In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-XXX.

**Statement of Commissioner Harold W. Furchtgott-Roth,
Concurring in Part and Dissenting in Part**

I concur in this Notice of Proposed Rulemaking ("NPRM") only in so far as the transition from analog to digital transmission of television broadcast signals necessitates a clarification of the existing rules governing broadcasters' legal obligations under the "public interest" standard. Commenters should feel free to address questions of that nature in this proceeding, and I encourage them to do so. I do not support, however, the notion that the transition provides a basis for increasing or otherwise changing the nature of broadcasters' public interest duties, the theory upon which much of this item is premised.

As I said in the Notice of Inquiry that precipitated today's item:

> The birth of digital television raises discrete issues regarding application of our existing public interest requirements during the transition period and beyond. Section 336(d) of the Act states "[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience and necessity." That section also requires that "[i]n the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest." Thus, the statute supports the Commission's application of its current public interest obligations to DTV."[1]

[1] Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, *Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees.*

What the statute does not support, however, is the adoption of "public interest mandates that have no discernible nexus to the transition to digital technology."[2] That seems to be the case with respect to almost every proposal made in this NPRM. For example, standardization of reports,[3] placement of reports in public files or on the web,[4] and the use of the internet to promote discussions between stations and their viewers[5] have no logical connection to the switch from analog to digital technology. The reasons that the majority gives concerning the asserted need for these changes, whatever their merit, stand or fall irregardless of the transition.[6] In the end, then, the Commission seems to be using the fact of the transition as a Trojan horse for increased regulation of broadcasters.

I also highlight the clear and present First Amendment danger posed by the concept of breaking out categories of programming on broadcasters' FCC forms.[7] Having the government pick one kind of program substance over another, and then ask broadcasters to list what they have done in that particular area at the time of license renewal, necessarily involves the Commission in direct content regulation. Admittedly,

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2 *Id.*

3 *See supra* at para. 7-14.

4 *See id.* at paras. 26, 31.

5 *See id.* at paras. 35-36.

6 I note that I support a reporting requirement on closed captioning and video description as a matter of policy. But such a requirement should be considered in a proceeding that is not premised on the fact of the transition but rather on the need for the requirement itself.

7 *See id.* at para. 15-25.

such a regulatory scheme imposes no hard quotas for programming. But it necessarily implies that the Commission (1) favors the sort of programming that it has chosen for categorization and (2) cares whether broadcasters air it or not. These proposed rule changes thus would create governmental pressure on broadcasters to air FCC-favored content, thereby creating a soft quota on that content.

The First Amendment questions raised by this sort of scheme are clearly evident. The coercion to air certain kinds of programming that the Commission has deemed to be in the "public interest" is not the sort of "general affirmative dut[y]" [8] that courts have sanctioned under the First Amendment. Rather, these regulations would push the Commission toward the unconstitutional side of the "tightrope [that it walks] between saying too much and saying too little"[9] about content that serves the "public interest." Thus is so because they pull certain content out of the universe of possible programming and expressly inquire about activity in that area. The Commission's traditional and more general approach of deferring to the broadcasters' mode of describing the ways in which their stations serve the public is far preferable, constitutionally speaking.

I would strongly urge broadcasters to resist this potential incursion on their editorial rights. Similarly, I would hope that the Commission ultimately will resist the temptation to micro-manage broadcast content under the guise of the "public interest" standard.

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[8] *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968).

[9] *Id.*

For the foregoing reasons, I narrowly concur in this NPRM for the limited purpose of clarifying the application of existing rules in the digital age. And I dissent vigorously from any suggestion that the Commission tally and review the aggregate content of broadcasters' programs for licensing purposes.

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