

Public Service Announcements, Broadcasters, and the Public Interest:
Regulatory Background and the Digital Future

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Abstract

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Public service announcements, or PSAs, have long been a staple of the public service programming that radio and television broadcasters provide their audiences, though the Federal Communications Commission has never had any quantitative standard for their use, nor even a meaningful qualitative one. The FCC, for example, defines PSAs as community-interest advertisements "for which no charge is made," though clearly many public service campaigns are paid in order to ensure optimal placement. Broadcast scholars in law and communications have paid almost no attention to PSAs as part of the public-service mix, focusing instead on more traditional programming forms.

In April 2000, however, the National Association of Broadcasters reported that of the \$8.1 billion in public service its members gave to their communities, the largest amount -- \$5.6 billion -- came in the form of airtime "donated" to PSAs. Scholars and journalists questioned the survey methods by which the NAB produced its figures, and others questioned the motivation for the report, which came in the aftermath of sharp criticism from advertising associations and then FCC Chairman Reed Hundt that television broadcasters had both cut the time given to PSAs and buried the few they did air in time slots where few people would see them. It also followed the 1998 report of the President's Advisory Commission on Public Interest Obligations of Digital Broadcasters, which urged that the FCC give new emphasis to PSAs in monitoring broadcaster community service, particularly as the nation's television broadcasters convert from analog to digital transmission. Currently, the FCC has issued two Notices of Proposed Rule Making, both of which involve PSAs in some way, but it is uncertain whether the proposed rules could weather statutory or constitutional challenge. Indeed, for all the emphasis now placed on PSAs as a significant contribution to public service programming, their regulatory history and their prospects in the digital future illustrate well the fundamental flaws in broadcast regulation, flaws that have existed since 1927 and which the 1996 Telecommunications Act did nothing to remedy.

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Introduction: A Private Industry with a Public Service Mandate

Broadcasting in the United States has long been a business dominated by private, for-profit firms whose enterprise is based on a curious *quid pro quo* in the law: In return for their free and exclusive channel assignments on the publicly owned electromagnetic spectrum, broadcasters must serve "the public interest, convenience and necessity."¹ Those six words have been the subject of controversy since 1927, when they first were borrowed from the language of interstate commerce and pasted into the Federal Radio Act. The 1927 law followed on an earlier legislative failure, the 1912 Radio Act, that had established a system for radio licensing but lacked any discretionary standard for accepting or denying applications.² Between 1922 and 1925, Commerce Secretary Herbert Hoover convened four national conferences to develop such a standard and, with it, to ensure that broadcasters could sustain themselves financially and provide a variety of programming.³

The debate, as it was framed then, featured several proposals for reform but was between two general conceptions. One, advanced by the universities, labor unions and churches that had pioneered the new medium, favored a non-profit and non-commercial system sustained by tax-revenues or some kind of license fee on receivers, similar to the public broadcasting systems then taking shape in Britain and Canada. A second view came from commercial broadcasters, led by ATT, which had pioneered the idea of "toll broadcasting" in which anyone who wished could pay a fee and get his message on the air.⁴ When a federal court declared the 1912 act unconstitutional in 1926,⁵ Congress responded with the 1927 law, declaring the airwaves public property and establishing as the standard of licensure that broadcasters serve "the public interest, convenience and necessity."⁶

Thus was the language of railroad, telegraph and telephone regulation transplanted into broadcasting, but with an important caveat: radio was not a public utility and would not be subject to the rate and service regulation. "The industry would have it both ways," writes one scholar of the period. "It would be authorized to operate within a profoundly favorable tradition of public interest interpretation associated with utility

monopolies, but would also be exempt from the more onerous rate and service restrictions of such regulations. In a word, it would have the *quid* without the *quo*."⁷ The practical effect of the new law was to change the character of the medium: Between 1927 and 1930, the number of non-profit and educational stations dropped from more than 200 to fewer than 70.⁸ Their frequencies were often reassigned to commercial stations, many of them affiliated with networks. By 1931, NBC and CBS accounted for 70 percent of all U.S. broadcasting and controlled all but three of the nation's 40 most powerful stations.⁹

