Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Public Interest Obligations	)	MM Docket No. 99-360
of TV Broadcast Licensees	)	
	)	

COMMENTS OF
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

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SUMMARY

The Radio-Television News Directors Association ("RTNDA") is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA's more than 3,200 members include news executives in broadcasting, cable and other electronic media in more than thirty countries.

While RTNDA in no way takes issue with the decision by some media companies to voluntarily provide air time to political candidates free of charge (this exercise of broadcasters' editorial discretion represents precisely the type of free speech activity RTNDA has long endeavored to preserve), RTNDA respectfully submits that the Commission should not attempt to articulate or endorse any particular plan for the use of television air time for political messages.

As a preliminary matter, RTNDA is concerned about the breadth of the NOI and its questionable nexus to the transition to digital television. RTNDA also believes that the FCC should begin its inquiry into application of its existing public interest requirements *de novo* and not rely on the Report of the Advisory Committee. Perhaps because the Advisory Committee failed to include, for example, a journalist with a strong news management background, it neglected to include the First Amendment in its deliberations. The FCC should not make the same mistake.

That said, because it would interfere with the editorial discretion of broadcasters without serving any substantial government interest, any requirement that would force broadcasters to provide air time to political candidates could not survive constitutional scrutiny. And, as a practical matter, because such a requirement would make it easier for candidates to duck the types of forums that require accountability and true debate; it would not result in increased issue-oriented discourse, but would end up leaving the public less well informed about politics than it is

now. The proposals also have the very real potential to erode the time available for true news and public affairs programming.

No precedent supports the use of government's coercive power to improve the conduct and discourse of politics or to combat negative campaigning. The First Amendment has always been hostile to government efforts to interfere with broadcasters' editorial discretion, and the transition to digital television has no bearing whatsoever on that issue.

In a broader sense, RTNDA believes that the Advisory Committee would perpetuate a regulatory system that has outlived any purpose it once may have served. The time has come not to increase content-based obligations on broadcasters, but to deregulate broadcasting and to create greater First Amendment freedom for broadcasters on a par with that of their print (and new media) colleagues. To do otherwise is to jeopardize the future of free, over-the-air television.

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The Radio-Television News Directors Association ("RTNDA"), by its attorneys, hereby submits its comments in response to the Notice of Inquiry ("NOI") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] With more than 3,200 members, RTNDA is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA's membership includes news executives in broadcasting, cable and other electronic media in more than thirty countries.

The FCC has instituted this proceeding to consider the public interest obligations of digital television broadcasters. Assuming a prominent role in the NOI is the final report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters ("Advisory

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[1] Public Interest Obligations of TV Broadcast Licensees, Notice of Inquiry, MM Docket No. 99-360, FCC 99-390 (rel. Dec. 20, 1999) ("NOI").

Committee"),[2] which was submitted on December 18, 1998 to Vice President Al Gore ("Advisory Committee Report").[3] The Advisory Committee Report contains ten recommendations regarding public interest obligations of television broadcasters, among them a proposal that television broadcasters provide five minutes each night between 5:00 PM and 11:35 PM (or the appropriate equivalent in Central and Mountain time zones) for "candidate-centered discourse" thirty days before an election.[4]

On October 20, 1999, the Vice President submitted a letter to FCC Chairman William Kennard asking that the Commission address certain of the Advisory Committee's recommendations.[5] On December 20, 1999, the FCC released the NOI to determine the public interest obligations of television broadcast licensees in the digital age.[6] The NOI requests information in four general areas: (i) challenges unique to the digital era; (ii) responding to the community; (iii) enhancing access to the media; and (iv) enhancing political discourse.[7]

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[2] President Bill Clinton chose 22 members to sit on the Advisory Committee, which met from 1997 - 1998. The Committee members included producers, academics, computer industry representatives, public interest advocates, broadcasters and advertisers, but no electronic journalists or other strong voices for deregulation and First Amendment protections.

[3] See Advisory Committee Report on the Public Interest Obligations of Digital Television Broadcasters, Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (1998) ("Advisory Committee Report").

[4] See id.

[5] Specifically, the Vice President asked the FCC to address the Committee's recommendations concerning political discourse, disaster warnings, disability access to digital programming, and diversity. See Letter from Vice President Al Gore to William E. Kennard, Chairman, FCC, Oct. 20, 1999 ("Vice President's Letter").

[6] See NOI.

[7] See id.

