

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the matter of  
  
Public Interest Obligations of  
TV Broadcast Licensees  
  
**MM Docket No. 99-360**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF  
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.**

The Association of Local Television Stations, Inc. ("ALTV") hereby submits its reply comments in the above-captioned proceeding. ALTV submitted substantial comments, which focused on the established legal limits on the Commission's authority to dictate the content of broadcast television programming.<sup>1</sup> In particular, ALTV observed that the Commission's oversight of television program content could extend no further than review of a licensee's overall programming. Therefore, ALTV posited, requirements that specific types of programming or specific amounts thereof be included in local television stations' program schedules would contravene the Communications Act. ALTV also noted that evidence necessarily was lacking with respect to any alleged shortcomings in local television stations' fulfillment of their public interest obligations on

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<sup>1</sup> Comments of ALTV, MM Docket No. 99-360 (filed March 27, 2000) at 10-12 [hereinafter cited as "ALTV"].

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their new DTV channels.<sup>2</sup> When all is said and done, ALTV emphasized, current law places a well-defined perimeter around the Commission's basic authority to meddle in the programming decisions of local television station licensees.<sup>3</sup>

In these reply comments, ALTV will limit itself to taking issue with a few statements from commenting parties. That many of the proposals advanced by commenting parties ignore the legal constraints on the Commission's authority is readily apparent.<sup>4</sup> As well-intended and well thought out as many of these proposals may be, they wrongly assume much more substantial authority on the Commission's part than the law has provided.<sup>5</sup> Furthermore, none of them is based on any finding that local television station's DTV programming fails to satisfy broadcast television's public interest obligations.<sup>6</sup> Indeed, as digital broadcast television has emerged from the womb literally

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<sup>2</sup> Many of the comments filed in this proceeding remain mired in attacking and defending local television stations' public interest performance on their analog channels. ALTV considers this irrelevant to the basic issue in this proceeding, which ALTV understands to be possible revisions in the rules implementing the public interest standard in light of the conversion of local television broadcasting from analog to digital transmission.

<sup>3</sup> ALTV also drew attention to the Commission's position that local television station's digital ancillary and supplementary services are not subject to the public interest requirements which attach to free, broadcast digital services. ALTV at 15.

<sup>4</sup> *See, e.g.*, Comments of the Office of Communication, Inc., of the United Church of Christ, *et al.*, MM Docket No. 99-360 (filed March 27, 2000) at 2-3 [hereinafter cited as "UCC"]; Comments of Center for Media Education *et al.*, MM Docket No. 99-360 (filed March 27, 2000) [hereinafter cited as "CME"]; Comments of People for Better TV, MM Docket No. 99-360 (filed March 27, 2000) at 2 [hereinafter cited as "People"].

<sup>5</sup> Notoriously *not* at issue in this proceeding is local television stations' obligation to broadcast programming "responsive to the needs of its community." UCC at 2-3. Positing this obligation, however, adds nothing to the debate over what regulations are necessary and appropriate under the law to evaluate local television stations' response to that obligation.

<sup>6</sup> ALTV wonders if broad generalities about broadcast television licensees' performance shed much light on the matter. Indeed, the consensus remains that most broadcasters have

gasping for life (seemingly against devastating odds), no such finding is even possible today. Little more need be said at this point in relation to such proposals. Therefore, ALTV offers the following nine “counterpoints.”

**Number One:** In urging the Commission to act now to adopt comprehensive public interest requirements for digital broadcasting UCC *et al.*, contend that “the speed of deployment makes delay untenable.”<sup>7</sup> From ALTV’s perspective, the only speed in the deployment of digital broadcasting is the Commission’s deadlines for local television stations to construct their new digital facilities. Essential standards remain unsettled. Cable carriage is rare, and the Commission is dawdling on must carry rules. Serious questions exist about the modulation standard for broadcast digital signals. Few sets have been sold, and those typically were for viewing DVD, DBS, or cable.<sup>8</sup> UCC may contend

