PUBLIC INTEREST REGULATION IN THE DIGITAL TV ERA

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Television, including terrestrial and direct broadcast satellite ("DBS"), cable television, multichannel multipoint distribution systems ("MMDS"), and local multipoint distribution systems ("LMDS"), is moving into the digital era. Federal Communication Commission ("FCC") Chairman Reed Hundt has called for clearly defined and heightened responsibilities for commercial television;[1] he has also indicated the desirability of symmetrical regulation of the principal electronic media subject to the FCC's jurisdiction. The White House, led by Vice President Gore, has established an advisory group, to study and make recommendations regarding the nature of the public interest obligations of digital broadcasters.[2] The major focus of this article is on that issue.

I. TRENDS AND GUIDING PRINCIPLES

It is not my purpose here to trace the trends of television in detail. For the purposes of this article, it suffices to say that we are heading for an era of digital television, many delivery systems, continuing fractionalization of the audience, and greater competition for that audience, the advertising dollar, and popular programming.[3] Cable television is certainly a great success story. It serves 63% of the nation's households,[4] with hundreds of channels of programming. DBS has made a strong entry with its 150 or more channels of digital television. Commercial television is flourishing because it continues to be *the* local outlet for television advertising. On a national level, it is the only way to garner the large audience

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1 *See* FCC Chairman Reed Hundt, Speech before the CTIA Convention (Mar. 4, 1997); *see e.g.* Reed Hundt, *First Things First,* BROADCASTING & CABLE, Mar. 3, 1997, at 32-33. (Hundt has left the FCC, but his successor appears to be following the same policies in this field).

2 *See* Vice President Al Gore, Speech on Public Interest Obligations in a Digital Age (Feb. 5, 1997); Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, 62 Fed. Reg. 12,065 (1997) (establishing the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters).

3 *See* Robert Pepper, *Broadcasting Policies in a Multichannel Marketplace, in* TELEVISION FOR THE 21ST CENTURY: THE NEXT WAVE 120 (The Aspen Institute Communications and Society Program 1993); *See also* Henry Geller, *1995-2005: Regulatory Reform for the Principal Electronic Media,* THE ANNENBERG WASH. PROGRAM NW. UNIV. 7-8 (1994).

4 *Not Much Improvement in Basic Subs for Cable Top 50,* TELEVISION DIGEST, May 12, 1997, at 2.

sought by many advertisers.[5] There is no way to predict with any certainty the impact of future video delivery systems such as LMDS, the local telephone companies ("telcos"), and most importantly, the Internet, through high speed data (including video) directed to either digital TV receivers or personal computers ("PCS").[6]

Against this background, the following principles should guide policy in this area:

(i) Continue and expand the policy of open entry. Such entry contributes to the diversity of programming and of sources, thereby markedly servicing the public interest and the First Amendment.[7]

(ii) Promote open, nondiscriminatory access for information providers and the public. This principle is closely related to the open entry policy, and indeed, with a plethora of effective distribution channels, no government intervention, such as requiring general (telco) or partial (cable) common carriage, may be needed.

(iii) Maintain and promote vigorous competition.[8] This principle may require a balance of conflicting considerations, namely, a need to consider economies of scale against the desirability of diversification and competition, especially at the local level.[9]

(iv) While the market should be given the fullest possible play, there is the need to insure against deficiencies, and thus to promote high quality public service programming that contributes to an educated and informed citizenry in a manner that (a) is effective; (b) reaches all Americans and deals with the have/have not problem; (c) is consistent with the First Amendment; and (d) reduces First Amendment strains by developing structural ap-

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[5] *See* Sally Goll Beatty, *Network TV Sales Head Skyward as Audience Size Remains a Lure*, WALL ST. J., June 5, 1997, at B12; Kyle Pope, *Why TV Ad Prices are Rising Even as Viewship is Falling*, WALL ST. J., May 12, 1997, at B1.

[6] The telcos do not appear to be a substantial factor in the near term, but must eventually turn to broadband transmission (and indeed, several are proceeding with expansive fiber programs). The Internet, while it faces considerable obstacles today for video distribution, may well be a most important future factor. *See, e.g.*, Steve Lohr, *The Next Act for Microsoft*, N.Y. TIMES, June 10, 1997, at D1; Don West, *Convergence the Hard Way*, BROADCASTING & CABLE, Apr. 9, 1997, at 6.

[7] *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 566-67 (1990) (quoting Associated Press v. United States, 326 U.S. 1, 20 ("[W]idest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.")).

[8] *Id.*

[9] Thus the proposal to allow newspapers to own television stations in the same area, *see* Chris McConnell, *Publishers Challenge Common Ownership Bars*, BROADCASTING & CABLE, June 9, 1997, at 20, or to permit duopoly ownership of local television stations goes markedly against the diversification principle. People rely on television stations and the newspaper for information on local issues, and therefore these powerful media should be in separately owned hands. While DBS, cable television, and other media may contribute to informing about national issues, they are not relevant to local issues. This area, while of the greatest importance, is not treated further in this article.

proaches that truly facilitate the achievement of goals without behavioral regulation. Television is becoming increasingly important to the nation. It is a child's window on the world, and most people now obtain their news and information from television. Therefore, television should also provide educational, cultural, and in-depth informational programming. The government's role here, as in the case of schools and libraries, is of great importance.

(v) Avoid unnecessary regulation and to the extent possible, adopt like regulation for like services so as not to tilt the playing field.

II. The Current Regulatory Schemes

Before turning to the issue of reform for digital TV, it is appropriate to briefly describe the current regulatory policies, especially for broadcasting.

A. *Broadcasting: Public Trustee Regulation*

Because the number of people who want to use the spectrum exceeds the number of available frequencies or channels, the Communications Act of 1934 establishes a system of short-term broadcast licenses to be awarded to private parties who volunteer to serve the public interest—to be a fiduciary or trustee for all those who were kept off the air by the government.[10] The Act imposes several public service requirements: (1) that the broadcaster serve local needs and interests, with what is called "community issue-oriented programming" today;[11] (2) that the broadcaster contribute to an informed electorate through informational and political broadcasts;[12] and (3) that because children are so important to the nation and watch so much television, television broadcasters are required to serve the educational and informational needs of this audience with programming specifically designed for that purpose.[13]

Requirements such as the above clearly involve content regulation, and thus, their constitutionality would normally be judged under the strict scrutiny standard of First Amendment jurisprudence. That standard places on the government the heavy burden of showing that the requirements are narrowly tailored (i.e., the

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[10] Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

[11] *See* Communication Act of 1934, 47 U.S.C. §307(b); Deregulation of Radio, 84 F.C.C.2d 968-69, 978, 982 (1981), *aff'd*, United Church of Christ v. FCC, 797 F.2d 1413 (D.C. Cir. 1983); Commercial TV Stations, 98 F.C.C.2d 1075 (1984).

[12] *See Id.* §§ 315(a), 312(a)(7)(1934).

[13] *See* Children's Television Act of 1990, 47 U.S.C. § 303b(a)(2)(1994) ("CTA").

least restrictive means) to serve a compelling interest.[14] However, the Supreme Court has consistently held that because of the above allocational scarcity, such governmentally imposed broadcasting requirements do not come under traditional heightened First Amendment jurisprudence, but rather the more liberal standard set out in the *Red Lion* and *NBC* cases[15]—if the regulation is reasonably related to the public interest, it is permissible under the First Amendment.

Finally, there is the matter of the efficacy of the public trustee scheme. It is a failure. The FCC has effectively deregulated broadcasting.[16] Indeed, with one exception, the Children's Television Act of 1990 ("CTA"), the FCC receives no programming information from which it might assess the public service efforts of its licensees, nor does it monitor the industry generally or through specific random inspections that evaluate public service efforts. Although the FCC requires broadcasters to maintain files indicating significant treatment of community issues, along with illustrative programs, broadcasters do not have to submit this material to the FCC. Instead, they send the FCC postcards stating that the relevant material may be found in a public file located at the station. As a result, the FCC must rely solely upon the public to bring to its attention stations that are not fulfilling their public service obligations.

