Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
DTV Consumer Education Initiative	)	MB Docket No. 07-148
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To: The Commission

JOINT COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

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EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") and the Association for Maximum Service Television, Inc. ("MSTV") welcome the opportunity to partner with the Commission to ensure that no consumer loses access to free local television programming after February 17, 2009, due to a lack of information about the DTV transition. Broadcasters have committed to educating the American public about the upcoming transition. Since late 2006, broadcasters have been coordinating extensively with government, private industry, membership organizations and others to educate all consumers so that they understand the digital television ("DTV") transition. The future of free-over-the air television depends upon a smooth transition to digital with minimum disruption to TV consumers.

The broadcast industry has embarked on an unparalleled and unprecedented consumer education campaign. This is a multi-faceted education campaign that uses all of the tools available to achieve its success. While much of this campaign is already underway, additional details of broadcasters' efforts and plans will be revealed over the next several weeks, including a Speakers' Bureau, a national DTV Roadshow and other initiatives. The DTV Education Campaign is designed much like a political election campaign –where the DTV transition is a candidate that starts with low name identification, and must be introduced and promoted among our "electorate" or television viewers. No avenue to reach consumers will be left unexplored as we reach out to all demographics, all geographical areas, urban and rural communities, the young and the old.

This week NAB will be rolling out the first of its Public Service Announcements ("PSAs") along with video and audio elements and public service tools. These PSAs, an English

version and a Spanish version, aim to generate support for DTV and increase public awareness that the transition is underway, that the transition will be complete in 2009, and that some households could lose their television signals unless they act.

In addition, NAB is in the process of producing a package for all television stations. That package will include, but is not limited to, multilingual on air announcements, HD video packages to stations to help stations report on the DTV transition, story ideas and copy for stations to use in newscasts, graphic elements, half-hour educational television program, etc. All NAB-produced PSAs and video footage that contains audio statements will include closed captioning.

With a large number of major stakeholders and a variety of groups affected by the DTV transition, NAB is helping coordinate the DTV Transition Coalition ("coalition"). With more than 160 businesses, trade associations and membership organizations, including the Commission, the coalition is dedicated to educating consumers on the DTV transition. Agency coordination, is also key to a successful consumer education campaign. NAB and MSTV respectfully suggest that any actions the Commission may take in this proceeding follow a few key principles. First, take actions that facilitate the transition, not impede it. Second, do not assume that a one-size-fits-all approach will work in all communities. Third, stand ready to adapt as needed. As detailed in our comments, the variety of on-air educational tools demonstrate the need for flexibility to use the right PSAs at the right time. This is paramount to an effective on-air campaign. Moreover, a collaborative consumer education campaign is good public policy and is also consistent with the Commission's statutory and Constitutional authority.

Coordination is critical to ensure that, in addition to messaging, industry, government agencies and other stakeholders are not either (1) unnecessarily duplicating consumer education

efforts' or (2) failing to target key segments of the American population. NAB and MSTV agree that DTV.gov partners should be regularly apprising the Commission on their consumer outreach efforts. Additionally, the coalition is committed to supplying the Commission with updates (both formal and informal) of its consumer education initiatives. NAB and MSTV are very concerned that a regulatory regime without appropriate flexibility is unlikely to garner the information that will truly asses the effectiveness of the industry's DTV consumer education initiative. We pledge to work with the Commission to determine appropriate reporting metrics that the Commission can utilize to determine audience reach and impressions performance**.**

Finally, we agree with the principle that it is key for all stakeholders to be tracking consumer awareness, so that, as we ramp up to the hard-date for analog shut off, messaging can be targeted to those communities or demographics where consumer awareness may be lagging. Because broadcasters, through the resources of NAB, MSTV and the coalition have been and will be expending significant resources to track the effectiveness of on-air and off-air consumer education, regulations on individual broadcasters are both duplicative and unnecessary. The cost burden, particularly to smaller and small market stations could be prohibitive. We suggest a more targeted approach to assessing consumer awareness be coordinated through our respective trade associations and the coalition. NAB and MSTV have the resources and ability to work directly with the Commission to share information to ensure coordinated data tracking on consumer education awareness.

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JOINT COMMENTS OF
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I. Introduction.

