**Statement of Henry Geller for the March 4, 2010 Workshop**

My task is to give a brief history and overview of the public interest concept in media policymaking. Since this story begins almost 100 years ago and is to be covered in 10 minutes, it will necessarily be skeletal.

Origins of Public Interest Deal. Under the 1912 Radio Act, it was illegal to transmit on radio without a license from the Department of Commerce, which actively policed broadcast stations to minimize interference. A 1926 successful challenge to this regulatory scheme ended this scheme and interference problems escalated everywhere.[1] A new allocation method had to be found.

Free speech advocates from religious, educational and labor groups, argued that a common carrier approach would be best by requiring broadcasters to allow anyone to buy airtime. The commercial broadcasters, represented by the National Association of Broadcasters (NAB), opposed common carrier and sought to retain editorial control over programming and to merge individual stations into national networks.

Congress adopted a compromise between the industry and the free speech advocates. With the Radio Act of 1927, and later the definitive Communications Act of 1934 (which remains the charter for broadcast television today), two core principles were established. First, Congress prohibited common carriage and mandated a government-controlled short-term licensing regime that assigned broadcasters to designated channels in the spectrum. Second, in order to justify this exclusionary zoning policy, Congress also required that broadcasters act as trustees of spectrum on behalf of all the others who were kept off the airwaves by the government.

As guardians of a scarce publicly owned resource, broadcasters were required to operate in the "public interest, convenience and necessity." In the Act and over time, Congress and the FCC have imposed several public interest obligations (PIOs) on broadcasters: they must serve local needs and interests (Section 307(b)); contribute to an informed electorate (e.g., Section 315, 312(a)(7)); and offer educational children's programming (see Children's Television Act of 1990); Section 303b(a). This deal – giving the broadcasters free spectrum in exchange for delivering PIOs – remains the law's framework today.

Three points should be noted. The free spectrum given is very valuable; the wireless phone industry has paid taxpayers over 50 billion at auction for the privilege of using public spectrum. Second, the broadcasters know what a good deal they have, and trumpet their adherence to the "social contract" they have made – putting profits second and public service first. However, they vigorously oppose any approach of clearly defined guidelines for public service on First Amendment groups. In effect, the NAB welcomes being called a public trustee as long as the obligation is left vague or unenforceable. The NAB also uses the social contract to oppose any

[1] A more complete description, with citations, is set out in the New America paper, The Case for a Spectrum Fee to Replace the 'Public Interest Obligations' of Broadcasters, May 2002, Henry Geller and Tim Watts, pp.2-3.

spectrum usage fee.[2] Third, Congress gained considerable leverage over this powerful new medium through its oversight of this continuing deal.

The Efficacy of the Public Interest Deal. Public interest, without clearly defined guidelines, is a vague concept. Commercial broadcasting is a business that faces fierce and increasing competition, from multichannel cable and satellite, the Internet, DVD, and other video outlets. In these circumstances, the commercial broadcaster must very largely focus on the bottom line.

The situation is similar to the issue of pollution: some businesses will be good citizens and not pollute the water or air, but many others, driven by strong competition, will take the profit-maximizing route and do great damage to the environment. The government therefore adopts specific regulations applicable to the entire industry. It does not say to the industry, "do right in the public interest and avoid undue pollution."

With exception of the Children Television Act (CTA, discussed within), the FCC has never adopted effective guidelines for local or informational programming – that is, quantitative guidelines for these categories during prescribed times (e.g., 6 am to midnight or prime time). There has thus been no effective enforcement of these PIOs. In the words of Commissioner Glen Robinson, echoing Ronald Coase, FCC regulation of broadcasting is a charade – a wrestling match full of grunts and groans signifying nothing.[3]

The FCC has gone from its 1946 Blue Book, which set forth its reliance on a random composite week of station operations, to its 1960 Programming Statement, which listed 14 general areas of interest, and then to renewal form and ascertainment prescriptions that require licensees to make local contacts and surveys of area problems, needs, and interests.[4] These vague approaches accomplished little. In 1973, FCC Chairman Dean Burch told a broadcast industry group: "If I were to pose the question, what *are* the FCC's renewal policies, everyone in this 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 (most of all the long-suffering renewal staff)."[5] With the CTA exception,

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[2] In the 103d Congress, the Administration proposed a $5 billion spectrum usage fee on broadcasters (beginning at 1 percent and rising to 5 percent). 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," Broadcasting & Cable Mag., June 13, 1994, pp. 42-43; see also id., April 7, 1997, 36 (First Amendment bars "requiring broadcasters to air particular types of programs)"

[3] 60 FCC2d at 439 (1976).