This reliance is wholly misplaced, as the seventeen year experience with postcard renewal shows. Even though people may send letters complaining about the disappearance of a favorite program or some content feature, they can hardly be expected to go to a station, examine its files, analyze the data, and then file a petition to deny. Postcard renewal simply permits the FCC to avoid consideration of public service issues. That is why it is aptly termed Deregulation of Radio (or Television).[17]

In 1976, Commissioner Glen Robinson, echoing Nobel Prize economist Ronald Coase, described FCC regulation of broadcasting as a charade—a wrestling match full of fake grunts and groans but signifying nothing.[18] Today, with postcard renewal, the charade continues, but is more starkly apparent. This is not to say commercial broadcasters render no public service, but with the one exception of the CTA, such service has nothing to do with reg-

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14 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

15 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); NBC v. United States, 319 U.S. 190, 226-27 (1943).

16 *See supra* note 11.

17 *Id.*

18 Cowles Fla. Broad., Inc., 60 F.C.C.2d 371, 439 (1976).

ulation. The point is that the FCC public trustee regime is, and has long been, a failure.[19]

B. *Cable Television*

Cable comes under a different regulatory and constitutional regime than broadcasting. Because it has a capacity for many channels of programming, it has never been regulated as a public trustee required to provide public service content in categories like children's television or informational programming. Indeed, the Act specifically bars such content regulation.[20] Instead, the policy is geared toward providing access for so-called public, educational, or governmental ("PEG") channels on a non-commercial basis or for commercial leased channels.[21] These access channels are designed to promote the *Associated Press* principle,[22] by freeing a significant amount of cable capacity from the control of the cable operator in order to diversify the sources of information coming to the cable subscriber.

In *Turner*, the Court unanimously rejected the government's argument for application of the *Red Lion* standard to cable television. It held that *Red Lion* is based on the unique and distinguishing characteristic that broadcast frequencies are a scarce resource that must be allocated among many more applicants than there are available frequencies, and that cable does not have such inherent limitations. Rather, the Court found that in light of technological developments, there is no practical limitation on the number of speakers, nor is there any danger of interference between two cable speakers.[23]

It follows that regulation of cable speech comes under traditional First Amendment jurisprudence—if content based, the standard is strict scrutiny;[24] if content neutral, the standard is the

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19 For a fuller discussion of this long pattern of failure, see Geller, *supra* note 3, at 12-17.

20 *See* Children's Television Act of 1990 § 624(f)(1), 47 U.S.C. §544(f)(1). Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 106 Stat 1501.

21 *Id.* §§ 611, 612 (1990).

22 *See supra* note 7.

23 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994). The Court, while agreeing that the cable market reflects dysfunction, also rejected the extension of *Red Lion* on that basis, holding that the physical, rather than economic characteristics of the broadcast market underlie the Court's broadcast jurisprudence, and that the claim of market dysfunction "is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media." *Id.* at 640.

24 In *Denver Area Telecomm. Consortium v. FCC*, 116 S. Ct. 2374 (1996), a case involving the constitutionality of provisions dealing with indecent programming over PEG and commercial leased channels, a plurality led by Justice Breyer used a new standard instead of strict scrutiny, called "close judicial scrutiny." *Id.* at 2385-86. Under that test, the plurality

intermediate standard of *United States v. O'Brien*.[25] It seems clear, therefore, that extending *Red Lion* requirements such as the provision for educational or informational programs, would not pass constitutional muster. There is simply no "compelling interest" or "extremely important" or "extraordinary" problem. Indeed, in light of cable's many channels of programming (e.g., The Learning Channel; Discovery Channel; Nickelodeon; Arts & Entertainment Channel; CNN and the new news channels; C-SPAN; the PEG channels), there is no problem at all, and no policy reason for government intrusion.[26]

There is a question as to the efficacy of the access provisions. While they constitute a sound approach in my view, their implementation at both the national and local levels has been flawed. A large number of franchising authorities do not require PEG channels, or if they do, fail to assure adequate financial support.[27] As to commercial leased channel operation, Congress recognized in the 1992 Cable Act that this requirement of the 1984 Cable law has been a failure. It therefore added a provision requiring the FCC to determine the operator's maximum rates for commercial leased channel use, and to establish reasonable terms and conditions.[28] The Commission has acted, with several parties appealing its order as inadequate to remedy the situation.[29] On this score also, the matter is unsettled both as to legality and efficacy.

C. *DBS*

The 1992 Act contains two public interest provisions concerning DBS.[30] Section 335(a) directs the FCC to initiate a proceeding to impose public interest requirements on DBS providers of video

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substitutes "extremely important" problems (or "extraordinary problems") for "compelling interest" and "sufficiently tailored" or "appropriately tailored" for "least restrictive means." *Id.* at 2385. The five other members adhered to *Turner* and employed strict scrutiny.

[25] 391 U.S. 367, 377 (1968). Under this standard, a content-neutral regulation is valid if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

[26] The constitutionality of the PEG and commercial leased channel provisions was sustained under an intermediate (*O'Brien*) analysis in *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 967-973 (D.C. Cir. 1996).

[27] For a full discussion of this and the leased channel problems, see Geller, *supra* note 3, at 28-31.

[28] *See* Cable Act of 1992 §9, 47 U.S.C. §532 (1994).

[29] Cable Television Leased Commercial Access, 62 Fed. Reg. 11364 (1997) (to be codified at 47 C.F.R. pt. 76) (proposed Mar. 12, 1997); *see* Value Vision Int'l, Inc. v. FCC, No. 97-1138 (D.C. Cir. filed Mar. 17, 1997).

[30] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 25, 106 Stat. 1501.

service (at a minimum, the access provisions of section 312(a)(7) and the use provisions of section 315). Section 335(b) requires the provider to reserve 4% to 7% of capacity for noncommercial programming of an educational or informational nature, with prices not to exceed 50% of the total direct costs of making such a channel available, and with the DBS provider having no editorial control over any video material offered under the section. The FCC has not imposed any public interest requirements beyond those specified in the Act under section 335(a) and has a proceeding under way to determine how both sections 335(a) and (b) should be implemented.[31]

Because DBS uses a scarce spectrum, a circuit court held that *Red Lion* is applicable and on that basis, sustained the constitutionality of section 335.[32] The case points to the unique nature of the Supreme Court's broadcast jurisprudence. The provision requiring 4% to 7% for noncommercial, educational, or informational purposes is reasonably related to a public interest purpose, and thus can be said to come under *Red Lion.* But if the provision was tested under traditional First Amendment jurisprudence, it would raise substantial constitutional issues.

First, there is the question whether the regulation is content neutral. In the case of cable, the access provisions do appear to be content neutral (commercial leased access, and noncommercial access in the form of public and governmental (a local C-SPAN—the educational channel is more problematic but might be swept along with the others)). In the case of DBS, the emphasis is on the educational and informational, similar to the CTA (and further, DBS is not a bottleneck multichannel provider like cable). If the DBS provision is not content neutral and comes under strict scrutiny, the question arises whether a compelling or extraordinary problem is being considered. DBS, like cable, carries a plethora of educational and informational programming (albeit most with commercials), and is eager to carry noncommercial PBS programming (and does carry into areas not served by local PBS stations).

If there is a problem in this area, it is really with the financing of such noncommercial channels of programming—a matter left in limbo by the statute. Significantly, MMDS, which is now com-

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[31] Implementation of Section 25 of the Cable Television Consumer and Competitive Act of 1992, FCC MM Docket No. 93-25.