I. INTRODUCTION

Because campaign coverage and "political discourse" are largely the province of broadcast newsrooms, RTNDA's comments herein will focus on that portion of the NOI. RTNDA firmly believes that any rule that would require broadcast licensees to provide mandatory air time to political candidates represents an affront to journalistic freedom. RTNDA respectfully submits that the Commission should not attempt to articulate or endorse any particular plan for the use of television air time for political messages. As a preliminary matter, RTNDA is concerned about the breadth of the NOI and its questionable nexus to the transition to digital television. Certainly, the FCC should resist calls to expand the public interest obligations of broadcasters simply because they will be utilizing a new technology to provide broadcast service to the public. History demonstrates that television broadcast stations have provided outstanding news and public interest programming and services for decades and, with increasing competition in the information marketplace, stations will have additional incentive to provide such programming and services in the digital era. Such programming has included that which enhances political discourse, such as coverage of debates, press conferences and other candidate forums, as well as the voluntary provision by television stations of air time for uninterrupted statements by candidates for public office.

In addition, RTNDA urges the FCC not to rely on the Advisory Committee's Report but to begin its inquiry into application of its existing public interest requirements *de novo*. The Advisory Committee operated under the false premise that all current broadcast regulation must apply in the digital era and that its only task was to consider what additional public interest obligations should be imposed. The FCC should shun this regulatory zeal. Moreover, the

Advisory Committee was limited in composition. It failed to include, for example, a journalist with a strong news management background. Perhaps as a result, it neglected to include the First Amendment in its deliberations. The FCC should not make the same mistake.

Indeed, several of the proposals advanced in the Commission's NOI would heighten content-oriented public interest obligations for television broadcasters, inconsistent with the protections of the First Amendment. Among them is the notion that television broadcasters should be saddled with a specific and quantifiable obligation to "enhance political discourse." Certainly, the pressure exerted by the Executive Branch on the FCC to open this proceeding is a thinly-veiled attempt to revive the dubious notion that the government can or should mandate that broadcasters provide air time for political candidates. Even the Advisory Committee could not reach consensus on the issue. As discussed more specifically below, RTNDA believes that mandatory air time could not survive constitutional scrutiny, and urges the Commission to reject all such proposals to interfere with broadcasters' good-faith programming decisions.

That said, RTNDA wishes to emphasize that in submitting these comments it in no way takes issue with the decision by some media companies to voluntarily provide air time to political candidates free of charge. Belo, for example, just last week announced that it would offer free air time to qualified candidates and expand its coverage of the 2000 election on a national and local level. Similar voluntary efforts by Hearst-Argyle, the E.W. Scripps Company, Capitol Broadcasting and others to enhance candidate-centered discourse in this manner are the result of the exercise of broadcasters' editorial discretion, and represent precisely the type of free speech activity RTNDA seeks to preserve.

II. ANY REQUIREMENT THAT BROADCAST LICENSEES PROVIDE AIR TIME FOR POLITICAL CANDIDATES IS UNCONSTITUTIONAL

In its single most recent and salient pronouncement on broadcast regulation, the Supreme Court stated that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2463 (1994). Yet, several of the proposals advanced by the NOI, most notably any mandate that digital broadcasters provide air time to political candidates other than as required by Section 315 of the Communications Act, would do just that. The suggestion that broadcasters be required to set aside programming time for political candidates suffers from serious constitutional flaws and is invasive of the fundamental principles of a free press. Freedom of the press is a bedrock First Amendment principle and one with which the government should not tamper. The FCC is not a national arbiter as to which topics should be deemed newsworthy, and it is not a competent judge of the wisdom, accuracy or balance of any station's (digital or not) news product.

Perhaps because journalists were conspicuously absent from the Advisory Committee, the Committee seems never to have weighed the impact of certain of its proposals on freedom of the press. More specifically, it would appear that the Advisory Committee failed to expressly recognize that a mandatory air time obligation would interfere with broadcasters' editorial discretion by compelling them to offer programming not of their own choosing. The so-called "Free TV" mandates that have been proposed ordain that certain kinds of speech will be broadcast, regardless of whether the speech would be something broadcasters would otherwise utter. While mandatory air time for political candidates would not single out particular viewpoints, such a requirement certainly would be speaker, subject, and format specific.

Therefore, mandating that broadcasters provide such air time would restrict broadcasters' speech, or at least their editorial discretion, and must be subject to appropriate constitutional scrutiny.

