *National Journal* (March 18, 2000).

amount of political information. Several commenters cited the extensive amounts of free air time they and other broadcasters voluntarily provide to political candidates, concluding that coercion in the form of mandated free air time requirements is not needed to insure that candidates are able to communicate with the public.<sup>43</sup> RTNDA also agreed with NAB that voters apparently do not believe that broadcasters' coverage of political campaigns is inadequate.<sup>44</sup>

NAB furthermore notes that supporters of free air time appear to assume that broadcast television is the only medium that counts when assessing the public's ability to access political and campaign information. For example, the Alliance for Better Campaign (*see* comments at 1) dismissed cable as a "niche medium" and made no reference whatsoever to the print media or the Internet. This position clearly flies in the face of reality. Cable now has nearly 67 million subscribers, and the viewership of cable networks continues to grow significantly.<sup>45</sup> A recent survey by Pew Research Center showed that 31% of surveyed voters named cable and 31% named newspapers as their leading source of election news, with 24% identifying broadcast network television. The editor-in-chief of Campaign & Elections magazine has, moreover, identified the Internet as the emerging "6th medium" for political advertisements, along with television, radio, newspapers, mail and telephones.<sup>46</sup> Thus, supporters cannot justify their proposals for requiring television broadcasters to provide free air time on the basis that broadcast television is the only medium that allows political candidates access to the voting public.

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<sup>43</sup> *See, e.g.*, Comments of CBS Corporation at 53-54, 63; Belo at 9-12. CBS also noted that political candidates are covered pervasively in broadcast news stories and have additional access to the public through the purchase of air time at lowest unit rates.

<sup>44</sup> *See* Comments of RTNDA at 9-10 (citing polls taken during current presidential campaign).

<sup>45</sup> *See Sixth Annual Video Programming Report* at ¶¶ 20, 24.

<sup>46</sup> *See Communications Daily* at 4-5 (April 18, 2000).

Finally, NAB wants to reemphasize the impracticability and burdensome nature of free air time proposals. For example, commenters supporting these proposals assumed that they would include free time for federal, state and local candidates.<sup>47</sup> NAB asserts that requiring broadcasters to provide free time for all these candidates (including school board, city/county council, mayor, other local offices such as district attorney, state legislature, governor, lieutenant governor and other state offices including judges, federal House of Representatives and Senate, and President) would be extraordinarily burdensome, particularly for broadcasters whose markets cover a number of state legislative and congressional districts and even parts of several different states.<sup>48</sup> Thus, even apart from the statutory and constitutional questions raised by free air time proposals, the Commission should hesitate before adopting any such burdensome requirements that will be ineffective in improving either political discourse or the U.S. campaign system.

**B. Requiring Broadcast Licensees to Provide Free Air Time to Candidates Would Exceed the Commission's Statutory Authority and Be Contrary to the First Amendment.**

As set forth in detail in our comments, NAB believes that the Commission lacks statutory authority to adopt a free air time mandate for broadcasters and that any such mandate would violate the First Amendment. A number of commenters agreed with NAB's conclusions.<sup>49</sup>

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<sup>47</sup> See, e.g., Comments of AFL-CIO at 3 (supporting free time for federal, state and local candidates); Alliance for Better Campaigns at ii (free time rule should guarantee access for state and local as well as federal candidates).

<sup>48</sup> Indeed, the burden inherent in requiring *free* access for such a large number of candidates would be exponentially greater than the *paid* time and *limited* access rights for *federal* candidates upheld by the Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. 367 (1981). NAB also stresses that Congress has only authorized by statute a right of reasonable access for *federal* candidates. The Commission's authority to expand this statutory right of access to include both state and local candidates may be questionable, particularly if such access is free rather than paid. See Section VI.B. below.

<sup>49</sup> See, e.g., Comments of Media Institute at 36-38; CBS Corporation at 52-65; RTNDA at 12-15.

Among the supporters of free air time proposals, only the Alliance for Better Campaigns (“Alliance”) addressed in any detail the Commission’s authority to adopt such proposals or their constitutional implications. In defending the Commission’s authority to mandate free time requirements, the Alliance predictably focused on the public interest standard under the 1934 Communications Act (“Act”), emphasizing the breadth of the Commission’s broadcast regulatory authority under this standard and the expansive interpretation of this authority in cases such as *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969). See Comments of Alliance at 8-10.