In 1934, a reform-minded Congress briefly considered revising the law to set aside a portion of the spectrum for educational and non-profit use, but the networks and the National Association of Broadcasters argued that no such set-aside was necessary. CBS Chairman William Paley, for example, promised the Senate Commerce Committee in 1930 that no more than 30 percent of his network's programming would ever be sold, that the balance would be available for unsponsored educational and noncommercial programming, a pledge he reiterated in 1934.¹⁰ The NAB, led by its lawyer, Louis G. Caldwell, defended the public interest language in the law as constitutional. "If all this be censorship," he wrote in 1929, "it seems unavoidable and in the best interests of the public."¹¹ In the end, the 1934 Communications Act was, so far as broadcasting was concerned, a near-verbatim reproduction of the 1927 law, though it abolished the old Federal Radio Commission and established in its place the Federal Communications Commission.

Today the regulatory scheme for broadcasting (radio and television) is essentially the same as it was in 1927. Several important regulations involving ownership, license terms and public interest record-keeping have been loosened over the years, most recently by the 1996 Telecommunications Act, but the social compact at the heart of the regulatory scheme is still there. The Telecommunications Act itself was the end result of a long attempt, beginning in the mid-1970s, to re-draft the law consistent with technological and economic changes in the communications industries, one of them the introduction and development of digital television. As a digital service, broadcast television is distinct from its analog forebear, permitting broadcasters to send multiple streams of programming, including high definition video, and to create interactive services -- in short, to create entirely new businesses with new streams of revenue. As of March 2001, 133 digital television stations were on the air in the United States.¹²

One of many questions digital television raises is what kind of service the public should expect for this new use of its property. Against that inquiry and the history that precedes it, this essay examines public service announcements, or PSAs, and whether they constitute public service under the law. In some obvious respects the subject is a modest one, having registered barely a blip in the literature on broadcast regulation. But looked at another way, the regulatory standing of PSAs captures in a nutshell the whole history of the public interest standard, full as it is of good intentions, vague regulatory admonitions and nearly unlimited broadcaster discretion in interpreting them. As a policy matter, the Federal Communications Commission (FCC) since 1980 has allowed broadcasters to count PSAs toward their statutory public service programming obligations, though precisely *how* they are to count is a trickier matter, discussed below. The FCC has no quantitative requirements for PSAs, nor does the agency in any way monitor their use. Further, though the FCC defines a PSA as a community-interest

advertisement “for which no charge is made,” many public service advertising campaigns *are* paid.

In 1998, following the passage of the 1996 Telecommunications Act, the President’s Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters urged that PSAs become a more substantial and documented part of broadcasters’ community service. The next year, the recommendation was one of several considered in an FCC Notice of Inquiry on the public interest obligations of broadcasters, and in late 2000 the role of PSAs in public service became part of an FCC Notice of Proposed Rule Making (NPRM) on the subject of standardized broadcaster disclosure of stations’ community service activities. It remains to be seen how the FCC, under new FCC Chairman Michael K. Powell, will view these and related recommendations as the nation’s broadcasters continue the transition to digital transmission.

PSAs as Public Service: Regulatory Background and Current Policy

Under Federal Communications Commission rules established in the 1980s, PSAs constitute a legitimate contribution to the mix of programming by which commercial and non-commercial broadcasters, radio and television, serve the public interest.¹³ Like most FCC regulations related to mass media content (and thus raising constitutional concerns), the language concerning PSAs is vague – not a standard, nor even a guideline. Indeed, it is this simple: Current FCC rules require commercial television broadcasters to keep in their file for public review, among other things, a list of community issues addressed by the station’s programming during the preceding three-month period; according to those rules, PSAs constitute treatment of public issues.¹⁴