The Advisory Committee Report recommends, for example, that television broadcasters provide five minutes each night between 5:00 PM and 11:35 PM (or the appropriate equivalent in Central or Mountain time zones) for "candidate-centered discourse" thirty days before and election. It is unclear how the Committee arrived at this "five minute" quick fix. Regardless, this type of requirement in and of itself represents an unconstitutional infringement on broadcasters' free speech rights. As a practical matter, however, the Commission should be aware that while its proposals do not single out newscasts or other news programming as the place in which to satisfy the candidate air time requirement, newscasts have and will continue to be the logical venue for political programming. A mandatory air time requirement will, therefore, have the net effect of being an egregious infringement on freedom of the press.

RTNDA recognizes all too well that the current constitutional regime entails a different set of First Amendment constraints on the regulation of the broadcast media from those that obtain for the rest of the population, including the print media. As the Supreme Court has repeatedly observed, such scrutiny allows restrictions on broadcaster speech to be upheld "only when . . . narrowly tailored to further a substantial government interest." *League of Women Voters of California*, 468 U.S. at 380. RTNDA submits, however, that requiring broadcasters to provide programming time to political candidates could not withstand even this lower level of constitutional scrutiny.

A. The Proposed Candidate Air Time Requirements Represent Government Interference With The Private Journalistic Interests Of Broadcasters

Any attempt to inject the federal government and its regulatory system into the editorial process is not narrowly tailored, but a mischievous and misguided undertaking. The Commission repeatedly has disclaimed the role of news evaluator, censor or editor. The FCC, particularly in its role as an independent agency, should continue to do so. To do otherwise would, in effect, dictate the content of a broadcast station's news programming.

The determination of what to include in any particular newscast constitutes the very core journalistic function of a broadcaster, and is a matter far removed from valid Commission supervision. Otherwise, the Commission "would assume a journalistic role totally inappropriate under the First Amendment, for which it lacks any expertise or authority." *Complaint of American Legal Foundation against CBS, Inc.*, (FCC 85-556, MMB, released October 18, 1985).

On the basis of established precedent, several principles governing the FCC's program role can be stated categorically. The Commission does not attempt to direct licensees in the selection or presentation of specific material. *Stockholders of CBS, Inc.* 11 FCC Rcd 3733, 3746 (1995). The choice of what local news is to be covered by a station is a matter committed to the licensee's good faith discretion. *American Broadcasting Companies, Inc.* 83 FCC 2d 302, 305 (1980). A licensee is under no obligation to cover each and every newsworthy event which occurs within a station's service area. *KSD-TV, Inc.*, 61 FCC 2d 504, 510 (1976). The FCC will not question a licensee's judgment merely because some party expresses the opinion that a particular event should have been covered or reported differently. To do so would contravene the First Amendment. *National Citizen's Committee for Broadcasting*, 32 FCC 2d 824 (1971); see also *The Selling of the Pentagon*, 30 FCC 2d 150 (1971); *WSMT, Inc*. 27 FCC 2d 993 (1971);

Columbia Broadcasting System (Hunger in America), 20 FCC 2d 143 (1969); *Network Coverage of the Democratic National Convention*, 16 FCC 2d 650 (1969).

Broadcast journalists face innumerable decisions for every program in choosing which events, including political events, warrant attention in news programs. Proponents of mandatory air time for political candidates would prefer that the FCC ignore altogether the First Amendment rights of broadcasters. They would have the Commission turn its back on political coverage decisions made by experienced, professional journalists. For the Commission to mandate that digital broadcasters provide political candidates with specific amounts of air time would be for the Commission "to enter 'an impenetrable thicket' of reviewing editing processes and adjudging editorial judgment . . . a function inconsistent with the First Amendment and with the national commitment to the principle that debate on public issues should be 'uninhibited, robust, [and] wide open.'" *In re Application of WGPR, Inc. and CBS, Inc.* 10 FCC Rcd 8140, 8147 (1995) (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

B. The Candidate Air Time Proposals Would Serve No Substantial Government Interest

President Clinton has stated that "Free TV" would foster a "campaign discourse that favors words over images and substance over sound bites," and "raise the level of discourse."[8] RTNDA, however, fails to see how mandatory air time would serve as a panacea to all that ails our nation's political campaigns. In fact, RTNDA does not believe that requiring broadcasters to provide this type of forum for political candidates would necessarily "raise the level of discourse."

