

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of

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Public Interest Obligations  
of TV Broadcast Licensees

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MM Docket No. 99-360

REPLY COMMENTS OF

OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST  
ALLIANCE FOR COMMUNITY MEDIA  
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS  
BENTON FOUNDATION  
BLACK CITIZENS FOR A FAIR MEDIA  
CENTER FOR MEDIA EDUCATION  
CONSUMERS UNION  
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL  
NATIONAL ASSOCIATION OF THE DEAF  
UNITED STATES CATHOLIC CONFERENCE  
WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS, (UCC *et al.*)

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## SUMMARY

In its initial comments, *UCC et al.* set forth a comprehensive proposal recommending reasonable regulations seeking to ensure that broadcasters serve the public interest in the digital environment. Numerous organizations representing various interests of the public and concerned individuals have likewise identified unfulfilled needs and called for quantifiable, minimum public interest requirements for all DTV broadcasters. Most industry commenters, however, have raised a host of constitutional, statutory and policy objections to the imposition of meaningful public interest requirements. *UCC et al.* submit these Reply Comments in response to those objections.

First and foremost, the proposed quantifiable minimum public interest obligations advanced by several public interest coalitions further the First Amendment rights of the American public. The Commission should dismiss the arguments of several commenters arguing that *Red Lion* is no longer good law and that scarcity is a thing of the past. These parties ignore the long history of consistent application of *Red Lion* and the continued scarcity of broadcast frequencies. Accordingly, the FCC has ample authority under *Red Lion* to adopt new public interest obligations because such regulations need only survive the relaxed standard of scrutiny traditionally applied to the broadcast medium.

Moreover, even if a more exacting standard of review were applied, the proposed minimum obligations would still pass constitutional muster because they do not improperly infringe on the rights of broadcast licensees. Some commenters erroneously contend that any new or enhanced public interest obligations would constitute unconstitutional conditions placed upon the DTV licensee. However, proposed requirements such as local programming and

political discourse obligations are content and viewpoint neutral and therefore do not unconstitutionally infringe upon the rights of broadcasters more than is necessary to promote the First Amendment rights of the American public. Local programming and political discourse obligations promote a diversity of information sources and an informed electorate. These recommendations ensure that broadcast licenses are used for the purposes for which they were issued - to provide communities with local information on public affairs. Additionally, the Commission should reject altogether CBS's contention that a free air-time requirement for political candidates would constitute an unconstitutional taking under the Fifth Amendment. The Communications Act makes clear that a broadcaster has no property interest in its license to use the spectrum.

Second, the Communications Act requires the Commission to adopt public interest obligations for DTV broadcasters. A few commenters erroneously assert that the Congressionally established *quid pro quo* between the public and the broadcasters is fundamentally misconceived. The government's justification for placing conditions on the broadcast license stems from the need for it to exert control over the allocation of spectrum. Historically, broadcasters have been given preferential treatment from Congress as they are expected to serve the public interest in exchange for this valuable license. The proposed limited public interest requirements are reasonable because broadcasters were given access to the digital portion of the spectrum free of charge.

A few commenters also contend that the deregulatory impetus of the 1996 Telecommunications Act somehow limits the Commission's ability to adopt minimum public interest obligations for DTV licenses. Yet this argument flies in the face of Congress' explicit

intent to ensure that television broadcasters, and specifically digital television broadcasters, continue to be regulated to serve the "public interest, convenience, and necessity." Still other commenters attempt to argue that the FCC simply does not have the authority to adopt local programming guidelines. But as the Commission and the Courts have recognized, quantified guidelines are a necessary implement towards a meaningful review of programming to determine license renewal.

Finally, the record demonstrates the need to adopt minimum public interest requirements for digital licensees because voluntary measures fail to ensure that all broadcasters serve the public interest. As shown by the comments of the Benton Foundation, People for Better TV, and others, much of the American public is frustrated with the dearth of local programming responsive to community needs. In contrast, commenters opposing regulation of DTV licensees have failed to provide credible evidence that broadcasters are meeting the educational and informational needs of their communities. It is now time for the Commission to revisit the area and take appropriate action in a rulemaking to ensure that all broadcasters serve the needs of their communities in the digital environment.

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**REPLY COMMENTS OF UCC *et al.***

The Office of Communication, Inc. of the United Church of Christ, Alliance for Community Media, Association of Independent Video and Filmmakers, Benton Foundation, Black Citizens for a Fair Media, Center for Media Education, Consumers Union, Minority Media and Telecommunications Council, the National Association of the Deaf, United States Catholic Conference and the Women's Institute for Freedom of the Press, ("UCC *et al.*") by their attorneys, the Institute for Public Representation and the Media Access Project, respectfully submit these comments in reply to comments filed in the above referenced proceeding.

UCC *et al.* note at the outset the large outpouring of comments from organizations representing diverse interests of the public identifying unfilled needs and calling for quantifiable, minimum public interest requirements for all digital television (DTV) broadcasters.<sup>1</sup> Unfortunately, however, most of the broadcast industry is resistant to the imposition of any concrete requirements. Industry commenters raise a host of constitutional, statutory and policy objections. These reply comments will focus on rebutting those objections.

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<sup>1</sup>See, e.g., *Comments of Alliance for Better Campaigns, Benton Foundation, Capitol Broadcasting, Center for Information, Technology & Science, Center for Media Education et al., Children NOW, Consumer Federation of America, League of United Latin American Citizens, Michigan Consumer Federation, National Association for the Deaf, People for Better TV ("PBTV"), Telecommunications for the Deaf, Inc., United States Catholic Conference ("USCC"), UCC et al. and WGBH Media Access Division.*

**I. SPECIFIC, QUANTIFIABLE PUBLIC INTEREST OBLIGATIONS FOR DIGITAL LICENSEES ARE CONSISTENT WITH THE FIRST AMENDMENT BECAUSE THEY DIRECTLY PROMOTE THE FREE SPEECH RIGHTS OF THE AMERICAN PUBLIC AND DO NOT IMPERMISSIBLY INFRINGE ON THE RIGHTS OF BROADCASTERS.**

In arguing against minimum public interest requirements such as local programming and political discourse obligations for DTV broadcasters, industry commenters question the constitutionality of such requirements on three basic grounds. First, they argue that *Red Lion* is no longer good law and that scarcity is a thing of the past. Second, some contend that imposing public interest obligations as a *quid pro quo* for the right to use the public airwaves somehow constitutes an unconstitutional condition. Finally, one commenter, CBS, argues that requiring broadcasters to afford free time to political candidates would amount to an unconstitutional taking of property. As discussed below, all of these arguments lack merit.

**A. The Long History of Consistent Application of *Red Lion* and the Persistent Scarcity of Broadcast Frequencies Clearly Support the Continued Vitality of *Red Lion*.**

Some commenters contend that the scarcity rationale set forth in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), justifying the regulation of broadcasting is suspect. *See, e.g., CBS Comments* at 12. These parties maintain that because the underlying legal justification for the Commission's constitutional authority to regulate broadcasters is precarious, the Commission should tread lightly in adopting any additional or enhanced public interest obligations. A few commenters go so far as to claim that *Red Lion* is no longer good law, and essentially suggest that no public interest obligations are justifiable. *See, e.g., Media Institute Comments* at 19. But as demonstrated below, scarcity remains - both as a legal and factual reality - and justifies the adoption of minimum public interest requirements for DTV broadcasters.