In considering the Alliance’s assertions, NAB observes that, in the *absence* of specific action by Congress, arguments relying on the general authority of the Commission might be more convincing. In the case of political broadcasting, however, the Commission is not writing on a “clean slate,” but is required to implement the clear and specific terms of Sections 315 and 312(a)(7) of the Act, which established a system of political broadcasting based on the purchase by candidates of time at a discount from ordinary rates.<sup>50</sup> The Commission is not free to simply ignore this congressional mandate and adopt an entirely inconsistent system of political broadcasting. As discussed in detail in NAB’s comments, such an action would violate the “ancient maxim” of *expressio unius est exclusio alterius* (i.e., “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode”).<sup>51</sup>

In addition, the Commission’s general public interest authority under the Act should not be interpreted to authorize the adoption of free air time requirements because such an

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<sup>50</sup> See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (because Congress “has directly spoken to the precise question” of political broadcasting, the Commission “must give effect” to this “unambiguously expressed intent of Congress”).

<sup>51</sup> *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

interpretation would effectively nullify the congressional mandate set forth in Sections 312(a)(7) and 315 and render these statutory provisions entirely superfluous.<sup>52</sup> As it is a “commonplace of statutory construction that the specific controls the general,”<sup>53</sup> the very specific terms of Sections 312(a)(7) and 315 must be regarded as controlling the Commission’s authority with regard to political broadcasting.<sup>54</sup> Because the only statutory provisions in the Communications Act directly addressing political broadcasting establish a system based on the purchase of air time at specified rates, the very general public interest provisions of the Act -- which do not even refer to political broadcasting -- cannot be interpreted as providing the Commission authority to adopt wholly inconsistent (and constitutionally suspect) rules requiring the provision of free air time.

Moreover, NAB believes that the Alliance may have overestimated the expansiveness of *Red Lion*’s interpretation of the Commission’s authority under the public interest standard. *Red Lion* in fact provided that regulations, such as the Fairness Doctrine, are permissible only where, in the absence of regulation, certain voices and views would “by necessity, be barred from the airwaves.” 395 U.S. at 389. As set forth in NAB’s comments and in these reply comments (*see* Section VI.A above), the Commission cannot seriously contend that political candidates are “barred from the airwaves” or that political information is unavailable to the public.

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<sup>52</sup> *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“a specific statute will not be controlled or nullified by a general one”); *Hohn v. U.S.*, 118 S.Ct. 1969, 1976 (1998) (courts should hesitate to adopt a construction of a statute making another statutory provision superfluous).

<sup>53</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

<sup>54</sup> *See Uncompahgre Valley Water Users Ass’n v. FERC*, 785 F.2d 269, 276 (10th Cir.) (“more specific legislation covering the given subject-matter will take precedence ‘over the general language of the same or another statute which might otherwise prove controlling’”) (*quoting Kepner v. U.S.*, 195 U.S. 100, 125 (1904)), *cert. denied*, 479 U.S. 829 (1986) .

In arguing that a free airtime mandate would also be constitutionally permissible, the Alliance primarily relied on the theory that broadcasters are “public trustees” who have been given the free use of valuable spectrum in return for fulfilling enforceable public interest obligations, including a special duty to present political broadcasts. *See* Comments of Alliance at 4-7. For the reasons set forth below, the Commission should not accept these arguments.

As an initial matter, NAB notes that the Alliance apparently wants to couch its argument in the “public trustee” language to the extent possible because the logical and empirical deficiencies of the scarcity doctrine make reliance on that rationale problematic. As NAB argued in detail in its comments, the scarcity doctrine is illogical and factually unsupportable, and therefore deficient as a legal basis for depriving broadcasters of full First Amendment protection.<sup>55</sup> However, despite the Alliance’s efforts to find an alternative basis for justifying lesser First Amendment protection of broadcasting, its arguments seem to revert back to that questionable doctrine.<sup>56</sup> Indeed, references to “public ownership” of the airwaves and the broadcaster’s role as a “public trustee” may be regarded as merely another way of restating the scarcity argument.<sup>57</sup>

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<sup>55</sup> *See also* Comments of Belo at 15-18 (scarcity is no longer a viable rationale for imposing increased public interest duties on broadcasters); Media Institute at 17-20 (scarcity is as dead as Rosencrantz and Guildenstern); CBS Corporation at 19-27 (to speak of scarcity in today’s media landscape borders “on the bizarre”); Progress & Freedom Foundation at 9-11 (scarcity rationale is no longer valid, even assuming it ever was); RTNDA at 15-17 (spectrum scarcity rationale underlying reduced First Amendment protection for broadcasters is no longer sustainable).