[8] Remarks to the Conference on Free TV and Political Reform and an Exchange with Reporters, 33 Weekly Comp. Pres. Doc. 330 (Mar. 11, 1997).

Broadcasters have a solid history of providing top quality news and information programming, and of covering political campaigns. In each of this year's New Hampshire and Super Tuesday primaries, broadcast coverage heightened interest in the races and voters turned out in record numbers. Following the New Hampshire primary, nearly nine in 10 New Hampshire Voters polled by Wirthlin Worldwide said that local radio and television stations provided "just the right amount of time" or "too much time" covering the primary election. The poll, commissioned by RTNDA and the National Association of Broadcasters ("NAB"), found that 77 percent of New Hampshire voters either watched or listened to a debate or

candidate forum on a local radio or television station. Forty-two percent of those polled said broadcast coverage of the election was "most helpful" to them in selecting a candidate.

Similarly, more than 85 percent of voters polled in five key Super Tuesday primary states said that local broadcasters had provided the "right amount" or "too much time" covering the primaries. In this separate poll conducted by Wirthlin Worldwide and commissioned by RTNDA and NAB, the majority of voters from California, Georgia, Missouri, New York and Ohio polled said they oppose requiring broadcasters to give political candidates free air time.

The results of this poll arguably reflect the opinion of most voters that a mandate that broadcasters provide air time to political candidates would not constitute the form of "issue-oriented discourse" voters truly value. A survey by Opinion Research Corp. found that 36 percent of those polled rated television debates as "the most valuable source of information on candidates;" 30 percent favored newscasts; and 17 percent favored interview programs. RTNDA submits that a political air time mandate would not promote the "issue-oriented discourse" inherent in debates and interview programs, but instead would sanction candidate-controlled forums that afford no time for questioning or rebuttal, and facilitate the telling of half-truths.

Unfortunately, while broadcasters have a great tradition of voluntarily offering political candidates the opportunity to participate in the types of forums that require accountability and reward depth (the types of forums voters truly value), politicians have an equally long tradition of refusing these offers. As even Paul Taylor, Executive Director of the Alliance for Better Campaigns, has recognized, "A generation of candidates has grown up in a world where they want to completely control and script any appearances on television."

In California, for example, a group of network-affiliated stations in the state's top four media markets offered to host a series of gubernatorial mini-debates during the 1998 campaign.

The candidates would not agree to participate, instead ducking the chance to state their positions on television in a format in which their opponents would have had a chance to offer a rebuttal. Similarly, in the 1996 North Carolina Senate race, the incumbent refused ever to debate with his challenger.

Several networks experimented with providing free air time to the Presidential candidates in 1996. The results were unimpressive. Most participants felt that the candidates merely "restated boiler plate," and that the experiment had little or no impact on issue-oriented discourse. While President Clinton and Senator Bob Dole accepted the offers of CBS, CNN, Fox, NBC and PBS to record one- to two-minute segments for later broadcast, the one "free time" offer both refused was ABC's proposal to have them debate for an hour during the week before Election Day. This example is but one of many that support the conclusion that mandatory air time for candidates would only make it easier for politicians to avoid answering questions and engaging in dialogue with each other.

Political air time requirements will not promote candidate accountability, journalistic scrutiny and citizen engagement, but merely perpetuate reliance on TelePrompTers and consultant-scripted sound bites. RTNDA submits, therefore, that requiring broadcasters to provide political candidates with air time would not further any "substantial government purpose" sufficient to countervail the abhorrent notion that the government should be allowed to regulate, judge, or in any way control the substance or quality of political debate.

C. Candidate Air Time Requirements are Unconstitutional Under Established Precedent

The conclusion that the candidate air time requirements proposed in the NOI cannot withstand constitutional scrutiny is reinforced by the increased constitutional significance that post-*Red Lion* cases have accorded to broadcasters' editorial discretion. Indeed, as early as *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS v. DNC*"), the Supreme Court "made clear that Commission actions which impinge upon [broadcast] licensee discretion by according individual rights of access are expressly discouraged under the [Communications] Act." In *CBS v. DNC*, a plurality of the Court upheld the Commission's refusal to order broadcasters to accept paid editorial advertisements as "well within" the Commission's discretion. 412 U.S. at 127. The plurality emphasized that "in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee," *id.* at 105, and that the Communications Act "explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies." *Id.* at 116. In light of these measures that "clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee," *id.* at 116, the Court announced the general rule that "[o]nly when the interests of the public are found to outweigh the private journalistic interests of broadcasters [should] government power be asserted within the framework of the Act." *Id.* at 110.