**1. The Supreme Court's decision in *Red Lion* is good law.**

Despite criticism by some scholars and judges, the fact remains that the Supreme Court has not overruled *Red Lion*, and in fact has continued to rely on it and cite it approvingly as applied to broadcasting. For example, in its 1990 decision in *Metro Broadcasting, Inc. v. FCC*, the Court stated that "[w]e have long recognized that '[b]ecause of the scarcity of [electromagnetic] frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.'" 497 U.S. 547, 566-67 (1990) (quoting *Red Lion*, 395 U.S. at 390), overruled in part by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

A few years later, the Court considered what First Amendment standard should apply to cable regulation. See *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"). In declining to extend *Red Lion* to cable, the Court reiterated the basis of the scarcity rationale and explained that "the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." *Id.* at 638.<sup>2</sup> The Court affirmed this reasoning three years later in *Turner Broadcasting v. FCC*, 520 U.S. 180, 187-88 (1997) ("*Turner II*"). Finally, as recently as 1997, in discussing the First Amendment standard to be applied to the Internet, the Court again acknowledged that "some of our cases have recognized special

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<sup>2</sup> Commenters' claims that *Turner I* marked the death knell of scarcity are greatly exaggerated. The *Turner I* court simply stated that "although courts and commentators have criticized the scarcity rationale . . . we have declined to question its continuing validity as support for our jurisprudence, . . . and see no reason to do so here." *Turner I*, 512 U.S. at 639 (citations omitted).

justifications for regulation of the broadcast media that are not applicable to other speakers."

*Reno v. ACLU*, 521 U.S. 844, 868 (1997) (citing *Red Lion*, 395 U.S. at 390).<sup>3</sup>

Additionally, lower courts have consistently followed *Red Lion*. Most recently, the Second Circuit cited *Red Lion's* holding that "[t]he scarcity of radio frequencies therefore required a regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to specific users." *FCC v. NextWave Personal Communications, Inc.*, 200 F.3d 43, 50 (2d Cir. 1999) (holding that bankruptcy court exceeded its authority by intervening in the FCC's exercise of exclusive jurisdiction over allocation of spectrum licenses). Further, in *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit recently held that because Direct Broadcast Satellite ("DBS") evidenced similar characteristics of scarcity found in *Red Lion*, regulation of DBS was subject to the "same relaxed standard of scrutiny that the court has applied to the traditional broadcast media." 93 F.3d 957, 975 (D.C. Cir. 1996) ("*Time Warner I*"), *reh'g en*

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<sup>3</sup> See also *CBS v. DNC*, 412 U.S. 94, 101 (1973) (holding that "[u]nlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated"); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 799 (1978) (upholding broadcast/newspaper cross ownership rule under scarcity based rational basis review); *FCC v. Pacifica*, 438 U.S. 726, 748-51 (1978) (affirming FCC's power to regulate broadcast programming partially on scarcity basis); *CBS v. FCC*, 453 U.S. 367, 395 (1981) (relying on *Red Lion* for the proposition that because broadcasters are given access to a limited resource the government may require a licensee to give access to its frequency for political candidates); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (stating that "our cases have taught, that given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community'" (quoting *Red Lion*, 395 U.S. at 389); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (citing *Red Lion* and the regulation of broadcasters premised on scarcity for the tenet that First Amendment principles are redefined according to "special circumstances of each field of applications").

*banc denied*, 105 F.3d 723 (D.C. Cir. 1997).<sup>4</sup>

A few broadcasters attempt to rely on language found in *League of Women Voters*, 468 U.S. 364 (1984), and *Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 FCC Rcd 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). These commenters urge the FCC to consider a footnote in *League of Women Voters*, where the Court acknowledged that "scarcity has come under increasing criticism. . . [but concludes that it was] not prepared [] to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. at 376 n.11. These parties also point to language in *Syracuse Peace Council*, indicating disapproval of the scarcity doctrine, as the Commission's "signal" of scarcity's demise. *See CBS Comments* at 19; *NAB Comments* at 13.

However, since *League of Women Voters* and *Syracuse Peace Council*, the Supreme Court and Congress have continued to rely on scarcity as a justification for the regulation of the broadcast medium. As discussed in detail above, the Court has cited *Red Lion* favorably on numerous occasions in the last ten years. In the 1990's, Congress passed several laws explicitly or implicitly premised on the scarcity justification. *See* 1990 Children's Television Act, codified

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<sup>4</sup> Commenters rely heavily on the *Time Warner II* dissent's critique of *Red Lion* to support their argument that broadcast frequencies are not uniquely scarce. *See, e.g., NAB Comments* at 12, *CBS Comments* at 28-29. However, the *Time Warner II* dissent explicitly stated that *Red Lion* remained good law, the crucial point being that it balked in extending the holding of *Red Lion* to DBS. *Time Warner II*, 105 F.3d at 724 n.2. Nevertheless, UCC *et al.* submit that the dissent's understanding of scarcity is flawed. As explained in Part I.B, scarcity does not turn on the number of channels available to the licensee. Rather, it turns on the number of available frequencies. *See Red Lion*, 395 U.S. at 400.

at 47 U.S.C. §§ 303a-b (conditioning license renewal upon demonstration that broadcaster had met the educational and informational needs of children); 1992 Cable Television Consumer Protection and Competition Act, § 4 codified at 47 U.S.C. § 614 (mandating cable carriage of local broadcast stations), § 25 codified at 47 U.S.C. § 335(b) (requiring DBS operators to set aside a percentage of channel capacity for noncommercial educational and informational programming); 1996 Telecommunications Act, § 201 codified at 47 U.S.C. § 336 (requiring DTV licensees to serve the public interest, convenience, and necessity).

Even if there were any basis to commenters' claims, the Commission is not free to disregard *Red Lion*. Only the Supreme Court has the authority to overrule *Red Lion*, and as demonstrated above, it does not seem so inclined. *See RTNDA v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) (stating that "[a]lthough *Red Lion* has been 'the subject of intense criticism,' it is still binding precedent") (citing *Time Warner II*, 105 F.3d at 724 n.2); Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 284 n.61 (1999). As the Commission recognized more than a decade ago, "to date the Court has determined that governmental regulation of broadcast speech is subject to a [lenient] standard of review under the First Amendment . . . . Until the Supreme Court reevaluates that determination, therefore, we shall evaluate the constitutionality of the fairness doctrine under the standard enunciated in *Red Lion* and its progeny." *Syracuse Peace Council*, 2 FCC Red at 5048. That statement is still applicable today.

## **2. The underlying basis of scarcity persists.**

Many commenters attack the foundation of scarcity by arguing that the increase in both broadcast and media outlets overall indicate that scarcity no longer exists. *See, e.g., CBS*

*Comments* at 19; *NAB Comments* at 12. These commenters fundamentally misconstrue how the Supreme Court understood the meaning of scarcity. The *Red Lion* Court held that, with regard to the broadcast spectrum, "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had," and thus it was "essential for the Government to tell some applicants that they could not broadcast at all because there was room only for a few." 395 U.S. at 388. The Court continued:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. . . . It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

395 U.S. at 388-89. The *Red Lion* Court concluded that:

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

395 U.S. at 390.

In sum, the meaning of scarcity is that "as a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." *Id.* at 390; *see also CBS v. DNC*, 412 U.S. 94, 101 (1972) ("[b]roadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated"); *NextWave*, 200 F.3d at 50. Therefore, the argument by several commenters that a credible scarcity analysis

should include an assessment of outlets in other media is incorrect under *Red Lion*.

