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

I. Introduction.

The National Association of Broadcasters ("NAB")[1] and the Association for Maximum Service Television, Inc. ("MSTV")[2] submit these brief joint reply comments in response to the above-captioned proceeding.[3] As stated in our initial comments in this proceeding, 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

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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*").

understand the digital television ("DTV") transition. Efforts will continue until well after the analog shut-off date of February 17, 2009.[4]

II. Broadcasters' Comprehensive And Voluntary Consumer Education Campaign Negates The Need For Regulation.

Due to a large increase in the number of broadcasters wanting to participate in the NAB's educational initiative, the release of the comprehensive plan has moved to October 15, 2007. As noted in our initial comments, the plan will include many different educational tools that broadcasters will use to educate the public.[5] We believe that only by using a combination of these tools can broadcasters reach every segment of the American public with information about the DTV Transition, what it means and what steps consumers must take to ensure uninterrupted access. Further, NAB and MSTV, in partnership with the government, will devise a means by which the success of the overall campaign can be measured, as opposed to the timing of particular Public Service Announcements ("PSAs"), which may or may not have a significant impact upon consumer education.

Broadcasters' plan largely eviscerates the concerns raised by other parties who have commented in this proceeding.[6] Indeed, the ever growing commitment broadcasters have made to participate in the NAB's education campaign, makes adoption of mandatory PSAs redundant

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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] *See* Comments of NAB and MSTV, MB Docket No. 07-148, at 6-7 (Sept. 17, 2007) ("Joint Comments").

[6] *See, e.g.*, Comments of the Telecommunications Regulatory Board of Puerto Rico, MB Docket No. 07-148, at 4 (Sept. 17, 2007); Comments of AARP, MB Docket No. 07-148, at 4-6 (Sept. 17, 2007); Comments of the State of New York State Consumer Protection Board, MB Docket No. 07-148, at 2 (Sept. 17, 2007).

and unnecessary.[7] We agree with comments by the State Broadcasters Association that "[t]he efforts already being planned and executed far exceed any requirements the FCC could or should impose."[8]

We also reiterate that flexibility is essential to a successful education campaign. Broadcasters must have the option to adapt their outreach efforts depending on market realities specific to their communities. Thus, we disagree strongly with CaptionMax that the Commission should proscribe the content and ensure the uniformity of all PSAs.[9] Such actions will hinder and not help broadcasters to spread the word. For example, a number of stations are currently running PSAs to drive awareness about the DTV transition. Those broadcasters are focusing their PSAs on their local communities, and not adopting a cookie cutter approach that may or may not be relevant to the needs of consumers in that particular market.[10] In addition, NAB's on-air package for all commercial and noncommercial television stations has been developed with the assumption that each broadcaster will use the tools in the package in a way that maximizes their effectiveness for the community served by the local broadcaster.

Indeed, NAB has already deployed the first of its fully-produced PSAs aimed at generating support for DTV and increasing public awareness that the transition is underway, that the transition will be complete in 2009, and that some households could lose their television

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[7] 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." *NPRM* at ¶¶ 4-5.

[8] Joint Comments of State Broadcasters Associations, MB Docket No. 07-148, at 8 (Sept. 17, 2007).

[9] *See* Comments of CaptionMax, Inc., MB Docket No. 07-148, at 2 (Sept. 17, 2007).

[10] NAB and MSTV recognize that a number of targeted audiences necessitate targeted messaging. For example, we support Lincoln Broadcasting Company's request that the Commission "include Asian-language consumer education as part of its own initiative…." Comments of Lincoln Broadcasting Company, MB Docket No. 07-148, at 4 (Sept. 17, 2007).

signals unless they act. The spot drives 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 the National Telecommunications and Information Administration ("NTIA") that provides information about the transition as well as the converter box coupon program. Thus, it unnecessary for government to dictate a particular message.

In addition, the timing of on-air initiatives must be coordinated with other agencies and industry efforts. As noted in our initial comments,[11] NTIA is required to start accepting applications for the converter box coupon on January 1, 2008.[12] There is, however, some uncertainty as to when digital-to-analog converter boxes will be available for sale by the electronic retailers.[13] 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. Again, it may be premature to air, or require the airing of, on-air campaigns directing consumers to purchase digital-to-analog converter boxes until they are widely available.

As you can see from the foregoing, regulatory flexibility is necessary to ensure that all on-air messaging can be adjusted on a timely basis. NAB and MSTV again urge the Commission to refrain from mandating specific content for on-air announcements and scrolling

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[11] *See* Joint Comments at 10.

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

[13] 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/.

crawls at this time, including the frequency with which they must be aired. Instead, the government and the broadcast industry should continue to collaborate on a rolling basis on appropriate and timely on-air campaign initiatives.

III. The Commission Should Adopt A Flexible Approach To DTV Consumer Education And Work With Industry To Develop Meaningful Reporting Methods.