[4] See Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (herein Gore Report), NTIA, Washington, DC, 1998, 27-28.

[5] Address to International Radio and Television Society, Sept. 14, 1973, FCC Memo 06608, 3. The FCC thereafter initiated a rule making to specify quantitative guidelines for renewal in

this statement still holds true for every year since the adoption of the 1934 Communications Act.[6]

The regulatory failure became even more acute with the deregulation of television in 1984.[7] The Commission ended the ascertainment requirements and examination of programming categories, to focus exclusively on community issue-oriented programming, broadly defined. The Commission stressed that it now intended to emphasize "the quality of a broadcaster's efforts, not the quantity of its non-entertainment programming (84 FCC2d at 991), and used descriptive terms like "good" and "meaningful." The FCC cannot constitutionally examine quality but no harm was done, because the Commission never had any intention of looking at any programming efforts. It was just a further part of the charade.

Although the Commission required broadcasters to maintain files showing significant treatment of community issues, along with illustrative programs, broadcasters did not submit this material to the Commission. Instead, they sent the FCC postcards stating that the relevant material is to be in the public files of the station. The Commission thus had to rely on the public to bring to its attention stations not fulfilling their public service obligation. This reliance was wholly misplaced, as experience quickly demonstrated; people can hardly be expected to go to a station, examine and analyze the data, and then file a petition to deny or complaint. Postcard renewal simply permitted the FCC to avoid consideration of public interest issues. Most surprising, Congress never held a hearing on postcard renewal.

There were other public interest failures. In 1982 the FCC ended its anti-trafficking rule (which required that a station be held by its owners for at least three years). This allowed traffickers to "flip" stations, and as a result, public trusts were being sold like "hog bellies" (Cong. Al Swift, Cong. Rec., June 19, 1986, E2190).

The comparative hearing process at renewal was supposed to spur incumbents to render substantial or meritorious public service in order to retain the channel against the challenging newcomer. The FCC, however, rejecting quantitative standards, never developed explicit standards in this area, and was severely criticized.[8] In practice, incumbents always won, regardless of their record, and the Act's purpose to promote meritorious service was thwarted. In the Telecom Act of 1996, Congress abolished the comparative renewal.

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specific categories (local, informational, children). Burch, however, left the Commission, and the effort foundered.

[6] From 1973 to the early 1980's, the FCC had processing guidelines on nonentertainment and local programming so its renewal staff could grant renewal under delegated authority. See UCC v. FCC, 707 F.2d at 1420-21.

[7] 96 FCC2d 1076 (1984); 104 FCC2d 358 (1986). The FCC Chairman was Mark Fowler, who stated that "television is just a toaster with pictures." Television Dig., Oct.19, 1987, 4. Ironically, the NAB protested Fowler's position because it jeopardized their protected public trustee status. See n.2, supra.

[8] Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 49 (D.C. Cir. 1978).

The "postcard renewal" Commission also abandoned the fairness doctrine. The doctrine required broadcasters to devote a reasonable amount of time to the discussion of controversial issues of public importance and to do so fairly by affording the opportunity for contrasting views on such issues. The FCC held that the doctrine chilled debate, a finding that was strongly contested by public interest groups; on appeal, the court never resolved this dispute but simply held that the Commission had discretion to follow the print model in this era of exploding new media.[9] But its abandonment is another clear indication that the public trustee scheme has failed. In the seminal WLBT-TV case, the Jackson, Miss. broadcaster presented only segregationist views even though integration was a raging issue there at the time; because of court rulings that fairness was the sine qua non for license renewal, the broadcaster lost its license.[10] Today, such a broadcaster would obtain renewal as a public trustee, even though it clearly had not acted as a fiduciary of its community, 45% of which is black.

The Gore Report and the CTA. In 1999, the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters issued its report. The Report did not question the efficacy of the public interest regulatory scheme. Rather, it called, inter alia, for digital broadcasters to make enhanced disclosure of their public interest programming on a quarterly basis, and for the FCC to adopt minimal public interest requirements in the areas of community outreach, accountability, public service announcements (PSAs), and public affairs programming. It urged that Congress create a trust fund to assure enhanced and permanent funding for public broadcasting, removing it from the vicissitudes of the political process.