It remains true today, as it did thirty years ago, that many more people want to broadcast than there are available frequencies.<sup>5</sup> Scarcity is not going to disappear any time soon, and commenters, as well as the Commission, know this all too well. In fact, broadcasters are basically opposing the creation of low power FM radio on scarcity grounds. *Creation of Low Power Radio Service*, MM Dkt. No. 99-25, Report and Order at ¶ 57 (rel. Jan. 27, 2000) ("*LPFM Order*"). Broadcasters are fighting tooth and nail to keep churches and community organizations from getting on the airwaves because they claim the added voices will cause interference. Remarks by Chairman William Kennard Before the National Association of Broadcasters Convention, <<http://www.fcc.gov/Speeches/Kennard/2000/spwek010.html>> (last visited Apr. 12, 2000). *See also USCC Comments* at 2. In addition, the Commission tacitly acknowledged in the *LPFM Order* the persistence of scarce frequencies by declining to extend low power licenses to the AM band because of the "extent of congestion." *LPFM Order* at ¶ 56.<sup>6</sup>

Moreover, Congress exacerbated the scarcity of broadcast frequencies by limiting eligibility for digital licenses solely to broadcasters already licensed for analog stations. *See* 47 U.S.C. § 336(a)(1). By excluding any new voices from the opportunity to obtain a digital television license, Congress reinforced the inherent physical limitation in broadcasting,

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<sup>5</sup> *See* Testimony of Henry Geller before the Senate Rules Committee on Campaign Finance Reform, May 15, 1996 (explaining there are no open television frequencies in any large market and any transfer of stations in such densely populated areas engenders a very large price).

<sup>6</sup> In creating the service, the Commission also noted that "the large number of existing FM stations precluded us from designating any specific frequencies for *LPFM* service, as no such channels are available throughout the country." *LPFM Order* at ¶ 56.

perpetuating the scarcity of broadcast licensees. Furthermore, although Congress completely revamped the framework of communications law in the 1996 Telecommunications Act, it notably did not reject *Red Lion*, scarcity or the public trustee system developed under Title III.<sup>7</sup> In fact, Congress explicitly affirmed public interest obligations and the public trustee system. *See* 47 U.S.C. § 336(d).

Thus it is clear that scarcity, in the sense understood by the Court in *Red Lion*, still exists. However, even assuming *arguendo* that scarcity concerned the total number of broadcast outlets, scarcity still remains. The actual number of television stations has not increased so dramatically since 1969.<sup>8</sup> But more importantly, the number of broadcast owners has steadily decreased.<sup>9</sup> Last summer, the FCC rescinded its longstanding policy preventing an entity from holding more than one broadcast license in a market. *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999). As a result, the top 25 station groups "now

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<sup>7</sup> *See also UCC III*, 707 F.2d 1413, 1430 n.50 (D.C. Cir. 1983) ("[i]t should be noted that Congress has not overturned by legislation this consistent course of administrative practice, thereby providing implicit approval for such Commission interpretations").

<sup>8</sup> *See* Henry Geller, *Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy*, in *DIGITAL BROADCASTING AND THE PUBLIC INTEREST* 37, at 39 (1998) ("[t]he scarcity relied upon in *Red Lion* is that many more people want to broadcast than are available frequencies or channels. That same scarcity indisputably exists today. *Red Lion* was a radio case, and in 1969 when it was decided, there were roughly 7,000 stations. It is ludicrous to argue that the public trustee scheme is constitutional at 7,000 but unconstitutional at 11,500 (the number of stations broadcasting today)").

<sup>9</sup> Since the owners of television stations ultimately determine the content, diversity is more properly assessed by looking at the number of owners than the number of channels. Thus, NAB's claim that the "transition to digital broadcasting should lead to even greater abundance of broadcast channels and program options," *NAB Comments* at 13, does nothing to reduce scarcity or increase diversity, since it is still the same small number of licensees that will determine what program options are offered.

control nearly 42% of the country's commercial TV stations." Elizabeth A. Rathburn, *Top 25 Television Station Groups: Down in Deregulation Dumps*, BROADCASTING & CABLE, Apr. 10, 2000, at 73. This growth in consolidation has been steadily rising for the past five years. *See id.* Thus, the diversity of voices in the TV broadcast industry is in steady decline, and this trend will likely continue in the transition to digital.<sup>10</sup>

Finally, the existence of non-broadcast outlets does not undermine the scarcity doctrine in the sense it was understood by the *Red Lion* Court. As discussed above, the relevant analysis concerns the scarcity of broadcast frequencies. *See* discussion, *supra* at 5-6. Yet, even if the FCC were to take into account the existence of non-broadcast media, such as cable and Internet, these media do not typically provide locally-oriented issue programming. *See UCC et al. Comments* at 12-14.

In light of *stare decisis* and the continued reality of scarcity, the Commission must consider the constitutionality of proposed public interest requirements, such as minimum local programming and public discourse obligations, "under the relaxed standard of scrutiny that the court has applied to the traditional broadcast media." *Time Warner I*, 105 F.3d at 975. As further elaborated in the following section discussing the proper First Amendment analysis, such proposals easily pass constitutional muster.

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<sup>10</sup> A few commenters also criticize the scarcity rationale on the grounds that even if scarcity does exist, it is not grounds for the disparate regulation of the broadcast medium as compared to other media. *See, e.g., Media Institute* at 20. As discussed in more detail in Part II, *supra*, the scarcity inherent in broadcasting is distinct not only because of the unusually high demand for spectrum with respect to supply and the need to prevent interference from competing voices, but also because of the government subsidy and selection of the speakers involved in the allocation of licenses. This is patently distinguishable from other forms of media such as newspapers.

**B. Minimum Public Interest Obligations Such as Local Programming Guidelines and Political Discourse Obligations Do Not Constitute Unconstitutional Conditions Required of the Broadcast Licensee.**

In addition to challenging the validity of *Red Lion*, some commenters oppose enhanced public interest obligations on the grounds that they would improperly interfere with the editorial discretion of broadcasters and constitute unconstitutional conditions. *See NAB Comments* at 32; *CBS Comments* at 55. However, as discussed below, minimum local programming and political discourse obligations further the First Amendment rights of the viewing public. In addition, such requirements would be content and viewpoint neutral and thus would not unconstitutionally interfere with the rights of broadcasters more than is necessary to promote the compelling government interests of ensuring public access to a diversity of sources of information and maintaining an informed electorate.

**1. Minimum public interest obligations promote values central to the First Amendment.**

The justification for placing programming conditions on licensees lies within the First Amendment itself. "It is the rights of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390. As *Red Lion* explained, the public has a First Amendment right to information concerning such primary issues as local public affairs and political discourse. *Id.* As numerous scholars have explained, under certain circumstances, the government can play a role in promoting public debate and democratic goals consistent with the First Amendment.<sup>11</sup> With respect to broadcast television, "[p]ublic interest obligations imposed

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<sup>11</sup> See generally Charles W. Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1997); Cass Sunstein, DEMOCRACY AND THE PROBLEM OF FREE

on broadcasters recognize the critical role these channels of communication play in our political and civic dialogue." Logan, 85 CAL. L. REV. at 1720.

Minimum local programming requirements and free time proposals are therefore constitutional because they directly further the First Amendment rights of the American public. In *Time Warner I*, the D.C. Circuit applied *Red Lion*'s relaxed standard of scrutiny to broadcasting, and upheld a statutory requirement that DBS operators use a specified percentage of their channel capacity for noncommercial educational and informational programming against a First Amendment challenge. 93 F.3d at 957. The court relied on the fact that the DBS set aside furthered the "right of the public to receive suitable access to social, political, esthetic, moral and other ideas." *Id.* at 975 (quoting *Red Lion*, 395 U.S. at 390). The DBS set aside also promoted a "diversity of views and information," an "interest that lies at the core of the First Amendment." *Id.* As in the DBS set aside, local programming and political discourse obligations are constitutional because they directly seek to accomplish similar goals. *See UCC et al. Comments* at 9-20; *Reply Comments of Alliance for Better Campaigns* at 6-10. These recommendations promote a wide availability of information about public affairs and political issues that is essential to the welfare of the American public.<sup>12</sup>

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SPEECH (1993); Harry Kalven, Jr., A WORTHY TRADITION : FREEDOM OF SPEECH IN AMERICA (1988); Lee Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 7 U. MICH. J.L. REF. 1 (1976); Jerome A. Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Zechariah Chafee, Jr., FREE SPEECH IN THE UNITED STATES (1941).