The flexible and cooperative 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. We reiterate that there are serious regulatory and Constitutional concerns with mandating the contents or the frequency of PSAs or scrolling crawls.[14] Thus, we strongly disagree with the Benton Foundation that the Commission has the statutory authority to regulate their airing.[15]

Indeed, mandatory PSAs and scrolling crawls would be a novel and wholly unwarranted intrusion on broadcasters' control over program content. "Sensitive to the First Amendment

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[14] *See* Joint Comments at 11-13.

[15] *See Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 802-803 (D.C. Cir. 2002). Contrary to the Benton Foundation's assertions, there are significant differences between requiring on-air station identification and compelling speech to further a governmental policy, in this instance the DTV Transition. *See* Comments of the Benton Foundation, MB Docket No. 07-148, at 14-15. Moreover, the Commission cannot avoid First Amendment problems by limiting the PSAs and scrolling crawls to pure "factual" information about the mechanics of the DTV transition, including requirements for aural descriptions of video content. The Commission's desire to educate broadcast viewers about the mechanics of the DTV transition is inextricably tied up with its support for Congress's policy choice. Mandating disclosure of "factual" information cannot be separated from encouraging listeners to act based on that information. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798-99 (1988) (rejecting distinction between compelled statements of opinion and compelled statements of fact). Because the public-awareness campaign envisioned in the *NPRM* is not commercial speech, the First Amendment standard for regulating commercial speech would not apply. *See Riley*, 487 U.S. at 796 n.9. Whether framed as "opinion" or "fact," the public-awareness campaign proposed by the *NPRM* would be a viewpoint-based regulation violating the First Amendment.

concerns inherent in any form of content regulation, the Commission has never attempted to define with exact precision the programming that a broadcaster should air to serve the needs and interests of its local community." *In the Matter of Broadcast Localism*, 19 F.C.C.R. 12425, MB Docket No. 04-233 (July 1, 2004). In has long been understood by the Commission and the courts that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although 'the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.'" *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 651 (1994) (quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7293 (1960)).[16]

We find it curious that Verizon makes a wholly unsupported declaration that the Commission has authority to require *broadcasters*' airing of PSAs,[17] while simultaneously noting the constitutional limitations of compelled speech for any other video provider. Such a self-serving declaration is inherently contradictory and is without merit. We note that many industries, including the Consumer Electronics Association, the Consumer Electronic Retailers

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[16] Indeed, when the Commission was asked to mandate a minimum number of PSAs in 1977, the Commission rejected the petition for rulemaking, explaining that it would be inappropriate to "substitute a prejudgment (in favor of PSAs) for informed licensee judgment." *In the Matter of Petition to Institute a Notice of Inquiry and Proposed Rulemaking on the Airing of Public Service Announcements by Broadcast Licensees*, 67 F.C.C.2d 907 (1977); *see also In Re Petitions of Deborah A. Lehman and Donald W. Ricketts*, 66 F.C.C.2d 1061 (1977); *In the Matter of Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, 81 F.C.C.2d 346 (1980).

[17] Comments of Verizon, MB Docket No. 07-148, at 8 (Sept. 17, 2007).

Coalition, Echostar and DIRECTV, emphasize the importance of their voluntary education efforts in lieu of regulation.[18] We concur.

Moreover, in light of the voluntary commitments broadcasters and other industries have made and will continue to make to promote the DTV transition, mandatory PSAs and scrolling crawls would be wholly unnecessary to ensure that consumers are well informed. And 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***.**

Finally, to the extent that the Commission has proposed reporting requirements on broadcast licensees, with penalties for noncompliance,[19] 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. We thus disagree with the Benton Foundation that monthly reporting requirements are appropriate.[20] The goal is to establish a process for measuring the

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[18] *See* Comments of the Consumer Electronics Association, MB Docket No. 07-148, at 5-9 (Sept. 17, 2007); Comments of the Consumer Electronics Retailers Coalition, MB Docket No. 07-148, at 11-13; Comments of Echostar, MB Docket No. 07-148, at 2-4 (Sept. 17, 2007); Comments of DIRECTV, Inc., MB Docket No. 07-148, at 2-3 (Sept. 17, 2007).

[19] *NPRM* at ¶ 7 (citing proposal set forth by Chairmen Dingell and Markey 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.").

[20] Comments of the Benton Foundation at 15.

success of the industries' efforts. As we roll out the comprehensive plan, we will be devising a method of reporting that will help identify weak spots. Polling, for example, may be an excellent way of measuring the success of a DTV campaign. Broadcasters encourage the Commission to work with us to develop meaningful, and voluntary, reporting methods.

IV. Conclusion.

Broadcasters are and will continue to do all that they can to ensure they do not lose any of their valued viewers during the transition. While PSAs are an important part of the education campaign, their success depends upon their coordination within the larger DTV efforts planned by the industry. 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 statutorily and 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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