



March 27, 2007

John Dingell
Chairman
Committee on Energy and Commerce
2328 Rayburn
Washington, DC 20515

Edward Markey
Chairman
Subcommittee on Telecommunications &
the Internet
2108 Rayburn
Washington, DC 20515

Dear Chairmen Dingell and Markey,

At the March 14 House Subcommittee on Telecommunications & the Internet Oversight of the Federal Communications Commission hearing, FCC Chairman Kevin Martin suggested that the Commission has addressed many of the issues raised in the 1999 Notice of Inquiry on the Public Interest Obligations of TV Broadcast Licensees¹ (“NOI”). We write today to respectfully disagree with Chairman Martin and again to call for quick resolution on a matter pending before the Commission since 1995, not 1999.

In the 1995 Notice of Proposed Rulemaking on Advanced Television Services and Their Impact Upon the Existing Television Broadcast Service² (“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 programming⁶ and must comply with the 1996 Act provisions relating to the

¹ 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)

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.

rating of video programming.⁷ 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.

Specifically, the Commission asked:

Should a licensee's public interest obligations depend on the nature of the services it chooses to provide and, if that is the case, how so? For example, if a broadcaster chooses to provide multiple standard definition services, should public interest obligations attach to each one? [S]hould public interest obligations be seen as attaching not to services but to licensees, each of whom would be required to operate the facilities associated with its 6 MHz [digital] channel in the public interest?⁸

On April 3, 1997, the Commission adopted the Fifth Report and Order on Advanced Television Services and Their Impact Upon the Existing Television Broadcast Service ("Fifth Report & Order").⁹ The order explicitly did not resolve the public interest obligation debate stating:

Some argue that broadcasters' public interest obligations in the digital world should be clearly defined and commensurate with the new opportunities provided by the digital channel broadcasters are receiving. Others contend that our current public interest rules need not change simply because broadcasters will be using digital technology to provide the same broadcast service to the public. ***We are not resolving this debate today.*** Instead, at an appropriate time, we will issue a Notice to collect and consider all views. As we authorize digital service, however, broadcast licensees and the public are on notice that existing public interest requirements continue to apply to all broadcast licensees. Broadcasters and the public are also on notice that the Commission may adopt new public interest rules for digital television. Thus as to the public interest, our action today forecloses nothing from our consideration.¹⁰

Nearly three years after the Fifth Report & Order and one year after a Presidential Advisory Committee concluded, "As this Nation's 1,600 television stations begin to convert to a digital television format, it is appropriate to reexamine the long-standing

⁷ 47 U.S.C. § 303(w).

⁸ NPRM at 35

⁹ In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service (MM Docket No. 87-268) April 3, 1997 (see http://www.fcc.gov/Bureaus/Mass_Media/Orders/1997/fcc97116.pdf)

¹⁰ Fifth Report & Order at 50 (emphasis added).

social compact between broadcasters and the American people,”¹¹ the Commission adopted the 1999 NOI mentioned by Chairman Martin.

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 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?¹²

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

- **Disclosure Obligations:**¹³ 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

¹¹ Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. “Charting the Digital Broadcasting Future” (p. xi) 1998 (<http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf>). The Advisory Committee was comprised of a broad cross-section of interests, consisting of twenty-two members chosen by the President from the commercial and noncommercial broadcasting industry, computer industries, producers, academic institutions, public interest organizations, and the advertising community.

¹² NOI at 11

¹³ NOI at 15-17

television programming reports.¹⁴ *The NOI led to a Notice of Proposed Rulemaking,¹⁵ but the Commission has not yet issued a Report & Order.*

- **Minimum public interest obligations:**¹⁶ 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.¹⁷ *The Commission has not reported on its findings on minimum public interest obligations.*
- **Access to the media:**¹⁸ 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, disabled persons. 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.¹⁹ 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 the disabled 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.*
- **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

¹⁴ 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 Rcd 15691 (1998) (Public File Report and Order).

¹⁵ 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

¹⁶ NOI at 20

¹⁷ Advisory Committee Report at § III.3

¹⁸ NOI at 24-28

¹⁹ 47 U.S.C. § 613.

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

The 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.*

FCC Commissioners Michael Copps and Jonathon Adelstein have been vocal about the importance of resolving the public interest obligation debate. Their strongest statements on the subject may have been delivered as the Commission decided on the dual and multicast carriage issues in 2005:

We are told to act now because this proceeding has been pending for so long. Other items integral to this one, prerequisites for today's vote, have been around even longer. Consider that in 1999, more than a year before our first must-carry vote, we opened a proceeding on the public interest obligations of digital TV broadcasters. And in that public interest proceeding, remember that we were not writing on a blank slate. Rather, we were addressing issues raised in a report from a Presidential advisory committee that was issued a full year before that. It is six years later now, and *this Commission still has not provided the American people with a clear idea as to how broadcasters' enhanced digital spectrum is going to improve our viewing experience.* The must-carry decision was a golden opportunity in which to consider this—but we let it slip away. Instead *we have a record of inaction that will go down, I believe, as the Commission's major failing in its efforts to move the digital transition forward.*²³

For nearly two years, both internally and externally, I have consistently maintained that it would be premature to decide multicast carriage without assurance that each programming stream would indeed serve its local community through the imposition of concrete and meaningful public interest requirements... Unfortunately, for two years I was unable to engage the industry in an effective fashion to step forward and engage in public interest discussions. Illustrating the resistance, the NAB expressed hostility to the Commission even inquiring into broadcast localism. And aside from concluding a children's programming item last year, the Commission until today continued to sit on an enhanced public disclosure

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 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).]