More recently, the Supreme Court's decision in *League of Women Voters of California*, 468 U.S. at 378 (1984) reaffirmed that "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public [duties]" (internal quotation marks omitted) (citing *CBS v. DNC*). Indeed, the Court stated that

"if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust." *League of Women Voters*, 468 U.S. at 378. The Court therefore struck down a provision of the Public Broadcasting Act of 1967, 47 U.S.C. § 399 (1976), that had forbidden any noncommercial educational station receiving federal funds from "engag[ing] in editorializing."

In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*"), the Court again emphasized that substantial weight must be accorded to editorial discretion in analyzing First Amendment claims. Although *Turner I* concerned cable rather than broadcasting, the Court there reviewed its broadcast decisions -- including *CBS v. DNS* and *League of Women Voters* -- and concluded that "our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices." *Turner I*, 512 U.S. at 651-652. *See also Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 737 (1996) (noting that "the editorial function itself is [a protected] aspect of 'speech.'") (Thomas, J., concurring in the judgment in part and dissenting in part).

Just two years ago, the Supreme Court once again reaffirmed its post-*Red Lion* view of the editorial rights of broadcasters. In *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998) ("*AETC*"), the Court rejected a First Amendment challenge by a political candidate who claimed that a state-owned public television broadcaster could not properly exclude him from a televised debate. The Court reiterated its finding from *CBS v. DNC* and *League of Women Voters* that "television broadcasters enjoy the widest journalistic freedom consistent with their public responsibilities." The Court emphasized that broadcasters "are not

only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." *AETC*, 118 S. Ct. at 1639 (internal quotation marks omitted). As a result, "a broadcaster by its nature will facilitate the expression of some view points instead of others." *Id.* The Court concluded that "[w]ere the judiciary to require . . . access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* (emphasis added).

"Access" rules—like a political air time mandate—go to the very heart of licensees' editorial discretion to determine who may speak and what they may say on broadcast stations. As such, these post-*Red Lion* decisions demonstrate that a political air time requirement could be justified only if it truly advanced a genuinely substantial government interest. As stated above, RTNDA maintains that it would not.

D. Characterizing Candidate Air Time Proposals as "Voluntary" Does Not Remedy Their Constitutional Infirmity

A final note: The problems do not go away if "free air time" or related schemes to control broadcasters are cast as "voluntary" measures. As FCC Commissioner Harold Furchtgott-Roth has correctly noted, the term "voluntary standards" often is a euphemism for coerced behavior and such standards provide a dangerous mechanism for the evasion of statutory limits on the FCC's delegated authority.

Indeed, "voluntary" standards are not what the proponents of "Free TV" ultimately are looking to achieve. Witness this statement from Paul Taylor, Executive Director of The Alliance for Better Campaigns: "We'll continue to promote these voluntary standards throughout 2000, but the longer the industry spurns these

recommendations, the stronger the case becomes for mandates. The FCC inquiry offers a forum to build such a case."[9]

The FCC should not enter this dangerous game. RTNDA submits that the Commission should not attempt to articulate or endorse any particular plan for the use of television air time for political messages, whether voluntary or mandatory.

III. THE TIME HAS COME FOR THE COMMISSION TO RECOGNIZE THAT CONTENT-BASED REQUIREMENTS IMPOSED ON BROADCASTERS SHOULD BE SUBJECT TO STRICT SCRUTINY

Although RTNDA submits that a candidate air time mandate would be unconstitutional under the intermediate level of scrutiny set by *Red Lion* and its progeny, the FCC should acknowledge that the spectrum scarcity rationale underlying such reduced scrutiny is no longer sustainable. The empirical basis of the "scarcity" rationale has been roundly criticized by some of America's most distinguished jurists and commentators, even by former (and current) members of the FCC. As early as its 1984 decision in *League of Women Voters*, 468 U.S. at 376 n.11, the Supreme Court itself indicated *Red Lion* may appropriately be reconsidered upon "some signal from Congress or the FCC that technological developments have advanced so far that some revision of broadcast regulation may be required."[10]

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[9] Citing Broadcasters' Resistance to Voluntary Air Time Appeals, Alliance Applauds FCC Inquiry Into TV's Public Interest Obligations, Press Release, Issued December 15, 1999.