The National Association of Broadcasters ("NAB")[1] and the Association for Maximum Service Television, Inc. ("MSTV")[2] submit these Joint Comments in response to the above-captioned proceeding.[3] Broadcasters at the national, state and local levels have been coordinating extensively with government, private industry, membership organizations and others to educate all consumers so that they understand the digital television ("DTV") transition.

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[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

[2] MSTV is a nonprofit trade association of local broadcast television stations committed to achieving and maintaining the highest technical quality of the local broadcast system.

[3] *See In the Matter of DTV Consumer Education Initiative*, MB Docket No. 07-148, Notice of Proposed Rulemaking, FCC 07-128 (rel. July 30, 2007) ("*NPRM*").

These activities began in earnest in late 2006 and will continue well after the analog shut-off date of February 17, 2009.[4]

The future of free-over-the air television depends upon a smooth transition to digital with minimum disruption to TV consumers. For this to happen, the American public must understand what all-digital broadcasting means for them, including the many benefits it will bring, the options available to be ready for the transition and the appropriate steps to take. Broadcasters have committed to educating the American public about the upcoming transition. To that end, the broadcast industry has embarked on an unparalleled and unprecedented consumer education campaign. This is a multi-faceted education campaign that uses all of the tools available to achieve its success.

The DTV Education Campaign is designed much like a political election campaign – where the DTV transition is a candidate that starts with low name identification, and must be introduced and promoted among our "electorate" or television viewers. No avenue to reach consumers will be left unexplored.[5] Broadcasters have embarked on an extensive education and marketing project to ensure we reach all demographics, all geographical areas, urban and rural communities, the young and the old. While much of this campaign is already underway, the full extent of broadcasters' efforts and plans will be revealed over the next several weeks. As discussed below, NAB and MSTV welcome the opportunity to partner with the Commission to

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[4] Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title III, §§ 3002(a), 3003, 3004, 120 Stat. 21, 22.

[5] NAB and MSTV applaud the Commission's recent action to ensure that cable subscribers will continue to receive the broadcast signals in digital and analog as needed. *See* FCC Adopts Rules to Ensure all Cable Customers Receive Local TV Stations After the Digital Television Transition, *Public Notice*, FCC 07-170 (Sept. 11, 2007).

ensure that no consumer loses access to free local television programming after February 17, 2009, due to a lack of information about the DTV transition.

II. Broadcasters' Consumer Education Initiatives Are Already Underway.

As detailed in NAB Joint Board Chair Jack Sander's August 21 letter to the Chairman, after Congress set by statute the February 17, 2009 hard date for the end of analog television, the NAB Television Board of Directors made the DTV transition its single highest priority.[6] Among its many actions, NAB hired a full time staff of five to focus exclusively on educating consumers affected by the DTV transition. Additionally, NAB has retained a public relations firm with several full-time staff solely dedicated to developing and deploying our consumer education initiative.

NAB and MSTV wholly concur with the Commission that it "promote a coordinated, national DTV consumer education campaign." *NPRM* at ¶ 3. Indeed, it is imperative that consistent, unified messaging be employed to ensure the American public is not confused as to what steps they need to affirmatively take to ensure their continuity of broadcast TV reception. With a large number of major stakeholders and a variety of groups affected by the DTV transition, NAB is helping coordinate the DTV Transition Coalition ("coalition"). With more than 160 businesses, trade associations and membership organizations, the coalition is dedicated to educating consumers on the DTV transition. The goal of the coalition is to ensure that no consumer loses free television reception in February 2009 due to a lack of information about the DTV transition.

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[6] In the Matter of DTV Consumer Education Initiative, Letter from Jack Sander to Chairman Kevin J. Martin, MB Docket No. 07-148, filed on August 21, 2007.

The coalition is recruiting organizations that have methods they can use to disseminate DTV-related information to their membership. Facilitating communication between groups that share an interest in a successful transition is crucial, and the DTV transition. The coalition has created message documents, talking points, a PowerPoint presentation and a comprehensive Web site (www.dtvtransition.org) to promote the transition. Eight founding organizations – NAB, MSTV, the Association of Public Television Stations ("APTS"), the Consumer Electronics Association ("CEA"), the Consumer Electronics Retailers Coalition ("CERC"), LG Electronics, Inc., the Leadership Conference on Civil Rights ("LCCR") and the National Cable and Telecommunications Association ("NCTA") – kicked off the coalition on February 28, with AARP joining soon after. Those nine organizations along with a broadcast network representative (Disney/ABC), now make up the coalition's Steering Committee. We are pleased that the Commission officially joined the coalition on July 6.