²³ Statement of Michael J Copps in Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules (See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256701A4.doc). [emphasis added]

proposal and a more than five-year old general inquiry into digital public interest obligations.²⁴

In February 2007, these same commissioners expressed similar concerns to this Subcommittee:

Consumer education and outreach are indispensable in gaining consumer acceptance of DTV... *Another—and critically important—step we could take is to revive some of our long dormant inquiries into the public service obligations of TV and radio broadcasters after the digital transition. I believe that resolving these questions as soon as possible will help consumers understand the benefits of going digital, which will in turn allow them to make the appropriate buying decisions in advance of the transition.*²⁵

The FCC must develop DTV public interest obligations and encourage more PSAs. First, *in order to maximize the benefits to the American people, the Commission needs to determine DTV broadcasters' public interest obligations.* This proceeding has been pending since 1999, and the Commission has failed to produce final rules. *Quantitative public interest obligations would encourage broadcasters to develop news and entertainment programming that is compelling and relevant to the viewing audience.*²⁶

Additionally, in November 2005, the Commission's own Consumer Advisory Committee, citing a woeful lack of progress, recommended that FCC should, within six months, issue Reports & Orders in the matters of 1) Public Interest Obligations of TV broadcast Licensees (MM Docket No. 99-360) and 2) Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations (MM 20 Docket No. 00-168).²⁷

In 2002, then-Commissioner Kevin Martin said, "I believe it is extremely important for the Commission to resolve outstanding DTV-related issues quickly so that affected

²⁴ Statement of Jonathan Adelstein in Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules; CS Docket No. 98-120; Second Report and Order and First Order on Reconsideration (see http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256701A6.doc)

²⁵ Responses of FCC Commissioner Michael Copps to Pre-Hearing Questions from the House Commerce Committee's Subcommittee on Telecommunications and the Internet. February 7, 2007. (See http://energycommerce.house.gov/Press_110/110-resp.FCC.020707.Copps.pdf) (emphasis added.)

²⁶ Responses of FCC Commissioner Jonathan Adelstein to Pre-Hearing Questions from the House Commerce Committee's Subcommittee on Telecommunications and the Internet. February 7, 2007. (See http://energycommerce.house.gov/Press_110/110-resp.FCC.020707.Adelstein.pdf) (emphasis added.)

²⁷ Federal Communication Commission's Consumer Advisory Committee. "Recommendation Regarding Consumer Interest Obligations of Digital Television Broadcasters." November 18, 2005. (see http://www.fcc.gov/cgb/cac/nov05_dtv_recommendation.html)

industries and consumers know the rules of the road.”²⁸ We cannot agree more. With less than 700 days before the completion of the transition to all-digital television broadcasting in the US, the American public deserves to know how television broadcasters will fulfill their role as public trustees of the airways in the digital age. Clear guidelines from the Commission would ensure that broadcasters adhere to the law and serve the local educational, informational and civic needs of the children and adults in the communities TV stations are licensed to serve.

We have taken the liberty of attaching a proposed processing guideline for the general public interest portion of broadcast license renewal applications.²⁹ The processing guidelines include Local Civic and Electoral Affairs Programming; Independently Produced Programming; Reporting/Disclosure; and Excessive Commercialization. Licensees that meet all four of the attached guidelines would receive staff level approval of the general public interest portion of their license renewal application; applications of licensees not meeting all of the following guidelines would be referred to the Commission for review. In addition, viewers would be empowered to file complaints with the Enforcement Bureau alleging that the licensee has failed to comply with the terms of this processing guideline. If, on the basis of viewer complaints or staff review, the staff determined that the licensee consistently fell significantly below the minima set forth here, the staff would have the authority to direct the early filing of license renewal applications or take other enforcement measures as may be appropriate.

We urge you to press the Commission and Chairman Martin to further explain the Commission’s failure to define the public interest obligations of digital broadcasters.

If we can answer any questions or be helpful in any way, please do not hesitate to contact us. Thank you for your time and consideration

Sincerely,

Meredith McGehee
Policy Director
Campaign Legal Center
(202) 736-2200

Charles Benton
Chairman
Benton Foundation
(847) 328-3040

Mark Lloyd
Senior Fellow
Center for American Progress
(202) 682-1611

ENC: Public Interest Obligations and the Digital Television Age

CC: House Subcommittee on Telecommunications and the Internet

²⁸ Statement on Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, Second Report and Order and Second Memorandum Opinion and Order (MM Docket No. 00-39) (August 8, 2002) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-225221A5.doc)

²⁹ This proposal was first delivered to the Commission in April 2004 by a coalition of groups including the Alliance for Better Campaigns, Benton Foundation, Center for Creative Voices in Media, Center for Digital Democracy, Common Cause, Institute for Public Representation of Georgetown University Law Center, Media Access Project, New America Foundation, and Office of Communication of the United Church of Christ, Inc.

FCC Chairman Kevin Martin