<sup>56</sup> *See* Comments of Alliance at 4, 14 (broadcasters are “public trustees given the privilege of using scarce radio frequencies”). In fact, the Alliance’s comments continually cite *Red Lion* (at least 15 separate citations), which, as explained in NAB’s comments, has as its factual predicate the presumed scarcity of broadcast frequencies. *See* 395 U.S. at 390, 398-99 n.25, n.26, 400.

<sup>57</sup> *See* Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L.J. 899, 911-12 (1998) (reference to public ownership of spectrum 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

Even assuming, however, that the public trustee approach can be regarded as an independent rationale for affording broadcasters limited constitutional protections, it does not mean that this rationale is ultimately convincing. As has been observed, proponents of free air time and other broadcast content regulations have frequently claimed that “the public” owns the broadcast spectrum. From this “metaphor” of public ownership of the airwaves, proponents of content regulation have argued that the public is the “owner” for whom the broadcast licensee acts as “trustee” of the spectrum rights.<sup>58</sup> But this claim of government ownership of spectrum, whichever variant form of the theory is considered, remains an inadequate basis for justifying reduced First Amendment protection for broadcasting.<sup>59</sup> As one observer has pointed out, the government may also own the national park system, but it cannot suppress speech in the parks. Similarly, “[j]ust because the government ‘owns’ the spectrum does not mean that it can control what is said there.”<sup>60</sup>

It is, moreover, meaningless as a practical matter to talk about the government, or anyone else, “owning” the airwaves in the ordinary sense of private ownership. As has been observed

the public ownership claim here is a trope, a way of reifying the government’s claim to regulatory authority. The government does not “own” the spectrum in the customary sense in which we use that term for private ownership claims. The spectrum itself is simply a phenomenon produced by the transmission of

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ownership”); Krattenmaker and Powe, *Regulating Broadcast Programming* at 228 (government’s claim of ownership of the airwaves “doubles back into scarcity”).

<sup>58</sup> BeVier, *Is Free TV for Federal Candidates Constitutional?* at 3-4 (AEI 1998) (attached as Appendix A to NAB’s comments). The “public ownership” metaphor has also spawned the “license as conditional grant theory,” which contends that the government, as owner of the spectrum, may condition the transfer of “its” property on the condition that the licensee fulfill various government-imposed obligations. *Id.* at 4.

<sup>59</sup> See BeVier, *Free TV* at 7-13 (critiquing both the “public trustee” and “conditional grant” theories in detail, and concluding that neither provided convincing support for regulators’ claims).

<sup>60</sup> Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. Rev. 990, 1029 (1989).

electromagnetic energy through space . . . . The government does not own the transmitters or the medium through which the transmitted energy flows, so to say that it owns the “airwaves” is merely to give a property label to its regulatory powers.<sup>61</sup>

Thus, the mere claim that the public or the government “owns” the broadcast spectrum, and that the licensee is a trustee for the true “owner,” cannot be regarded as stripping broadcasters of their First Amendment rights. The attachment by the Alliance of the “public trustee” label to broadcasters therefore fails to provide sufficient practical or legal justifications for the imposition of free air time or other content regulations on broadcasters.<sup>62</sup>

Commenters do further attempt to justify free air time proposals on the grounds that they are consistent with First Amendment values.<sup>63</sup> NAB contrarily believes that First Amendment values are in fact violated by government regulations, such as a free air time requirement, that impose content-based restrictions on broadcasters’ speech. As Justice Stewart wrote:

There is never a paucity of arguments in favor of limiting the freedom of the press . . . . And [I want] to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its “values” . . . . For if those “values” mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.<sup>64</sup>

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<sup>61</sup> Robinson, *Spectrum Property Law 101*, 41 J. Law & Econ. 609, 620 (1998). See also BeVier, *Free TV* at 9-10 (explaining that alleged similarities between broadcasters and private trustees do not in fact obtain, and that the public trustee analogy is merely a way of rhetorically legitimizing the government’s claim to regulatory authority); Krattenmaker and Powe, *Regulating Broadcast Programming* at 228 (the “government’s ownership of the airwaves comes from a legislative decision to claim ownership”).

<sup>62</sup> See also Comments of CBS Corporation at 27-31 (the concept of public ownership of the airwaves “is as pernicious as it is wrong” and cannot justify governmental intrusion into editorial decisions of broadcasters); Media Institute at 20-23 (there is no such thing as public ownership of the spectrum, and any regulatory rationales must survive strict scrutiny); RTNDA at 12-17 (content-based requirements imposed on broadcasters should be subject to strict scrutiny, but free air time requirements are unconstitutional even under established precedent).

