

October 19, 2007

The Honorable Kevin Martin
Chairman
Federal Communication Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Martin:

At the October 17, 2007 hearing of the House Subcommittee on Telecommunications and the Internet on the status of the digital television transition, you testified, in part, on facilitating multicast broadcast opportunities. You said that you believe that “*the ability to view new broadcast channels would facilitate the transition by providing people with an incentive to get a converter box.*” And you suggested that the consumer message about the DTV transition should be: “*If you get a new digital television or a converter box, you will be able to watch a wide array of new free programming.*” We write today to say that we believe that the **quality** of DTV programming, **not quantity** of DTV programming could be the key to a successful digital television transition.

Multicasting on local cable systems could be the great DTV benefit for US consumers, if broadcasters will better serve the basic needs of their local audiences – not only for children, where the FCC has unanimously supported new rules for DTV, but for everyone with increased local news, electoral and public affairs; more diverse programming for minorities and women; strengthened disability access; and necessary information in times of emergency.

By finally addressing the public interest obligations of digital television broadcasters, the FCC could give the DTV transition the boost it needs to ensure that no viewer -- nor the public interest -- is left in the Analog Age.

For over 12 years,¹ the Commission has recognized the importance of addressing the public interest obligations of digital television broadcasters, but has failed on the legal

¹ See attachment.

mandate to do so despite recommendations from a Presidential Advisory Committee, public interest groups, the Commission's own Consumer Advisory Committee and broadcasters themselves.

The obligation of broadcasters to serve local educational, informational, civic, minority, disability, and emergency needs of the public has been created by statute and upheld by the courts. Further guidance from the Commission is necessary to clarify how these public interest obligations apply to DTV broadcasters and to answer outstanding questions raised by the increased technological capabilities of the digital medium. We urge the Commission to issue clear, concrete guidelines on this subject, and to provide notice to regulated entities and the public regarding how broadcasters will continue to fulfill their public interests obligations in the digital age.

Respectfully,

Benton Foundation
Common Cause
Communication Service for the Deaf
Free Press
United States Conference of Catholic Bishops

Brief History of Digital Television Broadcasters and Public Interest Obligations

In the 1995 Notice of Proposed Rulemaking on Advanced Television Services and Their Impact Upon the Existing Television Broadcast Service² (“1995 NPRM”), the Commission noted that the rules imposing public interest obligations on broadcast licensees originate in the statutory mandate that broadcasters serve the “public interest, convenience, and necessity,” as well as other provisions of the Communications Act.³ These obligations include the requirements that broadcasters must provide “reasonable access” to candidates for federal elective office and must afford “equal opportunities” to candidates for any public office⁴ and that weekly they must provide three hours of children’s educational programming.⁵ Licensees must also adhere to restrictions on the airing of indecent programming,⁶ must make television programming accessible to people with disabilities,⁷ must comply with the 1996 Act provisions relating to the rating of video programming,⁸ and must provide the communications capability to the President to address the American public during a National emergency.⁹ The Commission noted that these current public interest rules were developed under the analog model and therefore were shaped by the limitations inherent in analog technology. The Commission sought comment on whether the greater capabilities afforded by digital technology should affect licensees’ obligations to serve the public interest, and if so, how those obligations might be adapted to the digital context.

With less than 500 days before the completion of the transition to all-digital television broadcasting in the US and 4,465 days after the Commission first sought comment on DTV broadcasters’ public service, the American public deserves to know how television

² In the Matter of Advanced Television Services and Their Impact Upon the Existing Television Broadcast Service (MM Docket No. 87-268). Adopted July 28, 1995 (see http://www.fcc.gov/Bureaus/Mass_Media/Notices/1995/fcc95315.txt).

³ 47 U.S.C. § 307(c).

⁴ 47 U.S.C. §§ 312(a)(7), 47 C.F.R. §§ 73.1944 (reasonable access); 47 U.S.C. 315, 47 C.F.R. § 73.1941. (equal opportunities). See also 47 C.F.R. § 73.1920 (personal attacks rule); 47 C.F.R. § 73.1930 (right to reply).

⁵ 47 U.S.C. § 303b, 47 C.F.R. § 73.671, 73.673, 73.3526.

⁶ 18 U.S.C. § 1464; 47 U.S.C. § 303; 47 C.F.R. § 73.3999.

⁷ 47 U.S.C. § 613; 47 U.S.C. §§ 303(u); 330(b); 47 C.F.R. §§ 79.1; 79.2.

⁸ 47 U.S.C. § 303(w).

⁹ See Emergency Alert System (<http://www.fcc.gov/pshs/eas/>)

broadcasters will fulfill their role as public trustees of the airways in the digital age. We therefore urge the Commission to issue clear guidelines to ensure that broadcasters adhere to the law and serve the local educational, informational, civic, minority, emergency and disability needs of the children and adults in the communities that TV stations are licensed to serve.