[32] Time Warner Entertainment Co. v. FCC, 93 F.3d 957, 973-77 (D.C. Cir. 1996), *reh'g denied,* 105 F.3d 723 (D.C. Cir. 1997) (five judges voting for rehearing and stating their belief that the DBS provision is unconstitutional, three voting against rehearing, and two recusing themselves).

mencing digital operation, and LMDS, which is about to be authorized, do not come under statutory (or administrative) requirements such as section 335.[33] This is sound, as both services need to establish themselves. While DBS is more advanced, it seems that a service reaching less than 10% of the U.S. households and still in an emerging state, section 335 should be implemented with the lightest regulatory hand at this time (i.e., only the statutorily imposed 4% to 7% requirement). If DBS does become a strong, profitable video provider, there is time enough to consider what public interest requirements should apply.

III. Sound Regulatory Policies for Digital Broadcast Television

A. *The Need for Clearly Defined Guidelines*

The 1996 Telecom Act specifically provides that the public interest standard is applicable to television broadcasting in the advanced (digital) era.[34] Chairman Hundt has called for "clearly defined guidelines for all uses of the airwaves [that come under the] public interest [standard],"[35] and has applauded the Executive Branch Commission to study broadcasters' public interest obligations in a digital age.[36]

First, so long as the Act requires the application of the public interest standard, the Chairman's position calling for clearly defined guidelines is sound. Public service, without further definition, is a vague concept. Commercial broadcasting is a business of fierce and ever-increasing competition.[37] In these circumstances, it is understandable that the commercial broadcaster largely focuses on the bottom line—maximizing profits.

The situation is similar to the issue of pollution: some businesses will be good citizens and not pollute the water, land, or air, but many others, driven by strong competition, will take the profit-maximizing route and do great damage to the environment. To prevent a Gresham's Law pattern from taking over the whole situation, the government adopts specific regulations applicable to an

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33 *See supra* note 29.

34 *See* Telecommunications Act of 1996, 47 U.S.C. § 336(d)(1994).

35 *See supra* note 1; the Chairman also stated that the Commission "will issue an inquiry this summer to 'afford all Americans an opportunity to advise us' . . . on specific public interest obligations for broadcasters." *Hundt on his Favorite Topics*, TV Digest, June 9, 1997, at 8.

36 As stated by Chairman Hundt on February 5, 1997.

37 *See, e.g.*, Bill Carter, *Losing Viewers to Cable, Again*, N.Y. Times, May 22, 1997, at C20.

entire industry. It does not say to the industry: "Do right and avoid undue pollution."

But with the exception of its recent action in the area of children's television (discussed below), the FCC has never adopted effective, objective guidelines for local or informational programming—that is, quantitative guidelines for these categories during prescribed times (e.g., 6 a.m. to midnight and during prime time).[38] Because the FCC was proceeding under vague, "marshmallow" standards,[39] there was no effective enforcement of the public interest requirement. In 1973, FCC Chairman Dean Burch told a broadcast industry group: "If I were to pose the question, what *are* the FCC renewal policies, and what are the controlling guidelines, everyone in the room would be on equal footing. You couldn't tell me, I couldn't tell you—and no one else at the Commission could do any better. . . ."[40]

With such "mushy" standards, it is most difficult for the agency to single out some station for denial of renewal; after all, the station is in the dock because it was given no guidelines by the FCC as to what was expected in order to gain renewal. This failure to act on an *ad hoc* basis compounded the problem. An action taken against one station, however unfair and perhaps subject to challenge on that score,[41] would nevertheless serve as an example to the entire industry, with an effect comparable to that of a general regulation. The FCC, however, shirked this responsibility, even when confronted with the most serious violations.[42]

As noted, the FCC effectively deregulated broadcasting in the 1980s by adopting postcard renewal. Instead of moving in the direction of making the public interest requirement effective, it boldly undermined the whole concept, as a practical matter. Most significantly, Congress never even held a hearing on this action, much less moved to set it aside.

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38 *See* National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978). From 1973 to the early 1980s, the FCC had processing guidelines governing nonentertainment programming and local programming for its renewal staff, so that the staff could grant renewal under delegated authority. *See* United Church of Christ v. FCC, 707 F.2d 1413, 1420-21 (D.C. Cir. 1985).

39 *Broadcast Renewal License: Hearings Before the House Subcomm. on Comms.*, 93d Cong., 1st Sess., ser. 93-36, pt.2, at 1120 (testimony of Chairman Dean Burch); En Banc Programming Inquiry, 44 F.C.C.2d 230 (1960); Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976); Revision of FCC Form 303, 52 F.C.C.2d 184 (1975); Ascertainment of Community Problems by Broadcast Applicants, 54 F.C.C.2d 418 (1976).

40 Dean Burch, Address to the *International Radio and Television Society* (Sept. 14, 1973).

41 *See infra* note 50.

42 *See*, Lamar Life Broad. Co., 38 F.C.C. 1143 (1965), *rev'd sub nom.*, United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1965); Kord, Inc., 31 F.C.C. 85 (1961); Moline Television Corp., 31 F.C.C.2d 263 (1971); Herman Hall, 11 F.C.C.2d 344 (1968).

Congress revised one facet with its passage of the 1990 Children's Television Act, requiring broadcasters to serve the educational and informational needs of children, with specific programming designed to serve such needs. Congress stated that a showing at renewal must be made as to this obligation and that the postcard would not suffice in this respect. The history of the implementation of this Act demonstrates the need for clearly defined guidelines.

The Act became effective in October, 1991. In March 1993, the FCC issued a Notice of Inquiry, because after examining renewal applications then on file, it found the following:

* No increase in the number of hours of educational and informational programming. The number of standard-length programs was at times very limited, with many licensees relying substantially on Public Service Announcements ("PSAs") and vignettes to meet the CTA obligation.

* No real change in the time slots devoted to children's programming, with CTA proponents claiming that broadcasters slotted educational programs before 7 a.m., when the child audience is minimal.

* Some licensees are proffering such animated programs as "The Flintstones" and "GI Joe" as educational, asserting that such programs include a variety of generalized pro-social themes.[43]

Another way to illustrate the need for quantitative guidelines is to examine the performance of Los Angeles VHF station, KCAL-TV, operated by the premier family and children's entertainment company, Disney. For over one year after the effective date of the CTA, KCAL-TV presented only one core educational program (i.e., program specifically designed to educate or inform children), a half-hour show at 5:30 a.m., subsequently augmented by another half-hour show at 6 a.m. After the FCC issued its Notice and moved forward to implement a three-hour quantitative guideline for such core programming, KCAL-TV rapidly increased its effort to meet that guideline.[44]

The National Association of Broadcasters ("NAB") argues that the approach of clearly defined guidelines for public service violates the First Amendment—that the Amendment bars governmen-

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43 *See* Policies and Rules Concerning Children's Television Programming Revision, 8 F.C.C.R. 1841, 1842 (1993).

44 *See* Petition of CME, to Deny Applications for Consent to Transfer of Control of Broadcast Licenses Held by Capital Cities/ABC to the Walt Disney Company, Nos. BTC, BTCH, of BTCCT-950823KA-950823LI, at 29-30. For a definition of core educational programming, see *infra* note 85.

tal action "requiring broadcasters to air particular types of programs."[45] The Act itself, however, requires broadcasters to air particular types of programs, to serve as a local outlet (with indeed the entire allocations scheme based on this obligation) and to present informational programming, including political broadcasts and children's educational programs.[46] The NAB is really arguing that the public trustee scheme of the Act is unconstitutional. If it believes that, why does it not challenge the constitutionality of the Act, and specifically the CTA?[47]

The answer is that the NAB welcomes being called a public trustee, so long as the obligation is left vague and therefore unenforceable. If the NAB were to lose its public trustee status, it might well be subject to spectrum auctions (as to the new channels for advanced TV Broadcasting) and spectrum usage fees. For example, in the 103rd Congress, the Administration, seeking to raise needed revenues, proposed a $5 billion spectrum usage fee on broadcasters (beginning at 1% and rising to 5%). The NAB successfully opposed this effort, and used the argument that the fee scheme would "change the landscape of communications policy" by eliminating broadcasters' commitment to serve the public interest in exchange for free use of the spectrum. "Broadcasters have always supported that compact, [NAB President] Fritts says. This proposal, however, puts it at risk, he says."[48]

The NAB's position is truly astounding—that it accepts the public service obligation, but any attempt to implement it by adopting quantitative guidelines as to some prescribed category such as the CTA, is unconstitutional. The guideline is just that—a reasonable guideline or "safe harbor" assuring renewal by the staff, with the renewal applicant having the right under the CTA and the FCC's rules to make further showings as to why renewal is in order.[49] If, to take an egregious case, an applicant sought renewal with only a half-hour or one hour of programming at a very early

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45 Edward Fritts, *Response to FCC Chairman Reed Hundt*, BROADCASTING & CABLE, Apr. 7, 1997, at 36.