[10] In *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the U.S. Court of Appeals for the D.C. Circuit suggested that it would be inappropriate to "reexamine" the scarcity doctrine because only the Supreme Court may overrule its opinions. Writing for the panel, Judge Silberman opined that "[w]e are stuck with the scarcity doctrine until the day that the Supreme Court [] no longer rules the broadcast jungle." *Id.* This pronouncement, however, was both *dicta* and incorrect. First, *Tribune*'s holding was that the petitioner's claims had not been properly

(Continued...)

That "signal" has long since been sent. Specifically, in *Syracuse Peace Council*,[11] the Commission unanimously held that

> the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press. Therefore, in response to the question raised by the Supreme Court in *League of Women Voters*, we believe that the standard applied in *Red Lion* should be reconsidered and that the constitutional principles applicable to the printed press should be equally applicable to the electronic press.

2 FCC Rcd at 5053.

In light of the Commission's "signal" in *SPC*, "[i]t is time to revisit [the scarcity] rationale." *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, C.J., dissenting) ("*ACT*"). In *ACT*, Chief Judge Edwards rebutted claims of both "technological" and "economic" scarcity of spectrum. Of "technological scarcity," Chief Judge Edwards observed that (1) "this problem does not distinguish broadcasting from print and is easily remedied with a system of administrative licensing or private property rights"; and (2) "should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum." *Id.* at 674-675 (footnotes omitted). Chief Judge Edwards found "economic" scarcity arguments no more convincing. He wrote:

(...Continued)
presented to the agency, *id.* at 67-68; the Court's discussion of the scarcity rationale was not necessary to its holding, and so not binding on this panel. Second, although it is certainly true that the lower courts may not "overrule" decisions of the Supreme Court, the question whether spectrum scarcity persists is a factual one for the FCC, not a legal one for the courts. In the *Fairness Report* and *SPC*, the Commission definitively determined that technological change has overtaken the notion of "spectrum scarcity."

[11] *Syracuse Peace Council against Television Station WTVH, Syracuse, New York*, 2 FCC Rcd 5043, 5052-53 (1987), *aff'd*, 867 F.2d 654 (1989) ("*SPC*"); see also id. ("[T]he [scarcity] rationale . . . is no longer sustainable in the vastly transformed, diverse market that exists today.").

> [A]ll resources are scarce in the sense that people often would like to use more than exists. Especially when the Government gives away a valuable commodity, such as the right to use certain airwaves free of charge, the demand will likely always exceed the supply. And with the development of cable, spectrum-based communications media now have an abundance of alternatives, essentially rendering the economic scarcity arguments superfluous.

Id. (footnotes omitted). As a result, Chief Judge Edwards concluded, "it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity." *Id.* at 674.

RTNDA agrees, and submits that such "exacting scrutiny" should be applied to any public interest obligations the Commission seeks to impose on digital broadcasters. RTNDA urges the Commission to preserve its long-standing policy of relying on the editorial discretion of broadcasters to promote the public interest, and to eschew further content-based regulation.

IV. CONCLUSION

Because it would interfere with the editorial discretion of broadcasters without serving any substantial government interest, any requirement that would force broadcasters to provide air time to political candidates could not survive constitutional scrutiny. And, as a practical matter, because such a requirement would make it easier for candidates to duck the types of forums that require accountability and true debate, it would not result in increased issue-oriented discourse, but would end up leaving the public less well informed about politics than it is now. The proposals also have the very real potential to erode the time available for true news and public affairs programming.

No precedent supports the use of government's coercive power to improve the conduct and discourse of politics or to combat negative campaigning. The First

Amendment has always been hostile to government efforts to interfere with broadcasters' editorial discretion, and the transition to digital television has no bearing whatsoever on that issue. Therefore, RTNDA respectfully submits that the Commission should not attempt to articulate or endorse any particular plan for the use of television air time for political messages.

In a broader sense, RTNDA believes that the Advisory Committee would perpetuate a regulatory system that has outlived any purpose it once may have served. The time has come not to increase content-based obligations on broadcasters, but to deregulate broadcasting and to create greater First Amendment freedom for broadcasters on a par with that of their print (and

new media) colleagues. To do otherwise is to jeopardize the future of free, over-the-air television.

Respectfully submitted,

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