The Commission adopted a Notice of Inquiry on the Public Interest Obligations of TV Broadcast Licensees¹⁰ (“1999 NOI”) in December 1999. The 1999 NOI again raised unresolved questions about multicasting and the “challenges unique to the digital era”:

“It is thus clear that DTV broadcasters must air programming responsive to their communities of license, comply with the statutory requirements concerning political advertising and candidate access, and provide children’s educational and informational programming, among other things. But as People for Better TV ask, how do these obligations apply to a DTV broadcaster that chooses to multicast? Do a licensee’s public interest obligations attach to the DTV channel as a whole, such that a licensee has discretion to fulfill them on one of its program streams, or to air some of its public interest programming on more than one of its program streams? Should, instead, the obligations attach to each program stream offered by the licensee, such that, for example, a licensee would need to air children’s programming on each of its DTV program streams? The Advisory Committee Report contemplates that, under certain circumstances, a digital broadcaster should not have nonstatutory public interest obligations imposed on channels other than its “primary” channel. A majority of the members of the Advisory Committee believe that the FCC should prohibit broadcasters from segregating candidate-centered programming to separate program streams, because they believe that would violate candidates’ reasonable access and equal opportunities. We

¹⁰ In the Matter of Public Interest Obligations of TV Broadcast Licensees (MM Docket No 99-360), adopted December 15, 1999 (see http://www.fcc.gov/Bureaus/Mass_Media/Notices/1999/fcc99390.doc).

seek comment on these approaches. In addition, how should we take into account the fact that DTV broadcasters can choose either to multicast multiple standard definition DTV program streams or broadcast one or two HDTV program streams during different parts of the day?”¹¹

In addition, the FCC asked for comments on the following issues that have not been resolved yet:

- **Disclosure Obligations:**¹² Current Commission rules require commercial TV broadcasters to include in their public file, among other things, citizen agreements, records concerning broadcasts by candidates for public office, annual employment reports, letters and e-mail from the public, issues/programming lists, records concerning children’s programming commercial limits, and children’s television programming reports.¹³ *The 1999 NOI led to a Notice of Proposed Rulemaking,¹⁴ but the Commission has not yet issued a Report & Order.*
- **Minimum public interest obligations:**¹⁵ The Commission asked for comments on the Advisory Committee recommendation that “[t]he FCC should adopt a set of mandatory minimum public interest requirements for digital broadcasters . . . that would not impose an undue burden on digital broadcast stations, . . . should apply to areas generally accepted as important universal responsibilities for broadcasters,” and should be phased in over several years.¹⁶ *The Commission has not reported on its findings on minimum public interest obligations.*

¹¹ NOI at 11.

¹² NOI at 15-17.

¹³ 47 C.F.R. § 73.3526(e). The Commission noted that it streamlined public file rules in 1998. See In the Matter of Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, MM Docket No. 97-138, Report and Order, 13 FCC Red 15691 (1998) (Public File Report and Order).

¹⁴ In the Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations (MM 20 Docket No. 00-168) September 14, 2000 (see http://www.fcc.gov/Bureaus/Mass_Media/Notices/2000/fcc00345.pdf).

¹⁵ NOI at 20.

¹⁶ Advisory Committee Report at § III.3.

- **Access to the media:**¹⁷ One of the Commission’s long-standing goals in the area of broadcast regulation is to enhance the access to the media by all people, including people of all races, ethnicities, and gender, and, most recently, people with disabilities. Congress emphasized this goal when it amended section 1 of the Communications Act in 1996 to refine this agency’s mission as making available “to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service....” It further highlighted this goal when it added provisions to the Act concerning people with disabilities, such as section 713 relating to closed captioning and video description.¹⁸ Given the efficiencies of digital technology, DTV broadcasters are able to “multicast” and air several programs at the same time, as well as provide more information within the signal of each programming stream. The Commission sought comment on the ways broadcasters can use this technology to provide greater access to the media for people with disabilities and innovative ways unique to DTV that the Commission could use to encourage diversity in the digital era. *The Commission has not issued a report on its findings.*¹⁹

- **Enhancing political discourse:**²⁰ The Commission has long interpreted the statutory public interest standard as imposing an obligation on broadcast licensees to air programming regarding political campaigns.²¹ The Supreme Court likewise has recognized the impact television broadcasting has on our political system.²² The

¹⁷ NOI at 24-28.

¹⁸ 47 U.S.C. § 613.

¹⁹ This has become a particular problem for individuals who rely on captioning to view television programming because some broadcasters have taken the position that when they convert a standard definition analog network to a high definition (HD) channel, they are creating a “new network” that automatically qualifies for an exemption from the FCC’s captioning rules for a four year period, even when the HD channel is substantially similar to its analog counterpart. The consequence is that programming captioned in its analog version is no longer captioned when provided over a digital stream.

²⁰ NOI at 34-38.

²¹ See, e.g., Licensee Responsibility as to Political Broadcasts, 15 FCC 2d 94 (1968).

²² “Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates. A majority of the population cites television as its primary source of election information, and debates are regarded as the ‘only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format

Commission sought comment on ways that candidate access to television and thus the quality of political discourse might be improved. *The Commission has not reported on its findings.*

- **Emergency Alert System:** In the November 2005 Further Notice issued in EB Docket 04-296, the FCC sought comment on how to improve EAS. It stated that a reliable "wide-reaching public alert and warning system is critical to public safety" and that the EAS network should permit "officials at the national, state and local levels to reach affected citizens in the most effective and efficient manner possible." The FCC requested comment on a wide range of issues, including: enhancing the EAS network architecture and message distribution, adopting a common EAS messaging protocol, the feasibility of satellite television and radio service providers delivering state and local emergency messages, whether to require wireline video providers to transmit EAS alerts, the provision of EAS alerts to persons with sight and hearing disabilities, and other issues. *The FCC continues to implement its EAS responsibilities in this on-going rulemaking proceeding.*

which potentially offers sufficient time to explore issues and policies in depth in a neutral forum.”
Arkansas Educational Television Commission v. Forbes, 118 S.Ct. 1633, 1640 (1998)