The Gore Report did have one positive impact: The FCC's January 24, 2008 Report on Standardized and Enhanced Disclosure Requirements.[11] Citing the Report, the Commission adopted a standard form requiring broadcasters to delineate the public service programming broadcast on the primary channel (the one with entertainment, sports, etc.) and to make the form available on the station's website or, alternatively, on the website of the state broadcasters association. This, in itself, might promote more public service programming, because a station might be reluctant to have zero or very little programming in category after category.[12]

The FCC stressed in its Report that it was not making any substantive changes. Thus, the Commission was not requiring any minimum amount of programming in any category or combination of categories. The licensee was left with great discretion as the programming and amount in any category and also the judgment to be made in categorizing a program.

Clearly the Commission has made it much easier for public groups to examine the licensee's public service efforts. Whether the public will take advantage of this new opportunity or

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[9] Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir.1989), cert. denied, 110 S.Ct. 717 (1989). Practically speaking, there is no use rearguing this matter now, or considering implementing the doctrine only when an egregious pattern of violation of the doctrine is shown (i.e., a deliberate violation of the doctrine, established by independent extrinsic evidence or pattern of reckless disregard),

[10] UCC v. FCC, 359 F.2d 994 (D.C. Cir. 1965), 425 F.2d 543 (D.C. Cir. 1969).

[11] See FCC 07-205, Jan. 24, 2008.

[12] The NAB has appealed the FCC action, and the matter is now before the D.C. Circuit.

whether it will continue to be largely indifferent,[13] is a question that can be definitively settled only by experience. Even if the public does turn to Internet examination, it will face difficulties in deciding whether to challenge renewal, assuming the station has some programming in the various categories like news or civic affairs, because of the absence of any minimal requirements.

It might be argued that this could be remedied by having the FCC adopt quantitative requirements, either in all the categories or in some combination of the standard categories (or with some specification of the amount of locally originated programs in these categories).[14] But here the experience with the CTA becomes instructive.

In 1990, Congress enacted the CTA to increase the amount of educational and information programming available to children (herein E/I or core programming). The FCC was required to determine at renewal whether each television broadcast licensee has served the educational needs of children, including with programs specifically designed to do so (core programming), The CTA went into effect in October, 1991.

In March, 1993, the FCC found that there had been no increase in the hours of E/I programming, with many licensees relying on PSAs and vignettes to meet the CTA obligation. Other licensees proffered animated programs like "The Flintstones" and "GI Joe" as E/I, asserting that the programs include a variety of generalized pro-social themes. The time slots for educational programming were often before 7 am, when the child audience is minimal.[15] The reason for these deficiencies was that the agency, from 1991 through 1992, was being administered by a Commission hostile to the notion of requiring public service in specific categories like children's educational fare.

In light of the above situation, the FCC, under a new regime in 1993-1996, decided to adopt as a "safe haven" for renewal a three hour guideline for core programming at least 30 minutes in duration, regularly scheduled each week in the time period 6 am to 10 pm. This action made a big difference, with stations who had previously presented only one-half or one hour, now broadcasting three hours in order to meet the "safe harbor" for renewal.

However, while clearly an improvement, the above accomplishment is still not good policy. Consider the following defects:

(i) The object is not just quantity but high quality educational programming, when children are involved. The noncommercial system is motivated to present such programming, even though it is more expensive, and has a long track record of doing to. The commercial system has no such incentive or history. The commercial system, with its profit incentive, cannot be expected to develop and revise a "Sesame

[13] See op. cited n.11, pars. 10-12, 39.
[14] In my view, such a quantitative approach is needed if the agency or the public is to act on an informed basis; it is also needed in fairness to the broadcaster. See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), cert. denied, 402 U.S.1007 (1970).
[15] FCC Notice of Inquiry, 8 FCC Rcd 1841, 1842.

Street"; in the multichannel digital era, to present on its 19.3 Mobs a program for pre-schoolers, one for school aged (6-11), another for teenagers, a literacy program, and one for teacher training or parents. Adequately funded, PBS could implement such an ambitious educational plan.

