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FCC Workshop on the Future of Media  
March 4, 2010

As we make the transition from a broadcast world to a broadband world, we need to think carefully about how the public service principles of 20<sup>th</sup> century communications policy translate into the Internet age. The first thing to note is that this is not a new idea. While public interest obligations on broadcasters may seem like a singular regulatory regime for a unique technology, the public service principles that led to their creation are old. They are old and they have a storied history at the core of our democracy.

Every communications medium in the last century has been placed in a policy framework intended to guarantee specific public interest outcomes in American society. It is true for radio, television, cable, and the Internet. This is rooted in democratic theory that dates back at least to the Founders when the media system consisted of postmen on horseback and in wagons with sacks of newspapers. The Founders made the creation of a national postal service and subsidies of newspaper delivery a cornerstone of public policy in the early Republic. Only the technology has changed.

The core idea is a simple one. The news media are not simply another market of products and services in the economy. Tied to the outputs of media markets is the health of our democracy and the vibrancy of our political discourse. The news, information, and viewpoint we rely upon as citizens for competent self-government come from the media.

As Supreme Court Justice Felix Frankfurter put it in the seminal 1945 case *AP v. US*:

“In addition to being a commercial enterprise, [the press] has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press...is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes.”<sup>1</sup>

But there is an inherent tension here. The civic benefits of the media are often in conflict with the imperatives of commerce. The needs of citizens are not the same as the desires of consumers. In the era of mass media, this tension has taken another form. The modern media market financially rewards consolidation of market power and the pure pursuit of revenues at the expense of public service principles. Even a casual glimpse at cable news and the inanity of the contemporary political debate tends to confirm this – though of course it is not uniform. And, it is worth noting, the poverty of journalism is not an ideological issue; it is a common problem across the board.

Industrial consolidation and market pressures necessarily decrease the diversity of independent viewpoint and typically reduce investment in public service journalism and the ideals of universal access and participation in politics. These features of the media market are simply not

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<sup>1</sup> *AP v. US* (1945), 326 US 27-28.

profitable. Conversely, the health of the marketplace of ideas in a democracy relies upon (in the famous words of Justice Hugo Black from the same case) the “widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Put differently – commerce benefits from centralized control over information; democracy benefits from decentralized control over information.

Communications policy has always been about balancing commercial and civic goals in the media marketplace. This is the social contract of mass media, and since 1934, the FCC has been its steward.

### Evolving Public Service Principles

So how are we to apply these ideas to our present conversation? I would argue that as we think about evolving technologies, we need to think about evolving our public service principles right alongside them. Set aside the dogma of the regulation vs. market fundamentalism debates that so often dominate the FCC’s dockets. Those arguments are simply inapt. The social contracts of mass media policy are not about *whether* public service principles should be applied upon the market. They are about *how* they will be applied.

These structural policies generally take three forms or some combination of them. They are all premised on the notion that media companies use public assets or benefits, like spectrum use, access to public rights of way, direct subsidies, copyright protection, or all of the above. They use these benefits to deliver information products for their own commercial gain; but they bear a singular burden of public service in the marketplace of ideas that is unique to the media as an economic sector.

Different media technologies and systems have fallen into different categories over the years.

- 1) Media companies may pay a fee for using a public asset that facilitates their business and that may be used for civic purposes. Here we can think of fees paid to government for access to the public rights of way or license fees for the use of spectrum that are put to other public purposes;
- 2) Media companies may offer public service in exchange for the use of a public asset. Here we can think of broadcast public interest obligations that they provide for the use of the public airwaves.
- 3) Media companies may ensure nondiscriminatory access to the communications media. Here we can think of the basic principles of the common carriage rules such as nondiscrimination, interconnection, and universal service that govern telecommunications networks.

For the sake of argument, let us hypothesize that the Commission’s recent deliberations about the future of broadcasting are correct – that broadcasters are transitioning into a broadband world. For the record, I think the epitaphs for local broadcasting are being written prematurely. Many broadcasters still provide valuable local public services. And it is undeniable that local

broadcasters continue to be one of two primary sources for local news (alongside newspapers) in most communities.

However, it is likely that the wheels of technology will turn and broadcasters will eventually become broadband providers of one type or another – either by changing their business models themselves or turning in their licenses for reallocation to others.

So what should become of public interest obligations and the traditional social contract of the broadcast industry? The traditional public interest obligations—such as children’s programming, localism, and lower prices for political advertisements—were a cornerstone of broadcast policy from its inception. But they have never worked particularly well. I do not mean to uniformly indict the broadcast industry. Some broadcasters have been exemplary in their public service. But that is simply not the case generally. Now that the broadcast industry is in flux, it raises the question about how to apply the social contract in a transitional period.

This history indicates that it is harder to discipline commercial behavior with affirmative public interest commitments than it is to do so by exacting fees or with prohibitive obligations (such as a nondiscrimination requirement in telecommunications). Abandoning public service principles in the face of technological change should not be considered a reasonable path. That flies in the face of all past technological transitions that have seen public service policies carried through to the new technology.

My suggestion is to go back to basics, but to create realistic options for media companies. If there are broadcasters that would like to remain in the current system, more power to them. But they should be obliged to abide by enhanced public interest obligations that take cues from the leadership of Commissioner Michael Copps in calling for stronger public service provisions in exchange for their special treatment under the law. If there are broadcasters that would like to become broadband providers or transfer their licenses to those who would provider broadband networks, we should apply the model of common carriage principles and license fees (note that I do not use the term common carriage *regulations*). And if there are broadcasters that are in between, there may be a combination that is applicable using spectrum fees in lieu of public service content.

But the FCC should be clear that the social contract of media companies remains alive and well, as it has since the days of our Founders. The same logic of balancing the commercial priorities of media markets with public service principles applies today exactly as it always has.

In the same spirit, in this proceeding the FCC should explore recommendations for how license fees might be used to further public interest benefits. Free Press has long supported the idea (advocated by many over the years) that fees paid by spectrum licensees should be applied to fill the gaps in public service media that are not addressed by commercial media. This is simply another form of upholding the historic social contract. It is especially important and applicable today given the crisis in the business of local journalism. Such policies must be coupled closely with clear firewalls to ensure journalistic independence – just as it is done in virtually every other industrialized democracy.

Finally, the FCC should look at how the spirit of the public interest obligations long imposed on broadcasters should be realized in a broadband age for wired and wireless network operators. This should be a core part of the National Broadband Plan. In my view, the public service principles of the Internet age lie in policies like Network Neutrality which guarantee an open platform for the online marketplace of ideas. These principles should also inform policies that subsidize broadband for low-income households and promote universal affordable access in rural America. These principles should inform consumer protection issues that facilitate access and utilization of networks, both wired and wireless. These principles should inform policies that determine how spectrum is allocated and used. If the Commission is set to reallocate 500 MHz of the public airwaves, we should see to it that those decisions seek to maximize competition and consumer choice – outcomes which further the goals of access and participation. Further, we should explore ways in which current spectrum holders have not utilized their allocation to its full public benefit. These include build-out requirements and opportunistic spectrum sharing policies. While all of this may seem far afield from the traditional broadcast public interest obligations, they are policies rooted in the same ideal of the social contract for public service.

To understand what we should do with broadcast public interest obligations, we have to understand how we ought to implement the same principles in the broadband era.