46 *See supra* Part II.

47 The allocational scarcity on which the public trustee scheme rests persists today, with no channels or frequencies available in most markets and with stations being sold at very high prices because of the scarcity. *See* Geller, *supra* note 3, at 11.

48 Kim McAvoy, *Broadcast, Cable Unite Behind Senate Bill*, BROADCASTING & CABLE, June 13, 1994, at 42-43 ("Dingell may be set to derail onerous spectrum fee."); Scott Greenberger, *Fritts Insists Highway will Include Broadcasters*, MULTICHANNEL NEWS, May 23, 1994, at 130 (where an industry spokesman warned that if the fee were implemented, the public service obligation would have to be removed).

49 *See* Children's Television Act, § 303b(a)(2)(1990); FCC Report on Children's Television Act, FCC 96-335, at para. 135 (1996).

morning hour, the FCC could constitutionally deny renewal on an *ad hoc* basis. So the issue is why does it not serve the public interest and the First Amendment to give applicants some reasonable notice of what is required for renewal? As the court stated in the *Greater Boston* case, administrative discretion to deny renewal must be "reasonably confined by ground rules and standards."[50]

This is not to say that there are no First Amendment difficulties in the implementation of the public trustee scheme. There clearly are. Thus, the Supreme Court, while affirming the constitutionality of the scheme, has acknowledged that the scheme necessarily entails First Amendment strains—that the role of the government as "guardian of the public interest" and the role of the licensee as a "journalistic 'free agent' call for a delicate balancing of competing interests. . . . The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values written into the . . . Communications Act."[51]

Whatever public service program categories are used, for example, local, informational, nonentertainment, community issue-oriented, or "specifically designed to [educate or inform children]," definitional problems arise, particularly at the margins.[52] Take the latter category, called core educational programming.[53] Educational or informational programming for children contains a strong entertainment component, and trying to separate the two components is neither possible nor appropriate. Further, it can have a social purpose instead of being cognitively directed.[54] This can result in the claim that "The Little Mermaid" meets the definition of core educational programming because it shows little girls how to be leaders or how to be assertive. Controversy can and has arisen over programs like NBC's "NBA Inside Stuff," with the network disputing the criticism that this was not core educational fare by citing the support of two educational psychologists who had assisted in its preparation.[55] This means that the Act must be imple-

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50 Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970).

51 CBS v. Democratic Nat'l Comm., 412 U.S. 94, 117-18 (1973) ("A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.' To perform its statutory duties, the Commission must oversee without censoring. . . .").

52 For a full discussion of this proposition, *see* HENRY GELLER, BROADCASTING, IN NEW DIRECTIONS IN TELECOMMUNICATIONS POLICY 125-54 (P. Newberg ed., Duke Univ. Press 1989).

53 *See infra* note 85.

54 *See id.*

55 Thus, in the 1997 STATE OF CHILDREN'S TELEVISION REPORT: PROGRAMMING FOR CHILDREN OVER BROADCAST AND CABLE TELEVISION (The Annenberg Public Policy Center of the

mented reasonably, and specifically by affording broad programming discretion to the licensee.[56] But as shown, it does not mean that there should not be clearly defined, reasonable guidelines as to the public service categories.

B. *The Appropriate Guidelines for the Digital TV Broadcast Operation*

1. Introduction: Guidelines for the Present Analog Operation

Since the 1996 Act explicitly makes the public interest standard applicable to the digital era,[57] it is sound policy to consider what clearly defined, reasonable guidelines are appropriate for that era. But before doing so, it makes sense to ask what sound guidelines are to be adopted today for the present analog operation. This is so for two reasons: (1) that operation will continue to dominate broadcasting for at least another decade and perhaps longer (the FCC's target date for full industry transition to digital operation is 2006); and (2) as discussed within, there is a substantial possibility that the digital operation may very largely resemble the analog one so far as guidelines are concerned.

As noted, the FCC has adopted quantitative guidelines only in the area of children's television programming. The broadcast licensee remains under a general public interest obligation to serve its area through community issue-oriented programming, but there are no guidelines and indeed, the renewal applicant sends only a postcard to the FCC. If the FCC were really serious about obtaining a reasonable amount of public service, it would specify some quantitative guideline in this respect. For example, the guideline assuring renewal in television might be 15% of the broadcast day (6 a.m. to midnight) devoted to local programming (including 15% in prime time), and 18% devoted to informational (nonentertainment) programming (including 18% in prime time and the three-hour core programming guideline in children's educational/informational programming).[58] In radio, the guideline

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Univ. of Pa. 1997) [hereinafter ANNENBERG REPORT], there is the finding that "one quarter of the commercial broadcasters' educational/informational programs could not be considered educational by any reasonable bench mark." *Id.* at 4. This finding included network shows like "NBA Inside Stuff," ABC's "New Adventures of Winnie the Pooh", and CBS' "Secrets of the Crypt-keeper's Haunted House." Elizabeth A. Rathbun, *Anneberg Grades Children's Television,* BROADCASTING & CABLE, June 16, 1997, at 21.

56 *See CBS,* 412 U.S. at 110("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.").

57 *See supra* note 34.

58 The two figures would overlap since, for example, local news would of course also count towards the informational guideline. Chairman Hundt's proposal of a "modest 5% of programming time on digital TV" for public service is too modest, in my opinion. *See* Speech to the International Radio & Television Society (Oct. 18, 1996).

might be 8% of the time (6 a.m. to midnight) to be devoted to non-entertainment programming (community issue-oriented, by another name) but with an exception for specialized stations like those presenting mostly classical music—perhaps there a requirement of only 2%.[59]

This approach would be directed at the three main content thrusts of the Communications Act—local, informational, and children's educational programming.[60] It is not a new approach. Rather, it resembles past failed efforts along the same line.[61] Further, there could be new refinements to this general approach. Thus, another facet of the informational requirement stressed in the Act is the provision of time for political broadcasts.[62] It has been suggested that there should be a guideline of twenty minutes (in four five-minute segments, one in prime time, all on a sustaining (free) basis) to be devoted to appearances of candidates during the thirty days prior to the general election (or fifteen days in off-year elections)—that this would promote a core value of the public interest.[63]

The above proposal is directed to that value and has nothing to do with campaign reform, and indeed would not alleviate the need for such reform in any way.[64] Chairman Hundt has put forward a proposal for very substantial amounts of free time during the Presidential general election, specifically to effect needed campaign reform.[65] Such proposals would be similar to the British system, whereby the parties receive free broadcast time (with the candidate appearing) and cannot purchase any additional time. (In the United States, this bar would be the condition for accepting the free time, in order to meet the constitutional requirements of *Buckley v. Valeo*.[66]) While the proposal is most worthy and certainly of the greatest pertinence to the issue of public trustee

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59 *See infra* notes 96-98 and accompanying text.

60 *See infra* Part II.A.