(ii) Annual studies by the Annenberg Washington Program have questioned the educational value of a substantial amount of the core programming being offered by commercial broadcasters. In one such review, for example, it was found that one quarter of these programs had no educational value and that overall there was a heavy emphasis on social rather than cognitive values.[16]

In May, 2007, the FCC sought comments on the status of children's television programming.[17] The Children's Media Policy Coalition[18] assessed the E/I performance for affiliated stations in six of the top 10 Designated Market Areas (DMA). It found that nearly all E/I programming is relegated to weekends, even though weekdays comprise a significant portion of children's viewing times, and that preemption for sports continues to be problem. The Coalition also analyzed the core programs offered by broadcasters in the Los Angeles DMA, as representative of programming offered in most markets. It found that the "vast majority of broadcasters air programs with social/emotional lessons, but offer few academic or informational shows." It pointed out that "the Commission and Congress have recognized that children can benefit greatly from E/I programs that provide academic and informational lessons, yet it does not appear that children are receiving those benefits." The Coalition also found that "some programs reported as E/I contain little or no educational content. Indeed, some programs provide weak or generic social lessons, still others appear to be merely entertainment programs masquerading as educational."[19]

(iii) There are First Amendment strains in the CTA approach because there will always be difficult questions at the margins. To attract the young child, the program 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 entertainment fare. When this consideration is combined with a program that purportedly seeks to teach children a lesson as to some social goal, the FCC can end up reviewing content in a most sensitive area. Chairman Hundt asserted that NBC's program, "NBA Inside Stuff", could not be regarded as E/I, but NBC, relying on two educational psychologists, claimed the program was designed to teach "life lessons", not just promote basketball, and Hundt backed off.[20] Significantly, the FCC has not acted on a UCC petition filed in September, 2004, seeking to deny renewal for two Washington, DC stations on the ground that the programs claimed to be E/I lacked education as a substantial purpose.

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[16] Annenberg Washington Program's annual surveys are available at http//www.Annenberg. nwu.ed.
[17] 73 Fed, Reg, 24308 (May 2, 2007).
[18] Children Now, American Academy of Pediatrics, Benton Foundation, National PTA, UCC.
[19] Coalition Comments in MB Docket No. 000167, at ii-iii.
[20] New York Times, "Networks Comply but Barely on Children's Shows," Dec. 11, 1997, C1.

The above discussion of CTA implementation illumines the similar difficulties that would be involved with the use of quantitative guidelines or "safe havens" for renewal for the categories (including combinations thereof) set out in the January 24, 2008 Report on standardized and enhanced disclosure. There would, for example, be First Amendment issues at the margins of programs claimed to be "community issue oriented" or "local civic" or "public affairs". In short, the broadcast public trustee content regulatory content system is anomalous in this century and will become more so in light of developments in electronic media, has difficult First Amendment strains if and when implemented quantitatively, has been very largely a failed regulatory scheme for seven decades, and in any event cannot meet public service goals as well as an alternative. That alternative is that in lieu of the public trustee content obligation (the social compact of rendering public service at the expense of profits in exchange for free use of the spectrum), there would be a spectrum usage fee imposed on the commercial broadcasters, with the sums so collected going largely to a trust fund for public television.

The amount of the fee would be set by Congress. Based on past precedent, a 5% fee on gross advertising revenues might be appropriate. This is the fee imposed widely on gross cable revenues for use of the city streets (the Communications Act allows the franchise authority to impose a fee up to 5% and the great majority now are at or close to that figure). Five percent is also the fee decided upon by the FCC to determine what sums are to be paid the Treasury by digital TV broadcasters for engaging in ancillary services. Since the advertising revenues of local TV stations were roughly 17 billions in 2007, (TVB source), this would garner an annual fee of roughly $850 million.

Public television would thus be enabled to fully implement its expansive and much needed plans in the digital era (preparation, production, distribution, publicizing). See supra. In effect, it would be making mandatory the voluntary policy of Section 303b(b)(2) of the 1990 CTA.[21]

The trust fund would be used to finance more adequately the various other missions of public television – culture, arts, the humanities, drama, in-depth informational programming, programs for minorities. Public television wants to deliver high quality public service: that is its sole reason for existing. Commercial television wants to meet its growing competition and maximize its profits. So for the first time, government policy would be in accord with the driving considerations of the field. For the first time, commercial television and cable would be treated alike; significantly the public does not distinguish or care whether the program stems from cable or broadcast service.