<sup>12</sup> *See Turner I*, 520 U.S. at 663 ("it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public") (citations omitted); *Garrison v. Louisiana*, 379

**2. Minimum public interest requirements are content and viewpoint neutral.**

Even if the Commission were to apply a higher standard of First Amendment scrutiny, as some commenters suggest, local programming and political discourse obligations would still be upheld as constitutional. These proposed requirements are constitutional because they not only directly further the First Amendment rights of the American public, but are also content and viewpoint neutral.

In *Time Warner I*, the court found that the DBS set aside not only passed constitutional muster under the relaxed scrutiny of *Red Lion*, but also noted that the requirement would survive a higher level of scrutiny because it was not content-based. *See Time Warner I*, 93 F.3d at 977. The crucial fact was that the DBS set aside did not "dictate the specific content of the programming that DBS operators are required to carry." *Id.* at 977; *see also Turner II*, 520 U.S. 180 (upholding "must-carry" rules of the 1992 Cable Act requiring cable operators to carry local broadcast programming because the rules were content neutral, promoted the important government interests of preserving local broadcasting, and did not burden more speech than was necessary to further that interest).

Similar to the DBS set aside for non-commercial educational programming in *Time Warner I*, local programming requirements and free air-time for candidates would be clearly

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U.S. 64, 74-75 (1964) ("speech concerning public affairs is . . . the essence of self-government"); *CBS v. FCC*, 453 U.S. 367, 396 ("[w]e have recognized that 'it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day'") (citations omitted); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office").

constitutional as content neutral requirements. At bottom, these recommendations "serve similar objective[s]: [their] purpose and effect is to promote speech, not to restrict it." *Time Warner I*, 93 F.3d at 977 (citations omitted). As discussed above, the proposed rules are aimed at promoting "the widest possible dissemination of information from diverse and antagonistic sources" and "seek to ensure that the public receives through this medium a balanced presentation of information on issues of public importance." *Time Warner I*, 93 F.3d at 975 (citations omitted).

Moreover, like the DBS set aside, local programming and political discourse obligations would not dictate the specific type of programming a broadcaster must air. These recommendations "do not require or prohibit the carriage of particular ideas or points of view." *Time Warner*, 93 F.3d at 977 (citing *Turner I*, 512 U.S. at 645-46). Nor do they penalize broadcasters "because of the content of their programming." *Id.* In fact, the proposed local programming guidelines are less burdensome than the must-carry rules because they do not compel broadcasters to affirm a point of view with which they disagree and leave the broadcaster free to determine what content it will air to meet the guidelines.<sup>13</sup>

In this vein, the proposed recommendations are completely distinguishable from the regulations at issue in *League of Women Voters*, 468 U.S. 364 (1984). There, the Court struck down a statute that banned "any 'noncommercial educational broadcasting station which receives a grant from the Corporation [of Public Broadcasting]' [from] 'engage[ing] in editorializing.'"

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<sup>13</sup> In addition, free air-time proposals are also less burdensome vis-a-vis the cable operator because they would only require a broadcaster to provide a limited amount of free time during limited time periods, whereas the must-carry rules require cable operators to carry entire channels on an ongoing basis.

*Id.* at 366. The Court invalidated this provision because it "restricted the expression of editorial opinion on matters of public importance," a communication "entitled to the most exacting degree of First Amendment protection." *Id.* at 376 (citations omitted). Local programming and political discourse obligations do no such thing. Instead, these proposals "advance[] the substantial government interest in ensuring balanced presentations of views in this limited medium and yet pose[] no threat that a 'broadcaster [would be denied permission] to carry a particular program or to publish his own views.'" *Id.* at 378-79 (citations omitted).

But even if the proposed recommendations were found to be content based, they would still be permissible under the First Amendment because they are viewpoint neutral and are aimed at ensuring that the license is used for the purpose it was issued for in the first place. The key to determining whether a condition placed upon a government subsidy is unconstitutional is whether it is viewpoint discriminatory and reasonably related to the purpose of the subsidy. *See* Logan, 83 CAL. L. REV. at 1725-1745 (explaining in detail how public interest programming conditions are valid under an unconstitutional conditions analysis). For example, in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court upheld the "decency and respect criteria" of a challenged NEA grant statute, despite its "inherently content-based" nature, because the clause did not "silence speakers by expressly threatening censorship of ideas." *Id.* at 583.<sup>14</sup> In another government subsidy case, *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court

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<sup>14</sup> Additionally, the *Finley* court cited *Red Lion* to emphasize that "[u]nless and until [the statute] is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision." *Finley*, 524 U.S. at 587 (citing *Red Lion*, 390 U.S. at 396). In this case, there is no indication that a requirement to air local programming or provide free time for political candidates would in any way suppress disfavored viewpoints.

upheld the government's decision not to fund family planning projects that included abortion counseling because it was "not denying a benefit to anyone, but [] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196.<sup>15</sup>

Broadcasters are also given a subsidy in the form of free access to the spectrum. It is appropriate for the government to impose public interest obligations on these licensees in exchange. *See* discussion, *infra* Part II. Similar to the legislation upheld in *Finley*, minimum local programming requirements and free air-time for political candidates would be permissible conditions on the broadcast license that would not have the purpose or effect of silencing the speech of broadcasters.<sup>16</sup> To the contrary, such requirements, like those upheld in *Rust*, simply insist that the public airwaves be used for the purposes for which they were licensed.<sup>17</sup>

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<sup>15</sup> The *Rust* Court also explained that the condition was not viewpoint discriminatory because it did not compel funding recipients to give up abortion related speech or directly compromise their ability to speak on abortions issues. *Rust*, 500 U.S. at 196-197. Similarly, the proposed local programming and free time obligations "do not force [a TV licensee] to give up" any type of speech and "leave the [licensee] unfettered in its other activities." *Id.*

<sup>16</sup> In contrast, the cases commenters cite in opposition to minimum public interest requirements as unconstitutional conditions involve government discrimination on the basis of viewpoint or attempts to silence speech. For example, CBS cites *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), for the proposition that the government cannot deny benefits "on a basis that infringes his constitutional protected interests." But *Perry* involved a public school that decided not to renew a teacher's contract specifically because of the teacher's speech against the school. CBS also relies on *Speiser v. Randall*, 357 U.S. 513 (1958). However, *Speiser* concerned a portion of the California Constitution that the Court invalidated because the statute denied tax-exempt status to persons who advocate the overthrow of the government. These cases aim at silencing viewpoints, while the proposed public interest obligations do not.

<sup>17</sup> The foundation of the broadcast licensing system is premised on affording "each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." *See Turner I*, 512 U.S. at 661 (citations omitted). "The importance of local broadcasting can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *Id.* Accordingly,

In sum, minimum local programming and political discourse obligations promote the First Amendment rights of the public and place minimal burdens on the speech rights of broadcasters. Therefore, the Commission should dismiss all arguments that such requirements may be unconstitutional.