Also, as a member of the Commission's Consumer Advisory Committee ("CAC"), NAB appreciates the input of many fellow members of that represent the disability community. Broadcasters have pledged to ensure that all Americans, including the estimated 25 to 30 million persons who are deaf or hard of hearing, will be able to view the Public Service Announcements ("PSAs") and other related-programming material. To that end, all NAB-produced PSAs and video footage that contains audio statements will include closed captioning.

The following list details efforts the industry has taken thus far to promote the DTV education campaign:

- **Surveys and focus groups:** NAB has dedicated significant financial resources to research – from nationwide focus groups to massive surveys aimed exclusively at over-the-air viewers. With this research NAB has worked to find out as much as possible about its "target voters" – America's over-the-air, broadcast-only viewers, as well as households with secondary unconnected sets that receive local

broadcast television signals. NAB commissioned a variety of focus groups across the country to explore consumer attitudes on DTV among specific groups of consumers, including older Americans, African Americans and two focus groups among Hispanics in both English and Spanish. This has enabled NAB to design messages that will drive consumers to a desired action: taking the necessary steps to make the mandatory upgrade to digital television. NAB is also commissioning tracking surveys beginning this fall to measure any increase in consumer awareness, which allows NAB to focus its efforts on areas lagging in awareness.

- **International DTV research**: NAB staff have visited and maintain dialogues with officials running DTV transition campaigns in the United Kingdom, Sweden, Austria and Belgium to learn how European nations – some of which have already transitioned to digital – are running their digital transition campaigns. NAB has also invited officials from those countries and others, including Austria and Singapore, to discuss DTV deployment issues with American television broadcasters. In fact, the head of the United Kingdom's DTV transition campaign met with NAB staff and our coalition partners on July 31 in Washington. Many of these international representatives attended NAB's annual convention in April, the NAB Show, to participate in a panel discussion on this topic.

- **Earned media:** NAB's DTV transition team has a full-time media relations director whose sole purpose is to make sure that the DTV transition is being covered both accurately and ubiquitously by America's reporters. NAB has briefed reporters from major news organizations in New York, Chicago, San Jose and Washington, D.C., and will facilitate reporter briefings in all 50 states. NAB's earned media team, which also employs a public relations firm, will push locally-oriented stories in inner cities, metropolitan areas and into the heartland.

- **Web site:** NAB has provided extensive resources to its Web-based outreach, including www.DTVanswers.com – the broadcast industry's official Web site to educate consumers, journalists and opinion leaders on the DTV transition. Beyond a tutorial for consumers on what steps they must take to navigate the DTV transition, the site also offers consumer education materials to television stations, those designated speakers giving DTV presentations as part of our DTV Speakers Bureau (see page 7), state broadcasters associations and others partnering with NAB in its efforts.

- **Congressional staff briefings:** NAB briefed more than 100 House of Representatives staffers on the DTV transition on April 30, 2007, and an additional 25 Senate staffers on July 16, 2007. It will host another round of House and Senate staff briefings in 2008 and with new members of the House and Senate in 2009 to ensure that elected officials know how the DTV transition will impact their constituents.

- **Congressional DTV toolkit:** NAB delivered a DTV toolkit to each member of Congress the week of July 23, 2007. The toolkit includes resources policymakers

may need to communicate with their constituents about the transition, such as: a PowerPoint presentation, a sample press release, a sample op-ed, talking points for DTV speeches and communication with constituents, a bilingual congressional newsletter inset and a resource guide.

- **Local government DTV toolkit:** NAB has also partnered with state broadcast associations to deliver DTV toolkits and information to governors, state legislators, county commissioners and important local government agencies across the country – especially those dealing with elderly population.