It may be argued that with this reform, viewers, especially those not on cable or DBS, might lose public service programming in the absence of the public trustee content regulation of the FCC. But with disappearance of regulation, there would be little, if any, effects in areas such as news, news-type programs, etc., which are broadcast because of the station's bottom line, not regulation. There could be a small loss in the CTA area, but it would be greatly outweighed by

[21] This subsection provides that broadcasters who enable another broadcaster to present E/I programming are to be given credit for this action at the time of filing their renewal applications. The provision has been little used.

the provision of strong support for high quality educational fare over PBS, which reaches over 96% of the nation's TV households.[22]

Finally, there is the problem raised by the recent report, The Reconstruction of American Journalism, by Leonard Downie, Jr. and Michael Schudson.[23] The local newspaper has done the critical task of covering local issues, including any investigative efforts that are needed. With the diminishment and indeed possible disappearance of the local newspaper, there is serious gap in the social fabric. The Downie-Schudson Report points out that local public TV stations do nothing or very little in local journalistic activities, even though there are over 300 such stations which could make a significant contribution in this respect. In light of the above proposed trust fund, they could be charged to make that contribution.

The Report describes the dismal failure of both commercial and public radio to adequately present local journalistic programming and recommends remedial actions.[24] Of particular interest is the recommendation that fees be imposed on commercial radio, in order to remedy the above failure, by supplying some support to proposed "state Local News Fund Councils" (p.91).

The current commercial radio scheme faces great difficulty meeting its local public service programming obligation. These difficulties will only increase and indeed, the public trustee scheme for commercial radio might implode if it faces increased scrutiny. It behooves Congress and the FCC to seize the opportunity posed by the Report.

There should be studies and documentation of what fee, in lieu of the PIO, could be reasonably met by commercial radio – an issue that would also be considered in public hearings where all interested parties could comment. That is the critical issue – not what fee is needed to accomplish the goal of the Report to have a sufficient "Fund for Local News." If the Fund were established, its finances might well be a continuing process from many sources. Commercial radio would be called upon to make its proper contribution. If no Fund were established, that contribution would go to public radio.

Commercial radio was born in the early part of the 20th Century. It makes sense to shape a policy that conforms to the early part of the 21st Century. That policy can be win-win for commercial radio and the public interest. The industry will no longer face the burden of local public service programming and may gain an extended license term. The public interest will be promoted by significant sums directed to entities that are committed to needed local public service. It has been a continuing policy mistake to attempt to achieve public service

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[22] The same thing is true of PSAs. There is no FCC requirement for any amount or placement of PSAs; they can be carried by the broadcaster without interfering with the commercial operation. They do constitute public service if they displace valuable commercial time but surveys have found that they are rarely carried in prime time when both demand and price is so high, and when they are, they are typically paid for, not free. Broadcasting and Cable Mag., March 6, 2000, 98.

[23] Columbiajournalismreport.org (October 20, 2009).

[24] See, e.g., pp. 27-29; recommendations 3 and 5.

programming by behavioral content regulation that strives to make the commercial system act against its driving economic thrust.

Cable. Cable comes under a different regulatory and constitutional regime than broadcasting. Because it has a large 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.[25] Instead, the policy is geared to providing access for PEG (public, educational, and governmental) channels on a noncommercial basis and for commercial leased access. See Sections 611, 612. These access channels are designed to promote the Associated Press principle[26] by freeing some 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,[27] 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 channels, 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 on interference between two cable speakers.

It follows that regulation of cable comes under traditional First Amendment jurisprudence – if content based, strict scrutiny; if content neutral, the intermediate standard of O'Brien.[28] It seems clear, therefore, that extending requirements such as the provision of educational or informational programming to cable would not pass constitutional muster. There is simply no "compelling interest" or "extremely important" problem. Indeed, in light of cable's many channels of programming (e.g., The Learning Channel, Discovery Channel, History Channel, CNN, Fox News, MSNBC, Arts & Entertainment Channel, and most important, C-SPAN), there is no problem at all, and no reason for government intervention.

There is a substantial question as to the efficacy of the access provision. A large number of franchising authorities do not require PEG channels or if they do, fail to ensure adequate financial support. Congress should have required a minimum allocation of three channels for PEG and reasonable financial support. Instead, Congress went in the opposite direction with the

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[25] See Section 624(f)(1).

[26] Associated Press v. US, 326 U.S. 1, 20 ("widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

[27] 114 S.Ct. 2457. The Court, while agreeing that the cable market reflects dysfunction, also rejected the extension of Red Lion on that basis, holding that physical, rather than economic, characteristics of the broadcast market, underlie the Court's broadcast jurisprudence (a regulation reasonably related to the public interest is constitutional – see NBC v. U.S., 319 U.S. 190).