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done a fine job of serving the public on their analog channels. As the chairman recently stated, “ many broadcasters provide many wonderful services to their communities.” Remarks by Chairman William E. Kennard, FCC, Las Vegas, Nevada (April 11, 2000). The issue then becomes whether to adopt regulations applicable to all licensees in order to boost the performance of the few “bad apples.” For practical as well as legal reasons, ALTV has disfavored applying uniform regulatory programming obligations on all licensees just to deal with the sub par performers. First, legal mechanisms exist to sort out the bad apples. Licensees that have failed to operate in the public interest are subject to license termination. *See* 47 USC §309(k)(3)(A). Second, such a regulatory approach usually involves setting “minimum” performance guidelines. Such minimums evolve readily into maximums. *See* “Number Six,” *infra*. Third, in the same vein, uniform program content regulations tend to result in uniform programming. Nothing could more sharply insult the Commission’s vision of digital broadcast television as a cornucopia of innovative and diverse services to the public. Finally, program content requirements are an affront to the viewing public, which can provoke improvement in a station’s programming with the flick of a remote control.

<sup>7</sup>UCC at 2.

<sup>8</sup> The Consumer Electronics Association estimates that only 17% of roughly 200,000 DTV products are capable of receiving local television stations’ off-air DTV signals. *Broadcasting & Cable* (April 24, 2000) at 16.

that the Commission “not ask the public to wait for the public service owed to it by digital broadcasters,” but ALTV suggests that the proper question is why the Commission appears so willing to let the public wait for digital broadcasting – period! In any event, speed hardly characterizes the current state of digital broadcasting deployment.

**Number Two:** UCC also decries letting “digital broadcasters reap the rewards of spectrum granted to them for free.”<sup>9</sup> ALTV is unsure of what particular “rewards” UCC may have in mind. So far, local television stations have had to construct new digital facilities, initiate programming service to few, if any viewers, and maintain their full analog facility as well. This has involved significant financial investments with no immediate or even foreseeable prospect of meaningful additional revenue, much less “rewards.” Furthermore, the “free spectrum” argument always has been strained. A free *permanent* second slice of spectrum might have justified such arguments. In contrast, a *temporary* second channel assigned to facilitate an orderly transition – at local television stations’ expense – far from supports allegations that local television stations are beneficiaries of government largesse. Thus, when UCC claims that broadcasters are the “only one clear beneficiary of the transition to digital at the moment,” ALTV must wonder what twisted definition of “beneficiary” they had in mind.

**Number Three:** ALTV also must express a deep concern over proposals like those of UCC that “the Commission adopt specific quantitative minimum requirements concerning a digital licensee’s programming obligations.” Beyond the utter lack of regard

for the law, such proposals pose a threat to the constitutional underpinnings of the must carry requirements. As emphasized in ALTV's comments, the Court premised its conclusion that the must carry rules were not content based squarely on the Commission's limited power over broadcast program content.<sup>10</sup> The Court pointed specifically to the lack of quantitative requirements.<sup>11</sup> Consequently, imposition of quantitative requirements might prompt renewed review of the constitutionality of the must carry requirements. This would be especially ironic because the current lack of digital must carry requirements likely is retarding DTV set sales, thereby depriving the public of DTV service and local television stations of the audience they need to support the development and expansion of their digital broadcast services.<sup>12</sup>

**Number Four:** According to UCC and others, broadcasters would favor "clear, minimum requirements" because good broadcasters are discouraged when bad broadcasters get away with neglecting their public interest obligations.<sup>13</sup> Whereas good broadcasters may decry neglect by bad broadcasters, they have no desire to bring the house down on themselves via adoption of specific programming requirements. They certainly are not discouraged from pursuit of their own programming strategies, which invariably are part of their overall strategy to remain an integral and popular service to their communities.

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<sup>9</sup>UCC at 2, 7.

<sup>10</sup>ALTV at 11. Some might suggest that the Commission had adopted quantitative standards for children's television programming. However, the Commission adopted only processing guidelines, which allow stations a variety of means of compliance with the basic obligation. *Children's Television*, 11 FCC Rcd 10660 (1996).