III. Broadcasters Have a Comprehensive Plan For Consumer Education.

As detailed above, broadcasters' effort to educate the public are well underway. NAB and MSTV have rolled out particular initiatives as soon as they were ready, while continuing to put all of the pieces in place. Indeed, House Energy and Commerce Committee Chairman John Dingell (D-Mich.) has recognized our initiatives, stating:

> I am pleased that the broadcasting industry is launching a nationwide campaign to educate consumers about the approaching switch to digital television. It is reassuring to see the initiative taken by the broadcasting and cable industries to prepare consumers for the DTV transition -- an event that will enhance our nation's broadcasting system but, if left unadvertised, could cause widespread confusion and frustration. I am encouraged by the broadcasting industry's early progress, and I hope it will prompt other industries to join in this effort.[7]

In the coming few weeks, broadcasters will be making public additional plans for its DTV Education Campaign. The plan will include initiatives such as the following:

- **Conferences:** To better educate opinion leaders and communities disproportionately impacted by the DTV transition, NAB staff will attend and distribute information at more than 20 regional and national conferences in 2007 – including the conferences of the American Library Association, National

[7] *See* John Eggerton, *Dingell Praises Broadcasters for DTV- Campaign Launch Date***,** September 10, 2007, available at http://www.broadcastingcable.com/article/CA6477177.html

Association for the Advancement of Colored People, AARP, National Conference of State Legislatures, National Association of Counties, Congressional Black Caucus, National League of Cities, National Council of La Raza, League of United Latin American Citizens and others. NAB staff is also attending state broadcasters association conferences to reach out to television stations with regional DTV seminars to ensure that the efforts and messages of NAB dovetail with those of our individual broadcasters.

- **DTV Road Show:** In Fall 2007, NAB will launch a national DTV Road Show – a traveling media event that will reach more than 200 cities before February 2009. NAB spokespeople will demonstrate converter boxes in person at highly trafficked events, such as sporting events, state fairs and at state capitol buildings and city halls. These events will hit a large number of congressional districts, and NAB hopes to involve government officials and their local district offices in these demonstrations and events.

- **Speakers Bureau:** NAB is spearheading a national DTV Speakers Bureau to directly educate consumers on the transition with over 8,000 speaking engagements nationwide. Already, we have recruited over 600 speakers from 378 local television stations to participate in the DTV Speaker's Bureau. In advance of our official October 1 launch of the Speakers Bureau, we have already generated 18 speaking engagements in the month of September.

IV. Educating the Public About the Digital Television Transition Necessitates Flexibility, Coordinated Messaging and Voluntary Cooperation.

With respect to the particular issue of PSAs, NAB will continue to roll out PSAs along with video and audio elements and public service tools. A number of stations are currently running local PSAs to drive awareness about the DTV transition. In addition, NAB is in the process of producing a PSA package for all commercial and noncommercial television stations. That package will include, but is not limited to:

- **On-air announcements**: Four to six fully produced and edited 30-second announcements on the transition, and at least one 60-second version. We are currently in production of two PSAs on the DTV transition – one in English, one in Spanish – which will be distributed to stations this week;

- **Video package:** We have produced an HD video package for stations to help report on the DTV transition, which includes footage of converter boxes and other products, as well as interviews with FCC and Commerce Department officials on the DTV transition,

to help stations develop stories for their newscasts regarding the transition. The package will be distributed to stations this week;

- **Story ideas and copy** for stations to use in their newscasts;

- **Graphic elements:** Graphics, artwork and other production elements that local stations and state broadcasters groups can use to create their own spots;

- **"Donut" spots:** One or two "donut" spots – 30-second advertisements produced on the front and back ends, with room in the middle for a sound bite from a local official or news anchor – where local stations can insert their local talent into the DTV public service announcements;

- **DTV educational TV program:** A half-hour educational television program on the DTV transition that local commercial and public television stations can air when appropriate;

- **"Crawls"**: NAB will be working on and consulting with local stations and networks on how best to use "crawls" – or DTV-related messages that scroll across television screens during programming – to alert consumers to the transition and drive traffic to the Web site and the toll free phone number; and

- **Non-English language spots**: NAB is working with a number of groups that will produce spots in a variety of different languages for use on stations with non-English language programming. A Spanish language spot will be distributed to stations this week.

NAB will also use the PSAs to help market digital-to-analog converter boxes, which consumers may purchase with a $40 government voucher to successfully make the mandatory upgrade to digital.