61 For a detailed discussion of such efforts, *see* Bill F. Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C. L. REV. 1057, 1083-86, 1093-94 (1982).

62 *See* 47 U.S.C. §§ 312(a)(7), 315 (1994); S. REP. No. 92-96, 92d CONG., lst Sess., at 28 (1971).

63 For a full discussion of this concept, see Petition of Common Cause, *et al.*, for Inquiry or Rulemaking to Require Free Time for Political Broadcasts, filed October 21, 1993. It should be acknowledged that the author is one of two attorneys on the petition. No action has ever been taken on the petition.

64 *See id.* at 6 n.7 & 18.

65 *See, e.g.* Paul Taylor, *Superhighway Robbery*, THE NEW REPUBLIC, May 5, 1997, at 22.

66 424 U.S. 1 (1976). *See* the recent speech of former Chairman Newton Minow to the Economic Club of Chicago, April 16, 1997 for a fuller exposition of the approach. 143 CONG. REC. E774-03 (daily ed. Apr. 29, 1997) (statement of Newton Minow). It is necessary to impose the above condition because otherwise, the candidates would accept the free

obligation, it is beyond the scope of this article because it is integrally involved with campaign reform rather than simply the broadcast reform issue. Stated differently, such reform is clearly for the Congress, not the FCC[67] to consider (which is a pity, since Congress, despite the recent scandalous conduct of both election campaigns, so far seems most loath to act).

Finally, there are undoubtedly other public interest avenues that could be explored. I do not develop this area further, because while it is certainly germane and important in light of the continued applicability of the public interest standard, I strongly favor a different course.

2. Guidelines for the Digital (Advanced) Operation

I turn now to the issue of guidelines for broadcast operation during the digital era. Each existing television broadcaster has been assigned a 6 MHz digital television ("DTV") channel in addition to its current analog channel. The Commission has not specified that the broadcaster must use the channel for high definition television ("HDTV"). Rather, the DTV rules provide that so long as the broadcaster provides at least one free, over-the-air service throughout the broadcast day, it can decide upon the package of digital services that it wishes to provide. The 6 MHz channel really should be thought of as 19.3 Mbs; 19.3 Mbs would be very largely consumed for HDTV, which does require an enormous stream of data; or, because of the availability of digital compression techniques, the broadcaster can now offer four to six telecasts (sacrificing some amount of definition as the number goes up); or, it can use some of the capacity for digital ancillary services such as paging.[68] The decision is for the broadcaster to make based on the broadcaster's own judgment.

How that decision turns out can dramatically affect the formulation of public interest guidelines for DTV. Thus, if the emerging

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time, and still engage in expensive purchases of additional time, so that the need to raise huge sums of money would not be tempered at all.

[67] *See* Heather Fleming & Don West, *Tough's the Word for John McCain*, BROADCASTING & CABLE, Mar. 3, 1997, at 20 (interview with Senator John McCain)

> I don't believe that anything is going to happen which gives free television time to candidates unless it's part of an overall campaign reform package, which will have to be legislation passed by Congress. . . . Congress would naturally rebel if Mr. Hundt said, 'Well, OK, we're going to give this time to candidates without the rest of a reform package being passed.' It would be a total non-starter. . . . Because unless you had some restraint on campaign spending, that would just be another freebie for candidates.

Id.

[68] *See* Telecommunications Act of 1996, 47 U.S.C. § 336(a)(1),(b)(1),(e).

pattern is very largely HDTV operation (with only 1 or 2 MHz for ancillary endeavors), the DTV situation does not differ from the present analog one. However, if a multichannel operation results, there is an opportunity for greatly changed guidelines. For example, a guideline might then call for the devotion of 3 or 4 Mbs for public service operation. The nature of such a guideline is discussed below, but what needs to be emphasized is *that it is premature at this time to make any judgment as to which way the business decision will go.* No one can now say whether the operation will be very largely HDTV or multichannel.

It might be that the broadcaster will surely opt for extensive multichannel operation in order to meet the challenge of multichannel competitors like cable or DBS. But that might be a bad strategy in the so-called 500 channel universe. Robert Wright, the President of NBC, has stated his belief that the broadcast networks (and their affiliates) will continue to flourish so long as they each command a share around the twelve mark.[69] This view certainly seems to be borne out by present prices for television advertisements.[70] For this reason, it may not be a wise strategy for broadcasters (network or local) to send out multiple programs and thus end with a share like the cable channels.[71] Further, CBS Chairman Michael Jordan and Fox Chairman Rupert Murdoch have expressed great doubt that there is advertising support for such multichannel operation.[72] This is not to say with any certainty that broadcast DTV will be largely HDTV. Trade and newspaper reports indicate that there is great confusion among the broadcasters as to how to proceed.[73] The point is that it is premature to now formulate public interest guidelines for future DTV operation when the nature of that operation is so much in doubt.

That could be the conclusion of this essay—wait and hope. However the decision comes out, largely HDTV or multichannel,

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69 Bob Wright and the NBC Nobody Knows, Broadcasting & Cable, Mar. 6, 1995, at 46.

70 *See* Kyle Pope, *Why TV Ad Prices are Rising Even as Viewership Is Falling,* WALL ST. J., May 12, 1997, at B1 ("As TV watchers spread their viewing over several, if not dozens, of the nation's 200-plus cablechannels . . . advertisers have found it nearly impossible to reach the sort of mass audiences they crave. Broadcasters say it is this fracturing of the market that has made broadcast television so valuable.").

71 Thus, Michael Jordan, CBS Chairman, has stated that the television audience already is saturated with program choices from multichannel providers, so "real competitive advantage for broadcasters will be HDTV rather than multichannel standard definition." *Jordan Sees HDTV as Advantage,* TV Dig., June 16, 1997, at 8.

72 *Id.* Paul Farhi, *TV's Wave of the Future Takes on a Digital Look; Broadcast, PC Industries Clash Over Format,* THE WASHINGTON POST, Apr. 28, 1997, at A01. *See also* Heather Fleming, *Clinton Calls for Free Airtime,* BROADCASTING & CABLE, Mar. 17, 1997, at 18.

73 *See Padden Targets DTV Opportunities,* COMM. DAILY, May 29, 1997, at 2 (stating that while ABC has questions about DTV, it does not yet have any answers).

there is no real hope for a good solution to the public interest question. Therefore, a wholly different route should be taken.[74] This can be shown by analyzing an optimum multichannel DTV public interest approach and showing that it is still inadequate.

Suppose that in a 19.3 Mbs multichannel operation, 3 or 4 Mbs were required to be used for a public service channel. Such public service might be left to the discretion of the licensee and could include public affairs, news documentaries, political broadcasts, educational/information programming for children (in addition to any three hour guideline), and so on. Further, to ensure that the broadcaster's incentive is only public service and not profit maximizing, the channel would be entirely sustaining—that is, without any commercials.[75]

Such an arrangement would reflect the original Channel 3-Channel 4 pattern in the United Kingdom, where Channel 4 was supported by a portion of the advertising revenues garnered by Channel 3. Here, the public service channel would be supported by the commercial operation of the remaining 15-16 Mbs—probably four channels of commercial broadcasting.

Finally, if the broadcaster did not want to devote the 3-4 Mbs to this public service channel, it could retain the 3-4 Mbs for commercial operation but would then be required to pay a significant sum to a public television trust fund.[76] This "play or pay" option would reflect the thrust of section 303b (b)(2) of the CTA, which was initially promoted by the FCC but ultimately discarded. This option is not employed today to any significant extent.

This would be a very ambitious and optimum public service approach—difficult to achieve both practically and politically. But it is set forth here because an analysis of it demonstrates the need for a wholly different scheme. First, if the broadcaster decided to "play" in order to avoid a significant payment, the result would very likely be adjudged a dismal failure. For, with no revenue coming in, why would the broadcaster expend the considerable sums needed to produce high quality programming? Again, if we use children's programming as a focal point because of its central importance to the public interest, the commercial broadcaster would be most unlikely to devote the substantial sums needed to present

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74 *See infra* Part B.3.