**C. Any Takings Claim Under the Fifth Amendment Fails Because Licensees Have No Property Interests in the Spectrum.**

In addition to raising arguments under the First Amendment, CBS argues that a free air-time requirement for political candidates would constitute "a taking of private property for public use without just compensation, in violation of the Fifth Amendment to the Constitution." *CBS Comments* at 65-66. Apart from the fact that this argument is inconsistent with CBS's contention that the spectrum is incapable of "ownership," *id.* at 27, the Commission should wholly reject CBS's contention because broadcasters have no property interest in the spectrum.<sup>18</sup>

The relevant passages of the Communications Act are clear on this issue. Section 301 of the Communications Act explicitly states that:

*It is the purpose of this Act to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions and period of the license.*

47 U.S.C. § 301 (emphasis added). Section 304 of the Communications Act reads:

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requiring DTV licensees to air a minimum amount of local programming directly furthers the basis for which broadcasters were awarded the license in the first place.

<sup>18</sup> See Reed E. Hundt, *The Public's Airwaves: What does the public interest require of television broadcasters?*, 45 DUKE L.J. 1089, 1109 (1996); see also Jeffrey A. Levinson, *An Informed Electorate Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U.L. REV. 143, 165 (1992).

No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

47 U.S.C. § 304.<sup>19</sup> Accordingly, it is clear that broadcasters have no property right in their licenses, and reasonable conditions placed by Congress or the Commission on a broadcasters' use of the spectrum does not amount to a taking that would trigger constitutional concerns.

The Supreme Court explicitly recognized this principle in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). There, the Court held that the Commission could not consider the economic impact on an existing licensee in its determination of whether to award a new license because "[t]he policy of the [Communications] Act is clear that *no person is to have anything in the nature of a property right as a result of the granting of a license.*" *Sanders Bros.*, 309 U.S. at 475 (emphasis added). Later, in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), holding that the Commission must designate a comparative hearing when mutually exclusive applications are presented, the Court explained that the FCC could revoke a broadcaster's license pursuant to any established procedure because licensees do not have any vested interest in any frequency. *See id.* at 331-332. *See also Red Lion*, 395 U.S. at 393

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<sup>19</sup> Moreover, the application for a television broadcast station license requires the applicant to state that it:

waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application.

("[l]icenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them").

Most recently, the Second Circuit reaffirmed the principle that no property right attaches to a license to use the spectrum in *NextWave Personal Communications v. FCC*, 200 F.3d 43 (2nd Cir. 1999). The court explained that "[a] license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms . . . Licenses are revocable by the FCC, and the FCC can impose conditions upon them in the name of the public good." *NextWave*, 200 F.3d at 51.<sup>20</sup>

Finally, CBS's sole support for its position is misplaced. It cites *Penn Central Transportation v. City of New York*, 438 U.S. 104, 123 (1978), for the proposition that even if requiring free time was reasonable, the Fifth Amendment prevents the government from placing the burden of reforming the campaign finance system solely on broadcasters. *See CBS Comments* at 65. However, a full reading of *Penn Central* demonstrates that the case also stands for the proposition that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Id.* at 124 (citations omitted). In *Penn Central*, the Court held that because the owner did not have full property rights in the airspace above the

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<sup>20</sup> *See also NAB v. FCC*, 740 F.2d 1190, 1211 (D.C. Cir. 1984) (upholding the FCC's decision to give spectrum priority to DBS users over Fixed Service ("FS") partially on the grounds that FS licensees had no entitlement to their portion of the spectrum); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 61 (D.C. Cir. 1972) (concluding that under the Act, no person is to have anything in the nature of a property right); *American Broadcasting Co. v. FCC*, 191 F.2d 492, 497 (D.C. Cir. 1951) ("the policy of the Communications Act is that a broadcast licensee does not have a property right as a result of the granting of a license").

Grand Central terminal, there was no takings violation in preventing the owner of the terminal from building offices above the station. *Id.* at 125.

Looking at the particular circumstances of the case at hand, because a DTV licensee does not have property rights in the spectrum, a reasonable requirement to provide some minimum amount of free time would not constitute an illegal taking. *See also Reply Comments of Alliance for Better Campaigns.* Thus, CBS's argument that free time obligations would constitute a taking in violation of the Fifth Amendment amounts to no more than wishful thinking.

## **II. THE COMMUNICATIONS ACT REQUIRES THE FCC TO ADOPT PUBLIC INTEREST OBLIGATIONS FOR DTV BROADCASTERS.**

As well as arguing that certain minimum public interest obligations may be unconstitutional, a few parties contend that the Commission lacks the statutory authority to adopt such requirements. Some challenge the fundamental structure of the *quid pro quo* between the public and the broadcasters established by the Communications Act. Others contend that the deregulatory impetus of the 1996 Telecommunications Act somehow limits the Commission's ability to adopt minimum public interest obligations for DTV licensees. Still other commenters specifically argue that the FCC lacks the authority to adopt quantitative programming requirements for digital broadcasters. As discussed below, the Commission should wholly dismiss these contentions.

### **A. The Communications Act Establishes a *Quid Pro Quo* of Public Interest Programming in Exchange for the Free Use of the Spectrum.**

The Communications Act of 1934 established a regime under which broadcast licenses are awarded to private parties free of charge who in exchange volunteer to serve as trustees of the

public interest.<sup>21</sup> In addition to the initial selection for this subsidy, the special status of broadcast licensees has been continuously reinforced by preferential treatment from Congress.<sup>22</sup> A few commenters attempt to discredit the existing *quid pro quo* structure by first challenging its foundation - that no one, including the government, can "own" the spectrum. *See Media Institute Comments* at 20; *CBS Comments* at 28-31.<sup>23</sup>

But whether or not the government "owns" the spectrum is irrelevant. The rationale underlying *quid pro quo* turns on the fact that the government, by necessity, controls the

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<sup>21</sup> *See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (explaining that a broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations"); Logan, 85 CALIF. L. REV. at 1731 ("broadcasters have received, without charge, a direct government allocation of their means of communication – the right to use the spectrum. This benefit has been conferred on broadcasters on the explicit condition that they will serve the public interest in operating their stations, including the programming they air"). *See also Comments of UCC et al.* at 2-4.

<sup>22</sup> *See, e.g.,* 47 U.S.C. § 614 (mandating cable carriage of local broadcast stations); 47 U.S.C. § 336(a)(1) (awarding additional spectrum for digital television license free of charge to incumbent broadcasters); 47 U.S.C. § 309(j)(2)(B) (exempting digital broadcast licenses from auction proceedings). In other words:

[T]he fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others....[E]xisting broadcasters [have] a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by Government.

*Red Lion*, 395 U.S. at 400.

<sup>23</sup> On the one hand, CBS argues that no one, not even the government, "owns" the spectrum. However, CBS also contends that a free time requirement would constitute an unconstitutional taking because broadcasters have property rights in their licenses. *See Comments of CBS* at 65. CBS cannot have it both ways.

spectrum and decides who has access to it.<sup>24</sup> Such government control has existed for over seventy years. It is premised on the fact that because of interference, not everyone has unfettered access to the spectrum, and because of scarcity, the government must license access to some while denying it to others. *See* discussion, Part I.A. *supra*.

In a recent decision, the Second Circuit explained that although the government does not technically own the spectrum, the spectrum is subject to extensive government regulation because "[w]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." 200 F.3d at 50 (*quoting Red Lion*, 395 U.S. at 375-376) (citations omitted).<sup>25</sup> Recognizing this reality, Congress assumed government control of the airwaves in the 1927 Radio Act and made explicit that its allocation of spectrum to competing applicants free of charge necessarily carried a corresponding obligation to serve the public interest in return. *See* Krattenmaker, TELECOMMUNICATIONS LAW AND POLICY 11 (1994). When Congress revised the 1927 Radio Act in the Communications Act of 1934, it incorporated the key concepts of public control and licensee public interest requirements. *See* 47 U.S.C. §§ 301, 303, 307(b), 309(a); H.R. Conf. Rep. No. 1918, 73<sup>rd</sup> Cong. 2<sup>nd</sup> Sess. at 48 (1934).