In the *NPRM*, the Commission has placed a number of proposed actions out for public comment, including a requirement that television broadcasters "air periodic public service announcements and a rolling scroll about the digital transition."[8] The Commission also queries

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[8] *NPRM* at ¶¶ 4-5; *See also* Letter from the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, to the Honorable Kevin J. Martin, Chairman, the Honorable Michael J. Copps, Commissioner, the Honorable Jonathan S. Adelstein, Commissioner, the Honorable Deborah Taylor Tate, (continued…)

whether it should "produce an announcement or group of announcements to be used by all broadcasters, or simply provide a list of points that must be conveyed in any compliant announcement." *Id*. at ¶ 5. The Commission also requests comment on the timing and frequency of PSAs and rolling scrolls. *Id*.

NAB and MSTV appreciate that Commission's desire to play an active role in the DTV education effort. We respectfully suggest that any actions the Commission takes should follow a few key principles. First, take actions that facilitate the transition, not impede it. Second, do not assume that a one-size-fits-all approach will work in all communities. Third, stand ready to adapt as needed.

As detailed above, the variety of on-air educational tools demonstrate the need for flexibility to use the right PSAs at the right time. This is paramount to an effective on-air campaign. As broadcasters are currently surveying over 1,000 over-the-air viewers to determine appropriate messaging that spurs action, it is also clear that on-air campaigns must be both tailored and timed to multiple agency and industry initiatives. The first of NAB's fully-produced PSA spots will aim to generate support for DTV and increase public awareness that the transition is underway, that the transition will be complete in 2009, and that some households could lose their television signals unless they act. The spot will then drive viewers to gain more information about the transition by visiting www.DTVanswers.com – the broadcasting industry's official Web site on the DTV transition. It will also direct viewers to 1-888-DTV-2009, the toll-free number of NTIA that provides information about the transition as well as the converter box coupon program.

Commissioner, and the Honorable Robert M. McDowell, Commissioner, Federal Communications Commission, May 24, 2007 ("Dingell/Markey Letter").

The timing, however, of on-air initiatives must be coordinated with other agencies and industry efforts. For example, the National Telecommunications and Information Administration ("NTIA"), the agency that will distribute the government subsidy coupon program for digital-to-analog converter boxes, is required by statute to begin accepting applications on January 1, 2008.[9] There is, however, some uncertainty as to when digital-to-analog converter boxes will be available for sale by the electronic retailers.[10] NTIA may elect to delay distribution of the coupons, which have a 90 day expiration date, to ensure consumers have adequate time to purchase the converter boxes. This timing, in-turn, affects the initial on-air campaign. It may be premature to air, or require the airing of, a PSA campaign directing consumers to purchase digital-to-analog converter boxes until they are widely available on retailers' shelves. The unintended consequence may be to actually increase consumer confusion.

It is therefore imperative that the Commission facilitate, and not inadvertantly impede, the tailoring of the on-air campaign in the months leading up to the digital transition by permitting the needed flexibility to react to marketplace realities. For example, how quickly will American consumers apply for the NTIA coupon program? Will consumers purchase DTV receivers at the electronics industry-predicted level, or will those numbers be lagging or surpassing? Will adoption rates to digital technology vary on a regional basis? How does over-the-air household concentration play into the equation?

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[9] Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title III, §§ 3002(a), 3003, 3004, 120 Stat. 21, 22.

[10] TV Newsday, Inc, Harry A. Jessell, Tech spotlight: DTV Transition NTIA Coupon Program May Start Slowly (Aug. 23, 2007) found online at http://www.tvnewsday.com/articles/2007/08/23/daily.5/.

As you can see from these questions, regulatory flexibility is necessary to ensure that all on-air messaging can be adjusted on a timely basis. NAB and MSTV thus urge the Commission to refrain from mandating specific content for PSAs and rolling crawls at this time. Instead, the government and the broadcast industry should continue to collaborate on a rolling basis on appropriate and timely on-air campaign initiatives. Indeed, such collaboration has already taken place. Department of Commerce Secretary Carlos Gutierrez and Commissioner Robert McDowell have taped high definition video footage explaining the DTV transition. This will be distributed to stations this week. We look forward to working with all Commissioners and staff in the coming months on similar initiatives that can achieve the objective of effective consumer education.

