

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
A National Broadband Plan) **GN Dkt. Nos. 09-47, 09-51, 09-137**
For Our Future)
NBP Public Notice No. 26)

The Benton Foundation, Office of Communication, Inc. of the United Church of Christ, Campaign Legal Center, Center for Rural Strategies, Public Knowledge, Media Access Project, Main Street Project, New America Foundation, and United States Conference of Catholic Bishops respectfully submit these comments in the above referenced *Further Notice of Inquiry*, released December 2, 2009.

We strongly support the Commission’s efforts to identify mechanisms that will deliver broadband access to all Americans, particularly underserved populations and populations in rural areas. We believe that the Commission does have a duty to consider the most efficient use of spectrum and that consideration of broadcast spectrum is appropriate. However, the short time for comments and limited analysis given to this issue is vastly inadequate to address the number of issues that that must be considered if the Commission is truly about to reconfigure spectrum allocation away from favoring over-the-air television to favoring broadband and data services in its spectrum policies. We review below some of the most important issues that are raised by the Commission’s public notice.

The FCC raises questions about how broadcasters serve the public interest and the value of that service to the public. It cannot and should not make that determination in isolation from other proceedings before it, and the record which has been built in those proceedings. In fact, if the Commission had completed its enhanced disclosure proceeding in less than the eight years it took to do so,¹ it would have had accumulated actual facts regarding broadcasters’ programming from broadcasters themselves, and from the public. That the Commission is seeking information in this proceeding about public interest programming indicates the value of and need for the systematic method for gathering information about such programming put forth in the enhanced disclosure decision. The Commission also should review the record created in its localism proceeding² for useful information on public interest programming, and ensure that decisions made in this proceeding are consistent with decisions made in the localism proceeding. Future decisions on ownership rules are also interwoven with this. Many of the commenters have informed the Commission in other dockets of the disservice to

¹ *Report and Order, In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Dkt. No. 00-168, 43 CR 961 (2008).

² *Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Dkt. No. 04-233, 43 CR 996 (2008).

community needs and interests already caused by past loosening of ownership limits; before making any further changes in ownership rules which will not be undone later, the Commission should evaluate the public interest obligation issue raised in its localism proceeding as well as this *Inquiry*.

Any attempt to reconfigure television broadcasting must take into account not only the public interest standard enshrined in Title III of the Communications Act, but also the public policy concerns underlying that standard. Specifically, while the market well-serves the public's need for entertainment programming, a purely deregulatory approach has never proved adequate to supply sufficient programming to meet our nation's needs in the area of civic discourse, educational content, children's content, local programming, content that meets the needs of underserved segments of the population, such as people of color or the disabled, and populations that advertisers perceive as unvaluable, such as older people.

The failure of a free-wheeling market to meet these needs does not mean that we must remain with the current system. However, any new system *must* develop a new structure to address these gaps. For example, a number of proposals for alternate regulatory systems have been proposed over time. A pay-or-play model combined with a public interest set-aside might be a good component to a new system in which very few consumers receive their video programming via mass media broadcasting, but instead receive them over airwaves in a more individualize manner using Internet technology or a service similar to cell phones. In such a model, some of the funds raised from the leasing of spectrum would be allocated to the subsidy of public interest programming and spectrum would be set-aside by the government to transmit that programming to the public. Private companies offering service would be required to make the public interest content available and publicize it.

One of the more complicated logistical questions in such a regime would be how to serve the important goal of localism when we are moving more toward technology that is global in scope. Local content is an essential input in a democracy such as the United States which relies on federalism and highly decentralized decision-making for many of our most important public policy decisions, such as education and public safety. A system that fails to ensure that citizens around the country can receive the vital information they need to cast votes in local elections for school board, sheriff or county council, for instance, would be a poor legacy of the Obama Administration.

In light of the recent digital television transition, any proposal to reconfigure broadcasting must continue to protect the millions of Americans who rely on over-the-air television. The civil rights and media justice community in particular, has just shouldered an incredible burden assisting many communities with the complicated process of acquiring a set-top box so they would not lose access to essential information during the DTV transition. While it seems that the Commission's proposal does include continued access to some broadcast streams, it radically downgrades those streams and thus the potential for access to more diverse information via digital broadcasting. There is no question that commercial broadcasters have not begun to use the capacity in digital

broadcasting in any manner that justifies their occupation on the spectrum, but this does not mean that the very same populations that the FCC seeks to assist via the national broadband plan should suffer collateral damage as part of a new spectrum transition. These populations must be protected.

Most important, however, is a consideration of the constitutional issues surrounding such a change. Like the FCC's current proposals in its parental controls docket,³ the Commission has an opportunity in this proceeding to remake a new system that is technology-neutral but continues to protect core values. But reregulating the manner in which spectrum is allocated will necessarily raise questions about the scarcity doctrine, long perceived as the justification for public interest regulation in broadcasting. In a new system, the government would continue to have a compelling interest in preserving a diversity of viewpoints and provision of local news and information. If the new model is translated into collecting resources and subsidizing independent speech that would be very similar to many models adopted by the Congress and the Commission over years of communications policy. But the Commission would be abandoning its moral and statutory mandate to ignore the constitutional dimension to the current public notice.

In sum, we commend the Commission for taking its obligation to ensure all Americans receive broadband access and the openness of the proceeding considering these questions. We exhort the Commission to think carefully about how it will be sure that core public interest obligations will be met in a new system that could result from the proposals identified in the Commission's public notice.

Respectfully submitted,

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Office of Communication, Inc. of the United
Church of Christ
Campaign Legal Center
Center for Rural Strategies
Public Knowledge
Media Access Project
Main Street Project
New America Foundation
United States Conference of Catholic
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³ *Notice of Inquiry, Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, released October 23, 2009.