Under the regulatory system devised by Congress to ensure that the spectrum be used in

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<sup>24</sup> Unlike, for example, the newspaper industry, where competitors pay full market price to acquire the resources necessary to enter the market, broadcasters rely directly on the government's licensing of the spectrum to them. *See* Logan, 85 CALIF. L. REV. at 1731.

<sup>25</sup> It is, therefore, nonsensical to maintain that the government does not or could not "own" the spectrum due to its geophysical properties. *See, e.g., Media Institute Comments* at 20 ("[n]o one would assert government ownership of gravity as a justification for regulation - say, to support a federal excise tax on automobiles for the privilege of keeping cars on the road.")

the public interest, Congress delegated the Commission exclusive jurisdiction that extends "not only to the granting of licenses, but to the conditions that may be placed on their use."

*NextWave*, 200 F.3d at 54. As the *NextWave* court explained:

An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.

*Id.* (quoting *P & R Temmer v. FCC*, 743 F.2d 918, 927 (D.C. Cir. 1984)).

Since establishing the *quo pro quo* principle over seventy years ago, Congress has continually recognized that government control of the spectrum justifies certain conditions to be placed on its use. The Act itself, and subsequent amendments, specify certain conditions on the broadcast license granting access rights to political candidates. *See* 47 U.S.C. § 312(a)(7) (reasonable access), § 315(a) (equal opportunities), and § 315(b) (lowest unit charge). In addition, Congress passed the Children's Television Act in 1990, conditioning license renewal on, *inter alia*, whether broadcasters serve the informational and educational needs of children through programming. 47 U.S.C. § 303a-b.<sup>26</sup>

In the 1996 Telecommunications Act, Congress explicitly reaffirmed the *quid pro quo* between the public and broadcasters. *See* 47 U.S.C. § 336(d). As explained in the comments of

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<sup>26</sup> The courts have also recognized the exchange of free spectrum conditioned on public interest obligations. *See CBS v. FCC*, 453 U.S. at 395 (1981) ("a licensed broadcaster is 'granted free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public interest obligations.'"); *Red Lion*, 395 U.S. at 400 (recognizing the special preferential treatment the government has given broadcasters in exchange for program regulation). *See also UCC v. FCC*, 707 F.2d 1413, 1427-1428 (D.C. Cir. 1983) (acknowledging that the D.C. Circuit has long accepted the *quid pro quo* nature of the public trustee system enshrined in the Communications Act) (citations omitted).

UCC *et al.* and PBTv, Congress not only extended public interest requirements to digital broadcasters in exchange for the free use of the spectrum, Congress also continued to give broadcasters preferential treatment by limiting DTV licenses to incumbent broadcasters and exempting licensees from the auction process. *See UCC et al. Comments, PBTv Comments.* The legislative history confirms this interpretation.<sup>27</sup>

When it is in their interest to do so, broadcasters emphasize their special responsibilities as public trustees.<sup>28</sup> Indeed, in lobbying for the DTV spectrum, NAB President Edward Fritts stressed broadcasters' *quid pro quo* with the American public as justification for preferential treatment, such as no spectrum fees.<sup>29</sup> In fact, in this very proceeding, NAB asks that the must-

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<sup>27</sup> The Senate Report accompanying the 1996 Act stated that "[t]he bill permits broadcasters to use their spectrum for new services so long as they continue to provide broadcast programming that meets their public interest obligations." S. REP. NO. 230, 104<sup>th</sup> Cong., 1st Sess. 8 (1995). The House of Representatives conference report explicitly "adopts the Senate language that the Act's public interest obligations extend to new licenses and services." H.R. CONF. REP. NO. 458, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 30 (1996).

<sup>28</sup> For example, in pushing for the must-carry rules in the 1992 Cable Act and defending the regulations in the courts, "[t]he broadcast industry certainly emphasized that it is required to provide programming in the public interest when making its case for why mandatory carriage serves the public." Gretchen Craft Rubin, *Quid Pro Quo: What Broadcasters Really Want*, 66 GEO. WASH. L. REV. 686, 695 (1997).

<sup>29</sup> *See Senate Commerce Telecommunications Improvements on S. 1822 Before the Commerce Science and Transportation Committee*, 102<sup>nd</sup> Cong., 1st Sess. (1994) (statement of Edward Fritts, President & CEO of NAB); Henry Geller, *Public Interest Obligations of Broadcasters in the Digital Era: Law and Policy*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 37, 39 n.9 (1998). *See generally* Rubin, 66 GEO. WASH. L. REV. at 692- 695 (discussing the immense benefits the broadcast industry has garnered from the FCC and Congress by lobbying on the plank that broadcasters provide local public service). Rubin also points out the inconsistency between the broadcast industry's claim of public service and its desire to avoid any meaningful application of that duty. *See id.*; *see also* Henry Geller, *Implementation of "Pay" Models and the Existing Public Trustee Model*, in DIGITAL BROADCASTING AND THE PUBLIC INTEREST 227, 233 n.16 (1998).

carry rules be applied in the digital context. *See NAB Comments* at 3. If broadcasters are to continue to enjoy the benefits of free use of the spectrum and perhaps even must-carry, they should not be heard to complain when the Commission demands that they provide concrete service to the public in return.

**B. The Telecommunications Act of 1996 Makes Clear that DTV Broadcasters Must Continue to Serve the Public Interest and the Commission Has the Authority to Determine How the Public Interest Should Be Served.**

Some commenters argue that because the primary purpose of the 1996 Telecommunications Act was to reduce regulation and encourage rapid deployment of new technologies, imposing new or enhanced public interest requirements on DTV broadcasters would contravene Congressional intent. *See, e.g., Media Institute Comments* at 4; *NAB Comments* at 5-6. However, this interpretation is inconsistent with the plain language of the Act and the Commission's traditional authority to adapt the public interest standard to the dynamic medium of broadcasting.

Section 336(d) specifically states that "[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity." 47 U.S.C. § 336(d). Further, the Act explicitly directs the Commission to adopt such regulations to ensure that ancillary and supplementary services are consistent with the public interest, convenience, and necessity. 47 U.S.C. § 336(a)(2). Congress also granted the FCC authority to adopt any additional public interest obligations it deems necessary. *See* 47 U.S.C. § 336(b)(5). Thus, these specific manifestations of Congressional intent negate any general deregulatory purpose with respect to the FCC's authority to regulate DTV licensees in the public interest. *See Varsity Corp. v. Howe*, 516 U.S. 489, 519 (1996) ("[t]he

law is settled that however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment").<sup>30</sup>

NAB erroneously contends that the award of additional spectrum provides no basis for new public interest obligations because Congress chose not to require broadcasters to pay for the spectrum. *See NAB Comments* at 6-8. In actuality, Congress clearly intended for digital licensees to continue to serve the public interest. The Commission has a duty to formulate and revise its public interest policies to reflect changed circumstances in the digital era. *See CBS v. DNC*, 412 U.S. at 118 ("[the FCC] must adjust and readjust the regulatory mechanisms to meet changing problems and needs"); *accord Red Lion*, 395 U.S. at 394. Indeed, the Commission has already recognized that digital technology requires re-conceptualization of public interest obligations in light of the new capabilities. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12823 (1997).<sup>31</sup> Therefore, revising requirements such as closed captioning is clearly warranted, in light of the fact that DTV enables broadcasters to improve access for the deaf or hard of hearing. *See UCC et al. Comments* at 20-22.