V. A Flexible Approach to DTV Consumer Education Is Good Public Policy and is Consistent with the Commission's Statutory and Constitutional Authority.

The approach NAB and MSTV have outlined for any Commission action is good public policy and is also consistent with the Commission's statutory and Constitutional authority. It is well established that the Commission may not simply rely upon its general grants of authority to expand its authority to proscribe the content of on-air consumer education campaign.[11] The

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[11] The D.C. Circuit Court of Appeals has recognized the very limited nature of the Commission's authority to adopt rules significantly affecting the content of programming aired by broadcast licensees. In *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 802-803 (D.C. Cir. 2002), the court found that no provision (including § 1) of the Act authorized the Commission to adopt video description requirements for television broadcasters because such regulations "significantly implicate[d] program content." The court explained that the "very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content" in order to "avoid potential First Amendment Issues." *Id.* at 805. The court also noted that "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content." *Id*. (citing statutory sections explicitly authorizing the FCC to regulate obscene and indecent programming and the "equal (continued…)

Communications Act of 1934 ("Act") prohibits the FCC from engaging in "censorship" or from promulgating any "regulation" that "interfere[s] with the right of free speech by means of radio communication." 47 U.S.C. §326. On its face, Section 326 precludes the Commission from directly regulating the content of speech on radio and television. Absent another specific statutory provision authorizing required PSAs and crawls, including content thereof, which could be argued to override the prohibitions of Section 326, the Commission appears to be prohibited by the Act from adopting such requirements.

Specifically mandated PSAs and scrolling crawls could be subject to challenge under the First Amendment, because it would compel broadcasters to deliver a government-mandated message. It is well settled that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (noting that the First Amendment protects "the decision of both what to say and what *not* to say"). These protections extend both to compelled statements of opinion and compelled statements of fact: "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 798-99.

Compelled speech is particularly suspect when private entities are conscripted to relay "a particular message favored by the Government." *Turner*, 512 U.S. at 641. Rigorous scrutiny applies to such government-compelled speech. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S.

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opportunity" provision of air time to political candidates at discounted rates). The requirements that the Commission proposes would "significantly implicate program content." *Id.* at 803. The Commission therefore cannot rely on its general regulatory authority to adopt such a restriction. *Id*. at 805-807 (concluding that the FCC's general powers under Sections 1, 4(i) and 303(4) did not authorize the adoption of video description rules because those rules were "about program content.)

624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). As a general rule, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717 (footnote omitted).

Under these well-settled constitutional standards, the proposed rule's compulsion of speech raises serious issue under the First Amendment.[12] The proposed rule on its face would require private broadcasters to disseminate a *state-sponsored* message. While that message may not seem particularly controversial in this instance, the Government may not, at least absent a very strong justification, conscript private speakers to deliver such a message. *Barnette*, 319 U.S. at 633.

Any compulsion of speech as proposed in the *NPRM* would also be required to satisfy the constitutional requirement that it serve a very substantial governmental interest in a narrowly tailored way. It may be *convenient* for the government to use broadcasters to disseminate state-sponsored messages. But the government cannot conscript private broadcasters to deliver its messages simply because it would be more administratively convenient to do so. This is not a situation in which the government must quickly alert viewers of a natural disaster in order to

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[12] These principles apply with full force to the broadcast media. There is no doubt that broadcasters' speech is protected by the First Amendment. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984); *see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) (Section 326 of Communications Act "prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies") (plurality opinion). The Court has cautioned that "[g]overnment regulation over the content of broadcast programming must be narrow, and th[e] broadcast licensees must retain abundant discretion over programming choices." *Turner*, 512 U.S. at 651. Any restriction on broadcasters' First Amendment rights demands, at a minimum, a showing that it is "narrowly tailored to further a substantial governmental interest." *League of Women Voters*, 468 U.S. at 380.

protect public safety. *Compare In the Matter of Review of the Emergency Alert System*, EB 04-296, 2007 WL 2010799 (July 12, 2007). Alerting the public about the February 17, 2009 deadline for the DTV transition is certainly an important goal, but it is not the sort of emergency likely to justify restricting free speech. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Finally, in light of broadcasters' voluntary cooperation in raising awareness of the DTV transition, the *NPRM*'s mandatory requirements are wholly unnecessary. The message is already being delivered in numerous ways. The government can also supplement these voluntary efforts by using its own speech to reach the broadcasting public through the mails or by financing its own public-awareness campaign. These alternatives would ensure a smooth transition to DTV without creating the serious First Amendment problems raised by the mandatory proposals in the *NPRM*.