<sup>11</sup> *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2463 (1994).

<sup>12</sup> See Haring, John, Strategic Policy Research, *The Economic Case for Digital Broadcast Carriage Requirements* (October 13, 1998).

They appreciate better than anyone else does that stations may serve their communities in a variety of ways – and that governmental strictures would only stifle variety, diversity, and innovation.

**Number Five:** Finally, in addressing the premises of UCC’s proposals, ALTV reminds the Commission that “localism” is not coterminous with local public affairs programming.<sup>14</sup> It is a much broader concept. It extends from the fact that local stations are run by employees who reside in the local community to the myriad of community activities those employees undertake not only as employees of the station, but also as citizens of their communities. It consists of numerous programming decisions made by local employees, ranging from selecting news content to editing programming to conform to local tastes. It consists of station sponsored community activities and money and talent contributed to local charities and service organizations. It is selection of one syndicated program over another and preemption of a network program to cover a breaking local news event. It is interrupting a popular program to broadcast a tornado warning or dropping its program schedule entirely to broadcast vital information when a hurricane approaches. Therefore, rooting the concept of local service in broadcasting in a few hours of local talking heads each week is a travesty.

**Number Six:** Notably, comments of other parties starkly illustrate just what happens when rigid minimums replace flexibility. Stations that once broadcast six hours of educational and informational programming for children now broadcast three – in strict

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<sup>13</sup> UCC at 11; CME at 7.

<sup>14</sup> See UCC at 12.

compliance with new FCC processing guidelines! Furthermore, some of the programming was considered “preachy” and “boring.”<sup>15</sup> Similarly, as observed by Children Now, “Overall, local organizations across the country found that most stations comply with the minimum required hours with most stations airing only three to four hours of educational programming.”<sup>16</sup> This is precisely what happens when minimums are specified. They become maximums as well. In the case of children’s educational programming, as is now well known, the broadcast networks started providing the requisite three hours per week of core educational programming, thereby leaving local stations no incentive to do other than carry the network programming.<sup>17</sup> Would anyone really be surprised then if stations now broadcast less educational children’s programming (and likely less local children’s programming) than they did before the rules were adopted?

**Number Seven:** ALTV also is struck oddly by the notion of “asking the public what is in their [*sic*] interest.”<sup>18</sup> Local television stations do this every minute they are on the air. Any station that does not in some significant fashion respond to public interests in its local community jeopardizes its viability. Unless a station provides programming that piques local interests, it will falter and ultimately fail. Therefore, local television station management spends its days compiling a program schedule that will attract and

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<sup>15</sup> Response of the Center for Information, Technology & Society, MM Docket No. 99-360 (March 20, 2000) at 4-5.

<sup>16</sup> Comments of Children Now, MM Docket No. 99-360 (filed March 27, 2000) at 29.

<sup>17</sup> CME also posits that quantitative guidelines assure that stations would commit “a substantial amount of resources” to serving the educational needs of children. CME at 7. The result, however, appears to be that stations now invest three hours of time per week, the opportunity cost of broadcasting network programming. Moreover, quantitative guidelines have no effect whatsoever on the basic economics of local television.

maintain a local audience. In this context, the notion that the public should advise the federal government of its interests and the federal government then pass that advice on to local television stations in the form of program requirements stands out as ludicrous. No less convoluted in terms of assessing interests and responding thereto is the concept of community contracts and public interest plans.<sup>19</sup> Again, viewers express their opinions about programming with their eyeballs and their remote controls. They also are perfectly capable of writing letters to local stations, sending e-mails, and even calling local management on the telephone. As a fail-safe, if a station is egregiously ignoring the public and its public interest obligations, members of the local community may petition the Commission to deny its license renewal. All this is far more direct and focused than generally applicable programming rules adopted by a federal agency in Washington, D.C.

**Number Eight:** Some express concern that economic pressures may cause local television stations to provide programming, and, particularly, educational, cultural, and informational programming, only on a subscription basis.<sup>20</sup> This fear is unfounded.<sup>21</sup> The

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<sup>18</sup> People at 2.