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<sup>30</sup> In addition, it is clear from the Act that when Congress desires to limit the Commission's authority or wants the FCC to undertake a specific course of actions it does so explicitly. *See, e.g.* Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, § 202 (Feb. 8, 1996) (revising certain of the Commission's radio and television broadcast ownership rules and instructing the Commission to reform others).

<sup>31</sup> Contrary to the assertions of NAB, the Commission "must be given ample latitude to 'adapt its rules and policies to the demand of changing circumstances.'" *Motor Vehicles Mfrs. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). In light of digital television's new capabilities and the failure of broadcasters to meet the informational needs of their communities, *see* discussion, Part III, *infra*, the Commission has more than enough grounds upon which to adopt new and enhanced public interest obligations.

NAB also maintains that new and enhanced obligations are inappropriate because the temporary allotment of free additional spectrum for DTV did not constitute a "windfall." *See NAB Comments* at 5-6. NAB points out that no other communications service adopting digital technology has had to return spectrum. *Id.* at 7. But this claim misses the point. Cellular, paging, and SMRS operators that have converted to digital have done so without getting additional spectrum in the first place. Broadcasters not only got additional spectrum to convert to digital, they got it for free. Estimates of the value of the additional spectrum licenses received range from \$20 to \$132 billion. *See Rubin*, 66 GEO. WASH. L. REV. at 693.<sup>32</sup> Given the revenue potential of the new spectrum, even *Broadcasting and Cable* magazine observes that "increasingly it looks like they did get an incredible deal." *Now You Know: Bewildered by the DTV Revolution? Broadcasting and Cable is here to help sort it out*, BROADCASTING AND CABLE, April 10, 2000, at 34.

**C. The Commission has the Authority to Adopt Minimum Public Interest Requirements Such as Local Programming Guidelines.**

NAB and a few other commenters also contend that the FCC has no authority to adopt quantitative program regulations. *See, e.g., NAB Comments* at 37. However, as the history of broadcast regulation demonstrates, this is patently incorrect. Even now, the FCC has quantitative programming guidelines for children's educational programming to ensure that broadcasters

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<sup>32</sup> NAB also notes that broadcasters will incur substantial costs in the transition to digital. But all parties transforming their technologies to digital are incurring substantial costs, not just broadcasters.

meet their obligations under the Children's Television Act.<sup>33</sup>

In fact, the Commission has had quantitative guidelines for news, public affairs and other non-entertainment programming in the past. *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Requirements for Commercial Television Stations*, 98 FCC Rcd 1076 (1984). The Commission eliminated these quantitative guidelines after the court affirmed its earlier decision to deregulate similar provisions for radio licensees. *See UCC v. FCC*, 707 F.2d 1413,1442 (1983) ("*UCC III*"). In affirming that decision, the court noted that "[t]he Commission consistently stressed that if the consequences of this particular deregulation are not as predicted, it will 'revisit the area and take appropriate action in another rulemaking proceeding.'" *Id.* at 1442.

The *UCC III* court found that the Communications Act "imposes on licensees an obligation to provide non-entertainment programming responsive to issues of concern in the community to be served." *UCC III*, 707 F.2d at 1429; *accord UCC v. FCC*, 911 F.2d 803, 810 (D.C. Cir. 1990) ("*UCC IV*") (discussing obligations of TV licensees in light of deregulation).<sup>34</sup> Some consideration as to quantity of programming, reasoned the court, is therefore not only permitted, but necessary when evaluating license renewal. *Id.* at 1428 ("[s]ince the Commission

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<sup>33</sup> *See Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10660, 10729 (1996). In addition, the Commission's rationale for rejecting broadcasters' constitutional objections to the children's programming guidelines is equally applicable to the local programming guideline context. *See id.* at 10728 - 10733.

<sup>34</sup> Indeed, as the court elaborated, "[c]ommon sense alone dictates that if the Commission has imposed a public interest obligation on radio licensees to provide programming responsive to community issues, the obligation simply cannot be fulfilled without licensees airing some irreducible minimum amount of broadcast minutes." *UCC III*, 707 F.2d at 1433.

has the power to make license determinations on the basis of programming, then it perforce has the power - and in fact the responsibility - to define the licensees' public interest obligations with respect to programming").<sup>35</sup>

Thus, nothing in the Communications Act prohibits the FCC from using quantitative guidelines to evaluate DTV licensees' program service to their communities. We agree with PBTv that in light of the failed experiment of the Fowler Commission with market forces, minimum guidelines are necessary now more than ever before.<sup>36</sup>

### **III. THE RECORD DEMONSTRATES THAT THERE IS A NEED TO ADOPT MINIMUM PUBLIC INTEREST OBLIGATIONS FOR ALL DIGITAL TELEVISION LICENSEES.**

Several commenters argue that broadcasters are voluntarily meeting their public interest obligations and that specific requirements such as local programming guidelines are thus unnecessary and burdensome. *See, e.g., BELO Comments at 7; CBS Comments at 7-8; NAB Comments at 35.* However, the record shows that sole reliance on voluntary efforts is clearly insufficient.

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<sup>35</sup> CBS argues that the Commission's public interest authority to place conditions, such as minimal local programming, on a license is limited to technical regulations such as requiring a licensee to operate during certain hours. *See CBS Comments at 31.* But as the Supreme Court has held, "the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic." *NBC v. United States*, 390 U.S. 319, 215 (citations omitted).

<sup>36</sup> *See PBTv Comments at 20-24.* Moreover, as we demonstrated previously, there are numerous benefits to using quantitative guidelines in addition to securing the First Amendment rights of the viewing public. *See UCC et al. Comments at 7-14. See also* Reed Hundt and Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11, 13 (1996) (arguing that minimum public interest requirements are not only necessary to ensure public service, but without any standards, the public interest obligation may be impermissibly vague under the First Amendment).

**A. There is Substantial Evidence that Many Broadcasters are Not Meeting the Educational and Informational Needs of the Communities they are Licensed to Serve.**

As the hundreds of letters submitted with PBTV's Comments demonstrate, many viewers are frustrated with the paucity of educational and informational programming on local television stations. *See PBTV Comments*, Appendix D.<sup>37</sup> These letters provide anecdotal evidence that many broadcasters are not adequately serving their communities. Additionally, a study of over 100 broadcast licensees conducted by the Benton Foundation found that 0.3% of broadcast time was devoted to public affairs programming in markets surveyed. *See id.* at App. B-1; *see also Michigan Consumer Federation Comments* at 5 (Detroit CBS owned and operated TV station provides no daily local news). In addition, the comments of United States Catholic Conference (USCC) demonstrate that many broadcasters are not airing locally originated or oriented public service announcements. *See USCC Comments* at 3-8.

**B. There is Nothing in the Record that Indicates that Minimum, Quantifiable Obligations are Not Necessary to Ensure that DTV Broadcasters Meet Their Obligation to Serve the Public Interest.**

Commenters opposing public interest obligations for DTV licensees have failed to provide credible evidence that broadcasters are meeting the educational and informational needs of their communities. A few parties rely on the 1998 NAB Report to support their assertion that broadcasters have an "outstanding record of voluntary public service" and therefore minimum

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<sup>37</sup> This outpouring of comments is even more significant in light of the fact that most viewers are not even aware that broadcasters are supposed to provide public interest programming. *See Lake, Snell, Perry and Associates DTV Survey, PBTV Comments*, App. B-3. When informed that licensees do owe public interest obligations, the majority of viewers usually conclude that broadcasters should be required to provide more educational and informational programming. *Id.*

public interest obligations are unnecessary. *See CBS Comments* at 5-11, *NAB Comments* at 9, 35.<sup>38</sup> However, the 1998 NAB Report is inherently suspect because of its self-serving nature and lack of independent verification. *See Methodological Evaluation of 1998 NAB Report, PBTV Comments*, App. B-2. Moreover, the 1998 Report suffers from methodological flaws in the composition of the sample size and valuation of PSAs aired by surveyed broadcasters. *Id.*

The recent *National Report on Local Broadcasters' Community Service*, April 2000 (2000 NAB Report) suffers from similar flaws. *See Methodological Evaluation of 2000 NAB Report, PBTV Reply Comments*, App. A. It is, at bottom, a self-serving, unverifiable public relations document.<sup>39</sup> Yet, even taking the study at face value, it demonstrates what happens when there are no quantitative programming guidelines. The Report boasts that "nearly two thirds (65 percent) of TV stations aired local public affairs programs of at least 30 minutes in length every week during the year." *Id.* at 3. Thus, even using NAB's own figures, over a third of TV stations responding to the survey aired less than 30 minutes of local programming a week.