VI. The Commission Should Ensure That Any Reporting and Assessment Mechanisms Are Beneficial to the Transition.

The Commission has put forth a number of reporting and assessment proposals to ensure that on-air education efforts are properly reported to the Commission. NAB and MSTV agree that DTV.gov partners should be regularly apprising the Commission on their consumer outreach efforts. *NPRM* at ¶ 15. The role of partner is one broadcasters take very seriously. In fact, coordination is critical to ensure that, in addition to messaging, industry, government agencies and other stakeholders are not either (1) unnecessarily duplicating consumer education efforts' or (2) failing to target key segments of the American population. The need for coordination is

further underscored by the limited financial resources of the Commission.[13] Additionally, the coalition is committed to supplying the Commission with updates (both formal and informal) of its consumer education initiatives.

To the extent that the Commission has proposed reporting requirements on broadcast licensees, with penalties for noncompliance,[14] NAB and MSTV again urge the Commission to refrain from implementing regulatory regimes that may be onerous and may not actually garner the information that will truly asses the effectiveness of the industry's DTV consumer education initiative. The goal is to establish a process for measuring the success of the industries' efforts. A parallel would be that of an advertiser selling a product. We believe that using measurements similar to those used by advertisers to measure the success of any advertising campaign would provide a roadmap for measuring the success of the DTV consumer education campaign. NAB and MSTV therefore will work with the Commission to determine appropriate reporting metrics that the Commission can utilize to determine audience reach and impressions performance.

Finally, the Commission asks whether "broadcasters be required to formally assess and report on consumer awareness, and preparedness, particularly in certain communities." *NPRM* at ¶ 5. We agree with the principle that it is key for all stakeholders to be tracking consumer awareness, so that, as we ramp up to the hard-date for analog shut off, messaging can be targeted to those communities or demographics where consumer awareness may be lagging. Because broadcasters, through the resources of NAB, MSTV and the coalition have been and will be

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[13] *See, .e.g,* Letter from Chairman Martin to Chairman Dingell and Chairman Markey, June 18, 2007 at 2.

[14] *NPRM* at ¶ 7 (citing Dingell/Markey proposal that the Commission consider requiring "broadcast licensees and permittees to report, every 90 days, their consumer education efforts, including time, frequency, and content of public service announcements aired by each station in a market, with civil penalties for noncompliance.").

expending significant resources to track the effectiveness of on-air and off-air consumer education, regulations on individual broadcasters are both duplicative and unnecessary. The cost burden, particularly to smaller and small market stations could be prohibitive. Moreover, requiring each station in a given market to survey its consumers may yield different, even conflicting results (depending on survey methodology), and may not yield beneficial information to the Commission or industry on adjusting or increasing messaging. We suggest a more targeted approach to assessing consumer awareness be coordinated through our respective trade associations and the coalition. NAB and MSTV have the resources and ability to work directly with the Commission to share information to ensure coordinated data tracking on consumer education awareness.

VII. Conclusion.

We believe that a government/industry partnership is the best way to ensure that all consumers have the information they need to successfully navigate the DTV transition. Broadcasters are and will be doing all that they can to ensure they do not lose any of their valued viewers during the transition. There are many stakeholders, and they must work together in a coordinated way, both as to messaging and to timing. We believe the DTV Transition Coalition will help accomplish that goal. And while PSAs are an important part of the education campaign, their success depends upon their coordination within the larger DTV campaign the industry is planning. In addition, their effectiveness is directly related to their relevance to market realities as assessed continuously throughout the transition. For the above-stated reasons, we urge the Commission to refrain from imposing specific on-air education requirements. Not only are they constitutionally suspect, but they could inadvertently impede the success of the

campaign. The broadcasting industry is committed to a smooth transition. We look forward to working with Commission to achieve that goal.

Respectfully submitted,

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