<sup>63</sup> See, e.g., Comments of UCC at 17-19; Alliance at 11-13 (proposals would help maintain an informed electorate or contribute to democratic debate).

<sup>64</sup> *CBS, Inc. v. DNC*, 412 U.S. 94, 144-46 (1973) (Stewart, J., concurring).

Because a free air time mandate would replace the editorial decisions “made in the free judgment of individual broadcasters” with those “imposed by bureaucratic fiat,” the Commission should reject it as inimical to the First Amendment.

Interestingly, some of the proposals for free time would not only violate the rights of broadcasters, but would also impinge on the free speech rights of political candidates. For example, AFL-CIO (*see* comments at 3) supported a free air time mandate that would include “reasonable requirements that will maximize clarity, dignity and comparability of candidate presentations.” Any such attempt to regulate the format, style, presentation or content of the speech of political candidates would clearly be contrary to the basic tenets of the First Amendment, as political speech has traditionally been recognized as “core” First Amendment speech.<sup>65</sup> Given that the free time question is so fraught with constitutional difficulties, the Commission would be wise from refraining from acting in this area, particularly in the absence of explicit authority from Congress.

Finally, NAB wants to emphasize that, as convergence continues to erode the technological and regulatory distinctions between different sectors of the communications industry, affording the broadcast media alone less than full First Amendment protections will be increasingly difficult to defend.<sup>66</sup> Indeed, some have observed that the recent advances in communications technologies will provide the courts and the Commission a “golden

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<sup>65</sup> *See, e.g., Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 522 (1991) (discussion of governmental affairs is at the core of our First Amendment freedoms).

<sup>66</sup> *See Reno v. ACLU*, 521 U.S. 844 (1997) (like print media, Internet receives the full level of First Amendment protection).

opportunity” to end the disparate constitutional treatment accorded to broadcasting.<sup>67</sup> At the very least, NAB urges the Commission to consider carefully the true nature of the converging and highly competitive media marketplace in which broadcasters now operate, and insure that any public interest obligations adopted are warranted in such an altered environment.

## **VII. Conclusion**

As discussed in our comments and in these replies, NAB believes that new or expanded public interest obligations are generally not justified for DTV broadcasters, for two primary reasons. First, nothing inherent in the digital transition or in digital technology requires a different or more expansive public interest analysis than that currently applied to analog television broadcasters. Second, DTV will not benefit broadcasters to such a greater extent than their analog channels that some further recompense in the form of increased public interest obligations should be imposed. Moreover, in an era characterized by digital abundance and the convergence of formerly distinct communications technologies and services, the Commission should refrain from subjecting DTV broadcasters to expansive public interest duties that are not also applicable to the competitors of broadcasters. For the variety of policy and legal grounds set forth above, DTV broadcasters should be accorded the discretion to develop and offer innovative programming and other services that they believe will best meet the needs of the communities they serve. This regulatory approach would be consistent with the Commission’s stated goals of

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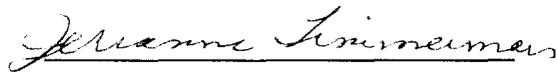
<sup>67</sup> See, e.g., Krattenmaker and Powe, *Converging First Amendment Principles for Converging Communications Media*, 104 Yale L. J. 1719 (1995) (“the latest advances in telecommunications provide federal courts the opportunity to discard the inherently silly notion that freedom of speech depends on the configuration of the speaker’s voicebox or mouthpiece”); Comments of Progress & Freedom Foundation at 15 (FCC “should use this proceeding to articulate a new deregulatory paradigm for the digital age, one in which all media, regardless of the technology used for information dissemination, enjoys the same First Amendment freedom”).

reducing direct regulation and of “wisely manag[ing] the transition from an industry regulator to a market facilitator.”<sup>68</sup>

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April 25, 2000

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<sup>68</sup> *Report Card on Implementation of the Chairman’s Draft Strategic Plan* at 1.

## CERTIFICATE OF SERVICE

I, Stacey M. Phillips, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 25<sup>th</sup> day of April, 2000, by first-class mail, postage prepaid, to the following:

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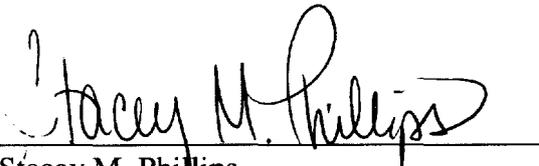
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