[28] U.S. v. O'Brien, 391 U.S. 367, 377(1968). Under this standard, a content neutral provision is valid if it "furthers an important or substantial governmental interest; if that interest is unrelated to the suppression of free expression; and if the incidental restriction on speech is no greater than is essential to the furtherance of that interest."

provision in the 1984 Cable Act that the use of the funds derived from the franchise fees (up to 5%) may not be regulated (Section 622 (i)). Because the cities were no longer required by the FCC to use the funds for cable-related purposes, including implementing PEG channels, the funds simply vanished into city coffers to pay for everything from pensions to potholes; cable industry representatives call this the $800 million bribe.[29]

As to commercial leased access channel operation, Congress recognized in the 1992 Cable Act that this provision has been a failure (in part because of the constraints in the 1984 provision). It therefore added a provision requiring the FCC to determine the cable operator's maximum rates for commercial leased channel use, and to establish reasonable terms and conditions; the FCC acted to implement this provision.[30] However, the provision still remains problematic, and as practical matter, newcomer attention has turned to the Internet.

There is a very important issue now pending before the FCC and the Courts – that of net neutrality. Both cable and the telcos are engaged in affording broadband access to the Internet (ISPs). An issue arose as to the classification of this service. Cable and the telcos argued that it is an information service while other parties like Brand X urged that it is telecommunications service common carrier under Title II of the Act plus a separate unregulated information service. (Disclosure: I was on the Board of Media Access Project at the time, and strongly supported the latter position in the litigation). The FCC took the position of cable and telcos that the broadband ISP service was an information service and therefore not regulated as a common carrier under Title II. In a 6-3 decision in the Supreme Court, the FCC won, chiefly on Chevron grounds (deference to the agency when interpreting murky or unclear statutory provisions).

However, the FCC is still committed to Net Neutrality as a sound and necessary policy, and works to impose it as a requirement under its ancillary authority in Title I to take necessary actions (Section 4(i)) to carry out the Act. In a dispute with Comcast that was recently argued before a panel of the Court of Appeals for the D.C. Circuit, the argument went very badly for the FCC position on its ancillary position. Consequently it is rumored that the FCC is considering bringing the broadband ISP operation under Title II.

This situation is both messy and unclear at this time. It is doubtful that it will be the subject of the workshop. Thus, although it is a most important public interest issue as to both cable and the telcos, it is simply noted here (without citations).

DBS. The 1992 Act (Section 25) contains two public interest provisions concerning DBS. Section 335(a) directs the FCC to initiate a proceeding to impose public interest requirements on DBS providers of video service (at a minimum, the access provisions of Section 312(a)(7) and the use provisions of Section 315). Section 335(b) requires the DBS provider to reserve 4 to 7

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[29] See H.Geller, Regulatory Reform for Principal Electronic Media, Annenberg Washington Program, November 1994, pp. 28-29.

[30] Sec.9 of 1992 Act; 47 USC Sec. 532; Second Report and Order on Leased Commercial Access, 62 Fed. Reg. 11364 (1997). It would have been better to eliminate the constraining provisions and require cable operator to engage in last-offer arbitration if no agreement were reached after a specified brief period.

percent of capacity for noncommercial programming of an educational or informational nature, with the prices not exceed 50% of the total direct costs of making such a channel available; the DBS provider is to have no editorial control over any video material offered under this section. The Commission determined upon a 4% allocation and did not impose any public interest requirements beyond those specified in the Act.

Because DBS uses scarce spectrum, the appellate court held that Red Lion is applicable and on that basis sustained the constitutionality of Section 25.[31] The case points up the unique nature of the Supreme Court's broadcast jurisprudence.

Internet. Little discussion is needed in this respect. There is the pending issue of Net Neutrality already noted. There has been no effort to extend Red Lion type regulation to the Internet, and it would in any event been struck down as unconstitutional. There have been efforts to extend the Pacifica-type approach to protect children from indecent programming on the Internet but they have been ruled unconstitutional. Reno v. ACLU, 521 U.S. 844 (1997); ACLU v. Ashcroft, 542 U.S. 656 (2004). In the latter case, in upholding a preliminary injunction against the enforcement of the Child Online Protection Act, the Court relied on the fact that blocking and filtering technology appeared to provide an effective and less restrictive alternative to the criminal sanctions the Act imposed. Ashcroft, 542 U.S. at 670.

[31] Time Warner Entertainment Co. v. FCC, 93 F.3d 973-977, rehearing denied February 7, 1997 (5 judges voting for rehearing and stating their belief that the DBS provision is unconstitutional).