<sup>19</sup> People at 5.

<sup>20</sup> People at 9.

<sup>21</sup> The migration of popular genres of entertainment programming to pay services is another matter. Some 25 years ago, the broadcast industry convinced the Commission that with the emergence of pay cable channels, this was matter of genuine and immediate concern. The Commission adopted rules to prevent the so-called “siphoning” of popular sports event broadcasts and motion picture programming from free television to pay cable. History records the fact that the court was less impressed. *See Home Box Office v. FCC*, 567 F. 2d 9 (D.C. Cir. 1977). More recently, Congress directed the FCC to look into the matter. It did, and then did nothing. *Final Report (Sports Programming Migration)*, 9 FCC Rcd 3440 (1994). ALTV remains sympathetic to the concern, but finds little reason to be optimistic that the Commission will suddenly see the light and address its concerns.

Commission already requires stations to maintain their free, broadcast television service on at least one channel. Additionally, no one disputes that broadcasters' basic public interest obligations will apply to their free broadcast channel or channels. Therefore, the departure of local informational programming to pay channels will not occur.<sup>22</sup>

**Number Nine:** Lastly, ALTV wishes to bring to the Commission's attention a notable fact. Some concern has existed that stations are spending less on programming because of pressure to maximize profits. Some rather compelling evidence now suggests otherwise. According to annual financial profiles prepared by NAB, stations appear to be spending proportionately more on news and other programming – 54.2 % to news, programming, and production in 1997 versus 49.7% in 1990. Cost savings appear to have been extracted in the area of general and administrative expenses – 18.4% in 1997 versus 30.0% in 1990.<sup>23</sup> Programming investment remains solid, as one would expect in a more competitive marketplace. If all a station has to sell is audience, it will maintain and increase its investment in attractive programming to maximize its audience. Therefore, worries that profit maximization strategies might undermine program investment are unfounded.

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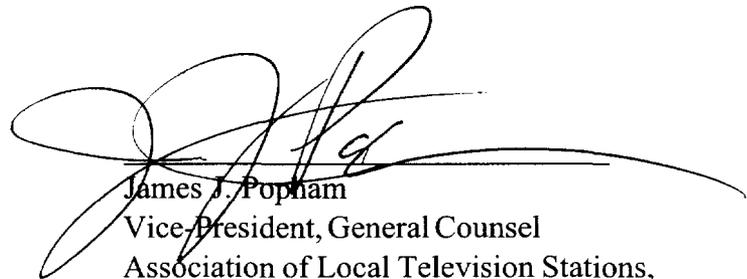
<sup>22</sup> ALTV does not mean to suggest that new and innovative informational services might not develop as pay services. However, local television stations' programming designed to meet its obligation to provide programming addressing local issues and needs will remain on its free, broadcast channel(s).

<sup>23</sup> See *NAB/BCFM 1991 Television Financial Report*; *NAB/CBFM 1998 Television Financial Report*. Those who remain concerned about the local focus of local television stations also might take some comfort in the fact that local advertising rose from 50.4% to 55% of local television stations' revenues between 1990 and 1997. *Id.*

In conclusion, ALTV urges the Commission to proceed with caution and circumspection. The tendency to pursue well-intended regulation of hopeful benefit is strong to be sure.<sup>24</sup> However, in the area of program content in particular it involves considerable peril.

Furthermore, the true benefits must be carefully assessed. Some may crusade for inclusion of broccoli on every plate. After all, broccoli is good for us. Left cold on the plate in the detritus of dinner, however, broccoli has no benefit whatsoever. Furthermore, it apparently is not as good for us as we once thought.<sup>25</sup>

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'J. Popham', is written over the typed name and title.

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<sup>24</sup> See, e.g., *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 37 (1974) (separate statement of Commissioner Glen O. Robinson).

<sup>25</sup> "Fiber doesn't help prevent pre-cancer growths – study," Reuters (April 19, 2000).