75 As to children's programming, no toy could be spun off for commercial sale until the passage of some substantial period—say, 18 months to two years.

76 I use the term "public television," but the operation would more aptly be described as "public telecommunications," using all methods of video distribution (e.g., over-the-air terrestrial, DBS, cable, MMDS, LMDS, cassettes).

quality children's programming. The tendency would be to "slough." The broadcaster would regard any diversion of its audience to the "public service channel" as a loss of viewers for its advertiser-based channels. Once again, regulation is trying to force a business —one under fierce competitive pressure—to act against its driving interest to maximize profit.[77]

If the broadcaster should "pay" instead of "play," this could contribute significantly to the production and distribution of high quality programming by the public television community. Indeed, it is the approach that I advocate.[78] However, this leads to an obvious conclusion: since sound policy is served only by the "pay" rather than "play" option, policy should be aimed solely at obtaining that payment.

If the operation were largely HDTV, this would, in effect, mean that the past inadequate scheme of public interest regulation would be applicable. Even if that scheme were improved along the lines suggested in Part B.1. above, so that there were quantitative requirements for public service, such as 15% local and 18% informational (including the three hour guideline for core children's educational programming), there would still be strong arguments militating for a new approach.

First, in the real world, public service programming is not a numbers game. The aim should be to deliver a reasonable amount of *high quality* programs that educate, inform, present the classic and new drama, advance culture, and serve minority interests. In the U.S. regulatory world, any content behavioral approach must be limited to quantitative guidelines and must eschew all qualitative focus. Whether some program is of high quality is a subjective judgment that the government could address only by violating the First Amendment.[79]

In its deregulation decisions in the 1980s, the FCC stated that it intended to emphasize "the quality of a broadcaster's efforts, not the quantity of its non-entertainment programming."[80] Thus, in its Radio and Television Deregulation Reports, the Commission stated:

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77 It could be argued that all this stems from the ban on advertising on the public service channel. But if that ban is lifted, we face the same problems already described—the drive to gain advertising support by emphasizing the entertainment/social purpose aspect of children's programming, and the resulting First Amendment problems.

78 *See infra* Part B.3.

79 *See* 47 U.S.C. § 326 (1994) (the "No Censorship" Clause).

80 Office of Communication of the United Church of Christ v. FCC, 779 F.2d 702, 710 (D.C. Cir. 1985).

> A station with good programs addressing public issues and aired during high listenership times but amounting to only 3 percent of its weekly programming may be doing a superior job to a station airing 6 percent on entertainment little of which deals in a meaningful fashion with public issues. The focus of our inquiry in the petition to deny context can be expected to be whether the challenged licensee acted reasonably in choosing the issues it addressed in its programming. Assessing the reasonableness a licensee's decision will necessitate an ad hoc review to examine the circumstances in which the programming decision was made.[81]

Nothing is more chilling or inappropriate than the FCC casting itself as the national nanny for broadcasters' decisions on issues, or examining program quality to determine whether a given program is good or bad because it fails to address issues in a meaningful way. Such a regime would flagrantly violate the First Amendment and the Act, and the FCC has, of course, never implemented such a bizarre scenario. The whole deregulation action, including postcard renewal, amounts to little more than a smoke screen for inaction.

There may be a great difference in quality between a "Sesame Street" and a commercial children's program that is geared largely to entertainment centered on a toy and has a claimed social purpose—between PBS "News Hour" or "Frontline" and the commercial newscasts or documentaries with "tabloid" emphasis.[82] The government is wholly and soundly precluded from considering such differences through content regulation. Since the provision of high quality programming in the public service areas is of great importance, the government should adopt a scheme that promotes such a provision rather than one where it correctly has no say on quality and the presentation of such programming may be against the driving business interest of the commercial broadcaster.

That scheme is the one detailed in Part B.3., below—and emphatically not the quantitative prescription of public service for HDTV. Significantly, in commenting on the *Annenberg Report*,[83] Chairman Hundt observed: "[the] studies show that virtually all the programs aired for children on PBS were judged to be of high quality and educational; only a third of those aired on the 'Big

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[81] Deregulation of Radio, 84 F.C.C.2d 968, 991 (1981); Commercial TV Stations, 98 F.C.C.2d 1075, 1095 (1984).

[82] *See* Steven Stark, *Local News: The Biggest Scandal on TV*, WASH. MONTHLY, June 1997, at 38.

[83] *See supra* note 55.

Three' networks fell into the same category. This statistic about PBS is not surprising."[84] It is not surprising because PBS has no commercial motivation and wants solely to deliver high quality educational programs.

Second, there are First Amendment strains in the latter approach because there will always be difficult questions at the margins, whatever the definition of public service may be. As noted, this again is best illustrated in the children's area, with its definition of core educational programming:[85] To attract the young child, the programming must have a strong entertainment quotient and the FCC has wisely determined that there is no way to draw a line as to the amount of such entertainment fare (e.g., that the program must be "primarily" educational rather than entertaining). When this consideration is combined with a program that purportedly seeks to teach children a lesson as to some social goal,[86] the FCC can end up reviewing content in a most sensitive area.[87] This is the "tightrope" or "delicate balance" referred to in the Supreme Court decisions.[88] And while it is constitutional under *Red Lion*, it is also good policy to avoid or reduce such First Amendment strain, if it is possible to do so and still obtain the public service sought. It is therefore a decided plus for the approach urged below,[89] which indeed does provide high quality

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84 *Reject Commercials on PBS—Hundt,* TV DIG., June 16, 1997, at 7. The *Annenberg Report* necessarily involved both "objective and subjective measures" and therefore cannot be looked to for precise statistics. ANNENBERG REPORT, *supra* note 55, at 11. The figures are properly relied upon as rough indications made by an independent and responsible academic organization. Thus, in the example in the text, even if the figures are not precisely accurate, the great disparity between PBS and the three networks is being soundly portrayed.

85 Core educational programs are defined in the CTA Report as those that (i) are specifically designed for children ages 16 or under; (ii) have serving the educational and information needs of children as a significant purpose; (iii) are regularly scheduled, weekly programs of at least 30 minutes; and (iv) are presented between the hours of 7 a.m. and 10 p.m. On the crucial element, (ii), the FCC looks to "content that would further the development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs." *See Id.* at 11, 15.

86 The *Annenberg Report* notes that the "most common 'primary lesson' in the broadcasters' educational programs was one that emphasized social/emotional skills (42.7%)," and that "nearly all of the network-provided programs had prosocial messages as their primary educational goal," because such programs garner higher ratings than those with a primary cognitive/intellectual message. *Id.* at 20-21.

87 Thus, it might have to review the one-quarter of educational/intellectual programs as to which the *Annenberg Report* concluded "could not be considered educational by any reasonable benchmark." *Id.* at 4. In this context, Chairman Hundt acknowledged that "this definitional issue is. . . the crux of our rules and by far the most difficult." *Reject Commercials on PBS—Hundt, supra* note 84, at 8. One industry spokesman complained that the process "comes very close to putting someone [from government] in my program department." *Id.*

88 *See supra* note 51.

89 *See supra* Part B.3.

public service programming even more effectively, that it eliminates these significant First Amendment strains.