The bulk of the 2000 NAB Report consists of anecdotes describing how some radio and television stations have acted as good corporate citizens in the past year. While the good deeds detailed in the 2000 NAB Report, *e.g.*, blood drives, collecting toys for tots, AIDS research fund-

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<sup>38</sup> In its comments, Belo submits a study claiming that six of its stations provide at least sixty hours per week of non-entertainment programming. *Belo Comments* at 8. Taken at face value, it only shows that six of the over 1,000 television licensees may be airing a minimum amount of local public affairs programming. The bottom line is that minimum requirements are necessary to ensure that all licensees honor their obligations. If Belo's stations really are providing the programming it claims, it should have no reason to strenuously oppose obligations requiring its stations to do what they are already doing.

<sup>39</sup> In fact, broadcasters' continued unsubstantiated claims of public service illustrate the need for minimum public interest obligations and meaningful disclosure requirements.

raising, are commendable,<sup>40</sup> they are the same type of public service and promotional activities undertaken by other businesses that do not get to use the public airwaves for free.<sup>41</sup> In short, the NAB study begs the real issue at hand -- whether TV licensees are providing programming that serves the educational and informational needs of their communities.<sup>42</sup> Only five of the seventy two pages address broadcasters' community affairs programming. *See* 2000 NAB Report at 64-70. And of the eleven examples, only two involve television stations.

Moreover, the \$8.1 billion figure repeatedly referred to in the 2000 NAB Report is clearly misleading. First, this figure counts as broadcasters' "contribution" to community service \$2.3 billion donated by viewers and listeners. *See* 2000 NAB Report at 7; Paige Alibiniak, *Service with an \$8B Smile*, BROADCASTING AND CABLE, April 10, 2000 at 24. In other words, the NAB attempts to justify broadcasters' public service by citing the money contributed by the public itself. *See Reply Comments of PBTv*, App. A; *Reply Comments of Benton*.

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<sup>40</sup> Several of the recent programs undertaken by broadcasters to create new opportunities for minorities and women, such as the Quetzal-Chase (formerly known as Prism) and Gateway funds, are also laudable and should be encouraged. *See CBS Comments* at 11. However, it should be noted that CBS, through the NAB, and also all 50 State Broadcasting Associations, are vehemently opposing the Commission's revised Equal Employment Opportunity rules, which require minimal recruiting, reporting and recordkeeping requirements. Additionally, as discussed earlier, broadcasters are currently waging an all-out assault against the FCC's attempt to give local church and community organizations access to LPFM. These actions call into question the degree of dedication the broadcast industry has toward community service.

<sup>41</sup> Corporations contribute tens of millions of dollars a year to the public out of their responsibility as good corporate citizens, not because of a specific statutory duty to serve the public interest. *See, e.g., 50 Largest Corporation Foundations by Total Giving*, <<http://fdncenter.org/grantmaker/trends/top50giving.html>> (last visited April 11, 2000).

<sup>42</sup> *See* Remarks by Chairman William Kennard Before the National Association of Broadcasters Convention, <<http://www.fcc.gov/Speeches/Kennard/2000/spwek010.html>> (last visited April 12, 2000).

The \$ 8.1 billion also includes \$ 5.6 billion of the supposed value of air time for public service announcements (PSAs). Of this amount, the only portion relevant to this inquiry is the alleged \$1.8 billion worth of PSAs run on television stations. *See* 2000 NAB Report at 7. It is clear that this figure is exaggerated. The Report arrives at this figure by collecting data from the stations that responded to the survey (about 73% of TV stations) and projecting the results over all television stations. *See* Albiniak at 24.<sup>43</sup> Because stations with poor records of public service are less likely to respond to the survey, it follows that the "projected" amount of PSAs aired across the population were substantially overstated. Furthermore, it is likely that the Report values the time donated to PSAs at an artificially high rate.<sup>44</sup> These two factors combine to create an artificially high calculation of the value of PSAs supposedly aired by broadcasters.

In sum, the Commission should heed the comments of the public and adopt public interest obligations to address the failure of many broadcasters' to provide local public affairs programming for the communities they are licensed to serve. The 2000 NAB Report and others

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<sup>43</sup> Further, in looking at the distribution of responding stations according to market size, proportionately more small market stations responded than large markets. *See* 2000 NAB Report at 6. This may also affect the validity of NAB's results. Small market stations usually air more PSAs because they are less able to sell their time than their counterparts in the large markets.

<sup>44</sup> The NAB Report asserts that the average TV station aired 142 PSAs per week. *See* 2000 NAB Report at 7. It then concludes, without explanation, that this number equates to \$1.5 million per station, or \$1.8 billion industry-wide. *Id.* Although the Report does not disclose how the value of PSA time was calculated, it likely used the same methodology as the 1998 Report. The 1998 Report used the "run-of-station rate," *i.e.*, the price per ad an advertiser pays to run ads during all broadcast times, to calculate the value of PSA time instead of the rate advertisers would typically pay during the time the PSA was actually aired. The rate distinction is crucial because most PSAs are run during non-prime time when rates are lower, or at times when stations are not able to sell the time at any price. Thus using the "run-of-the station rate" artificially inflates the value of the time. *See PBTV Comments* at App. B-2.

like it do nothing to dispel the mounting evidence that broadcasters are not satisfying the informational needs of their communities. It is now time for the Commission to "revisit the area and take appropriate action in another rulemaking proceeding." *UCC III*, 707 F.2d at 1442.

### CONCLUSION

For the foregoing reasons, the Commission should dismiss the arguments raised by broadcasters and others seeking to avoid any meaningful public interest obligations for DTV licensees. The constitutional arguments raised by these parties opposing new or enhanced public interest obligations are meritless. *Red Lion* still rules the jurisprudence of broadcast regulation. The scarcity of broadcast frequencies is as real today as it was over thirty years ago. Accordingly, the minimum public affairs programming obligations advanced by several public interest coalitions are per force constitutional because they promote the First Amendment rights of the American public. The statutory contentions advanced by some broadcasters are equally unconvincing. The 1996 Telecommunications Act continued the *quid pro quo* between the public and the broadcasters and expressly negated any deregulatory intent with respect to DTV broadcasters' public interest obligations. Moreover, the Act grants the Commission ample authority to adopt meaningful programming conditions for DTV licensees. Finally, the record shows that many licensees are failing to meet their obligation to serve their communities' educational and informational needs.

*UCC et al.* therefore reiterate their proposal that the Commission should issue a Notice of Proposed Rulemaking to determine the public interest obligations of digital licensees. As discussed in the comments of *UCC et al.*, the Commission should adopt minimum public interest obligations to ensure that all digital licensees serve the educational and informational needs of

their communities. In addition, the Commission should adopt new obligations to ensure that broadcasters use the enhanced services inherent in digital technology to better serve their communities.

Respectfully submitted.



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