Third, it is also good policy to avoid, as much as possible, asymmetric regulation of the various means of distributing television programming. Because the media are so different in nature, that is not always feasible or desirable. For example, the main regulatory problem in cable is dealing with its bottleneck monopoly,[90] and in light of its great and growing channel capacity as it moves into digital delivery, access provisions like commercial leased channel and PEG are sound policy; yet such access provisions are not feasible for broadcast HDTV, with its single channel of operation.[91]

But, it is possible to treat over-the-air broadcasting and cable, its main and growing competitor, similarly as to content regulation. Cable does not face content regulation as does broadcasting.[92] Because of cable's use of the public streets, the franchising authority can require a franchise fee of up to 5%, and thus financing for cable's public service (the PEG channels) is available.[93] With the approach recommended in Part B.3., over-the-air broadcasting would be treated much like cable—no content requirements like the provision of community issue-oriented programming (including the CTA requirements). Because broadcasting uses the public spectrum, there would be a modest spectrum usage fee to support the provision of high quality public service through its contribution to a trust fund for public telecommunications.

Fourth, even if the quantitative guidelines suggested in Part B.1. were adopted, experience points to the impermanence of any behavioral scheme. As noted, prior to the FCC's deregulatory actions in the 1980s, there were a number of public interest rules and policies including the quantitative renewal guidelines and the fairness doctrine. All of these rules and policies were sloughed aside because of the policy bent of the then Chairman of the FCC and his associates; indeed, Chairman Fowler referred to television as a "toaster with pictures" and asserted that at renewal, the broadcaster had no obligation to children for which the FCC would hold it

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90 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994).

91 If broadcasting in the digital era did operate in a multichannel mode, it might be possible to impose some reasonable access requirement on the public service channel (3 to 4 Mbs) as discussed before.

92 *See supra* note 20 and accompanying text.

93 Before the 1984 Cable Act, the franchise fee had to be used for cable-related purposes, such as support of the PEG channels. This was changed in the 1984 Act. See Geller, *supra* note 3, at 28-29, for a discussion of this change and its result. It is now a matter of discretion with the franchising authority whether adequate support is given to the PEG channels.

responsible.[94] An approach such as that advanced below is much more likely not only to be effective but to persist.

3. The Sound Approach: In Lieu of the Public Interest Obligation, Substitute a Spectrum Usage Fee that is Used to Directly Achieve Public Service Goals

The sound alternative approach has been foreshadowed in the above discussion. Improving the public trustee regulatory regime, while clearly needed if that regime is retained, is not the best way to proceed. The public trustee regime will always remain a behavioral content scheme that seeks, with First Amendment strains, to make the broadcaster act against its business interests by providing much less remunerative public service. It cannot deal with the need and desirability of promoting high quality public service programming.

The new approach would substitute a modest spectrum usage fee for the public fiduciary obligation. Congress could reasonably establish such a fee based on a percentage of gross advertising revenues, (e.g., 1% for radio and 3% for television). This fee might then be set in a long term contract, for example, fifteen years, between the FCC and the broadcaster, so that it would be exempt from the effects of government policy changes toward the media.[95] The sums so garnered would go into a trust fund for public telecommunications. For the first time, we would have a policy working for the achievement of public service goals.

The focus so far has been on television, but the far-reaching benefits of the alternative approach are pointed out by considering its application to broadcast radio. There are over 11,500 broadcast radio stations. All commercial radio stations are considered public trustees. But as far as the regulatory scheme is concerned, this is the charade which has been previously noted. The FCC has no knowledge as to their public service efforts (community issue-oriented programming). It receives only a postcard at renewal. It has never monitored the performance of these stations through community, regional, or individual spot-checks. As a practical matter, this is truly deregulation.

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94 *See* Henry Geller, Comment, *The FCC Under Mark Fowler: A Mixed Bag*, 10 HASTINGS COMM. & ENT. L.J. 521, 530-31 (1988).

95 Administrations have become hostile to the broadcast media because of what they regarded as too critical a press attitude. See Henry Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471, 498 (1975); F. Friendly, *Politicizing TV*, COLUM. JOURNALISM REV., Mar.-Apr. 1975, at 9 (threatening actions of the Nixon Administration).

There are market deficiencies in radio. Commercial radio does not now supply in-depth informational programs, dramatic fare, or programming for the blind. Noncommercial radio does, but it is inadequately funded. With a 1% spectrum fee, $130 million would be available,[96] with roughly $80 million for public radio and the remainder going to fund political broadcasts over radio, if a free time trust fund were established as part of campaign reform.

If this new approach were adopted, the policy structure would actively promote public service goals for the first time. The commercial radio system would continue to do what it already does—deliver a variety of entertainment formats, often interspersed with brief messages—and the noncommercial system would have sufficient funds to accomplish its goals.

Significantly, this approach is much sounder than any effort to provide clearly defined guidelines for public service in radio. It gives the most promise of securing high quality public service programming and avoids all First Amendment strains. Indeed, as shown by FCC experience under the processing guidelines in the 1970s, there can be adverse consequences in radio from the quantitative guideline approach. Because radio stations can choose a specialized format like classical music, they can have difficulty meeting even the generous guideline of 8% nonentertainment, and in the circumstances of major market operation, should not have to.[97]

Furthermore, the use of public interest criteria to choose among competing applicants in comparative hearings has been thoroughly discredited, and the whole process has long been at a standstill because of court action.[98] With the new approach, all new frequencies would be auctioned, and the sums obtained (probably not too great in view of the dearth of available frequencies in larger markets) would be contributed to the same trust fund for public telecommunications.

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96 *See* Lisa Brownlee, *Radio's Revenue is Getting a Lift from Consolidation*, WALL ST. J., June 20, 1997, at B7.

97 To give one example, KIBE-AM, a San Francisco classical music station, bowing to the FCC dictates, substituted a 6:00 a.m. talk show for a baroque music program, in order to gain renewal without going through an expensive hearing which it could ill afford. See Letter from Edward Davis, Station Manager KIBE-AM, to Henry Geller (Apr. 6, 1976) (on file with author). In this way, it did the least damage to its schedule. But the audience, which could turn to several other stations if it wanted "talk," lost a program which it enjoyed. The regulatory pattern, when so applied, does not serve the public interest.

98 See Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993); *Mixed Signals*, WALL ST. J., June 18, 1997, at A1 (quoting Chairman Hundt as saying, "We're in gridlock" and describing the comparative hearing as "cumbersome," one "of subjective judgment [which is] a recipe for lawyering deals").

This same approach should be applied to broadcast television. It would markedly help facilitate the production and presentation of high quality programming, such as educational programming for children, in-depth informational programming such as the "News Hour" or "Frontline," and cultural fare. It would contribute most substantially to solving the perennial funding problems of public telecommunications, which are extensively documented in *Quality Time?*, a recent report of the Twentieth Century Fund Task Force on Public Television. The most arresting statistics in the report show the amounts spent per capita by various nations for public broadcasting: In 1992, the United States spent only about $1.06; Japan spent $17.71; Canada spent $32.15; and the U.K. spend $38.56.[99]

To continue the example of funding children's educational programming because of its importance, if 1% of the spectrum usage fee were dedicated to this purpose (about $300 million), the Corporation for Public Broadcasting[100] could then fund production of such programming by a PBS station or an independent producer like Children's Television Workshop or the Ready to Learn Channel.[101] The funds might also be directed to local noncommercial stations working with community groups to activate the educational channel on the local cable system, with some of the programs so produced then broadcast or shared with the local library system to become an electronic educational clearinghouse.[102]

It has been argued that there is no need for the public service contribution of public television in light of cable's multichannel development. The above report establishes the continuing need for the public service contribution of public broadcasting, especially in the area of education. That discussion, while relied upon here, will not be repeated. To give one example, there is a clear need not just for the excellent pre-school fare on public television, but also for the strong development of programming aimed at the school age child, five to eleven years old. There is no basis for the assumption that cable will fill this need. Furthermore, cable is a

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99 QUALITY TIME?, THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON PUBLIC TELEVISION 152 (Twentieth Century Fund Press, 1993) [hereinafter TASK FORCE]. As a member of the Task Force, the author fully agreed with the report and its recommendations.

100 The *Report* noted above recommended several important changes in the governance of the public broadcasting system. *Id.* at 35-39.

101 Fortunately, Congress created the Ready to Learn Channel to which parents could reliably turn for children's programming; unfortunately, it has never adequately funded this undertaking.

102 TASK FORCE, *supra* note 99, at 20-21.

pay service and is not received in roughly one-third of all television households.[103]

This then is the concept for the new approach. There are of course many details to be resolved in its implementation.[104] There are several ways that the funds could be transferred—for example, they can accumulate in the trust fund until $4 billion is reached, at which point Federal support would cease. Or, the funds could be divided between the trust fund for public telecommunications and another fund for free political time.[105] Again, such considerations, while of great importance, must await progress or agreement on the main concept—to move forward to replace the public trustee scheme.

Aside from the merits, there are also large obstacles. The commercial broadcasters will strongly oppose the reform, because they would much rather "play" than pay 1% to 3% of gross revenues. As has been noted by congressional leaders,[106] the commercial broadcasters are a most powerful lobbying force. But just as campaign reform is difficult to achieve but nevertheless most worthy of being fought for this year and every year, the same is true of reform of the public trustee scheme. It took many years of effort to reform transportation or the common carrier scheme in the 1934

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103 Chairman Hundt opposes the above approach because he believes that "educational programming needs to be on the most popular channels, where viewers will see the show;" he "likened the placing of such shows on a separate channel to creating 'an educational ghetto'." Rathbun, *supra* note 55, at 20. But as noted, the PBS educational programs are consistently of high quality, are not so heavily weighted toward social goals, and are viewed by a substantial child audience (and with increased funds for marketing to parents, would be able to increase such viewing). Further, the governmental goal must be to assure the availability of the high quality programming to all age groups; it is a plus—not a disadvantage—that the parent can turn to noncommercial channels and direct the child's viewing to such channels. If the parent abdicates and does not supervise the child's viewing, the child will turn to the "most popular channels," and will find "low quality" programs "full of violence and devoid of any educational value." ANNENBERG REPORT, *supra* note 55, at 29.

104 Broadcasting would be subject to government regulation of obscene material and would continue to face the problem of indecent broadcasts, because this regulation is not based on the public trustee concept. *See* FCC v. Pacifica Co., 438 U.S. 726 (1978). But enforcement would no longer involve denial or revocation of license but only forfeiture. Further, broadcasters would still have to follow sponsorship identification provisions, multiple ownership rules, rigged quiz or payola restrictions; all of which would be enforced by cease and desist and/or forfeiture rulings. The equal opportunities provisions (including no censorship) would continue, although equal opportunities should apply only to paid time. These points are not discussed further because however difficult or important a particular aspect may be, the primary focus must be on the need to replace the public trustee scheme. The devil may be in the details, but without agreement on the central issue, we shall never arrive at the details.

105 See the proposal of Paul Taylor, *Creating a TV Time Bank*, THE NEW DEMOCRAT, May-June 1997, at 15.

106 Thus, Senator McCain stated that broadcasters were the most powerful lobby that he had encountered in Washington. Paul Farhi, *Their Reception's Great: When the National Association of Broadcasters goes to Capitol Hill, Congress is on the Same Wavelength*, THE WASH. POST, Feb. 16, 1997, at H5.

Act, but those efforts eventually paid off. The same effort should be made here.

Another obstacle is the need for revenues to achieve a balanced budget. This has resulted in the billions obtained through the spectrum auction process all going to deficit reduction,[107] and indeed skewing the auction process.[108] So, here again, Congress could decide on a spectrum usage fee but use the revenues for its own deficit purposes—and thus not provide high quality public service over an adequately funded public telecommunications system. But the monies here are being uniquely generated—replacing the public trustee obligation precisely to obtain funds to more effectively provide the needed public service. If the concept is adopted on this ground, the funds should and would go to public telecommunications.

IV. Policies for the Other Main Electronic Media

There is no need for extended discussion on this point. The new electronic delivery systems such as telco, LMDS, digital MMDS, and Internet video streaming (or other computer delivery systems) all should not come under *Red Lion* content regulation as a matter of policy (wholly aside from serious constitutional issues). These nascent video delivery systems should be allowed to develop with no intrusive content regulation.

Cable is well established, is a most powerful force in video, and will become even stronger as it enters the digital era. As noted, *Red Lion* cannot constitutionally be applied to cable, which comes under the traditional First Amendment jurisprudence. Congress has soundly eschewed *Red Lion* content regulation, and that policy should continue.

There is a problem as to the PEG channels in light of inadequate support at the local level in many instances. In those circumstances, including the political or practical considerations, it would appear that this problem will have to be solved over time at the local level. Stated differently, if, for example, some communities develop strong and effective local C-SPANs, this may well put pres-

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[107] Chairman Hundt has recognized public broadcasting's need for "significant, long-term, reliable funding," *Reject Commercials on PBS—Hundt,* supra note 84, but believes that such funding should come from spectrum auctions rather than the spectrum usage fee approach urged here. *See* Rathbun, *supra* note 55, at 21. That solution has been proposed for years and is simply not going to happen because of Congress' drive for deficit reduction, with all the auction funds committed for many years to that purpose. To advance it yet again in 1997 is a "cop-out." *Id.*

[108] *See* Peter Passell, *Big Brother Wants to Manage the Broadcast Spectrum Again,* N.Y. Times, Feb. 6, 1997, at D2.

sure on other communities to assure that there are resources available to duplicate that kind of strong service in their own localities. As noted, efforts to strengthen the local public television station may also be helpful in promoting a stronger PEG effort.[109]

As for the problem with commercial leased access, the move to digital should mean that there is a significant amount of new leased channel capacity available, since the 15% requirement would be applicable to the new digital channels. It is to be hoped that the FCC's recent revision as to reasonable pricing for leased channels will be effective. It would be better policy simply to require the cable operator to engage in last-offer arbitration if no agreement on terms is reached after a stated brief period.[110] Under this scenario, the programmer would obtain immediate access during the arbitration period after posting a bond to ensure financial performance. This would track the market better than authorizing the government to set prices and terms, and it would have offered a practical prerequisite to success for any programmer—prompt access to distribution—instead of a government proceeding.

The other substantial video distributer is DBS, with 4% penetration of U.S. television households, and the prospect of about 10% by the year 2000. As stated, there should be no action to implement section 25(a) (other than equal time rules). As for the 4% to 7% set aside for noncommercial educational and informational access, the real problem here is the lack of financial support for the production of programming. In that respect, the above spectrum usage approach should be most helpful, since the funds thus made available are for public *telecommunications* and thus would foster distribution over DBS for noncommercial educational/informational material produced with the markedly enhanced financial support.

V. Conclusion

The main focus here has been on appropriate governmental policy for DTV because there is now such great focus on that issue at the White House, the Congress, and the FCC. What is remarkable is that with the one exception noted below, the focus is confined to the way the public interest standard should apply in the

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109 See Brownlee, *supra* note 96, at 724.

110 In last-offer arbitration, the arbitrator chooses between the final offers of the two parties, forcing them to be realistic and thus closely emulating the market bargaining process.

digital era. Thus, the approaches of the Executive Branch and the FCC appear to give no consideration at all as to whether that standard should continue to apply, or whether it should be replaced by an approach such as that advocated here.

In the 1996 Telecommunications Act, Congress considered the common carrier approach that had been used for decades (from 1910 on), and drastically reformed the regulatory scheme. But as noted, the same Act continues the basic broadcast regulatory scheme that has been applied since 1927. The House Telecommunications Subcommittee, under Chairman Billy Tauzin, is raising the issue of its continuance. His proposal would substitute a spectrum usage fee for the public interest obligation of the commercial broadcaster, with the sums so obtained going to a trust fund for public broadcasting. It is hoped that this is the beginning of a long overdue debate on what is the sound governmental policy for broadcasting as the nation moves into the next century.