For commercial and non-commercial stations, the FCC defines a PSA as an advertisement “for which no charge is made and which promotes programs, activities or services of Federal, State or local governments or the programs, activities or services of nonprofit organizations or any other announcements regarded as serving community interests.”¹⁵ Of course, many organizations do purchase time for their public service campaigns -- buying time is the only way they can ensure placement for their spots in prime-time or in programming with the desired audience demographics.¹⁶

It is not clear that broadcasters themselves distinguish between paid time and free time in their own accounting of public service. A 1998 self-reporting study conducted by the polling firm Public Opinion Strategies for the NAB, for example, did not explicitly distinguish between paid and free time in the wording of its question on the subject, but rather asked respondents about the number and dollar value of PSAs they aired.¹⁷ When asked about the paid-unpaid distinction, the director of the Florida Association of Broadcasters told *Electronic Media* that “we consider them [paid ads] as PSAs.”¹⁸ To the extent that the distinction was implied in the survey instrument, either in 1998 or in a subsequent study in 2000, there is no way of knowing whether the respondents responded candidly, since of course they were not disinterested in the survey’s findings.

So far as the FCC is concerned, and despite its own definition of public service announcements, the distinction between paid and unpaid PSAs is irrelevant: the agency has no quantitative requirement with respect to PSAs and, as a policy matter, keeps no

¹³ Public Opinion Strategies, located in Alexandria, Virginia, did not respond to the author’s request for information on this point.

records of their use.¹⁹ Neither licensees nor networks need air PSAs at all, and they have complete editorial discretion to reject any PSA offered to them.

Only once has the FCC given PSAs focused attention, back when broadcast television was still dominated by three national networks and cable was still a rural signal-delivery service. In 1976, the San Francisco-based Public Media Center filed a petition with the FCC urging it to develop a quantitative PSA requirement. In 1978 the agency opened an inquiry into the matter, giving attention both to industry practices and the role that PSAs could or should play in the public service mix. Two years later the agency terminated that proceeding, declining to set any kind of PSA requirement but, importantly, modifying its reporting procedures "to enable licensees to receive greater credit for their public interest performance in the PSA sphere if they wish it."²⁰

In its petition to the FCC, the Public Media Center had claimed that broadcasters gave short shrift to PSAs generally, burying them in unfavorable hours, and to local citizens groups and charities specifically, favoring PSAs provided by the Ad Council and featuring nationally known and for the most part non-controversial groups. The petitioners proposed that broadcasters be required to present a minimum of three PSAs, totaling a minimum of 90 seconds, every two hours throughout the broadcast day. They also wanted the FCC to limit the number of PSAs a licensee or network could accept from a single entity (such as the Ad Council) and to require that a certain percentage of PSAs be of local origin. To further that goal, the petition called on broadcasters to make available to local organizations facilities and assistance with which to create PSAs. Finally, the petitioners urged the Commission to study licensee and network practices with respect to the acquisition and airing of PSAs.

In response, broadcasters and others opposed to the petition argued two things: that decisions about PSAs fell within the bounds of editorial discretion reserved to broadcasters by statute and by the First Amendment; and that there was no evidentiary basis for the FCC to act.²¹ The agency agreed and at first denied the petition.²¹ It then reconsidered the issue and chose to conduct the study on PSA practice that the Public Media Center had requested.²² In doing so, the FCC noted that "Congress, as well as governmental agencies such as the Federal Trade Commission and the Department of Health and Human Services are interested in the employment of PSAs in answering public needs."²³

At the time, the only data the FCC had on PSAs were those contained in license renewals, and that was not much: radio and television stations simply indicated how many PSAs they aired during a "composite" week. The FCC thus asked stations (and everyone else) to respond to its Notice of Inquiry with information about the time given to and the timing of PSAs; the nature of the PSAs aired; the sources of PSAs aired; the criteria for selecting them; and how useful such announcements were in serving the public.²⁴

Because of the self-selected nature of the responses, the FCC admitted, the picture that resulted from reply comments was statistically flawed, but nonetheless, the agency

¹⁹ Among the non-broadcast parties opposed to any quantitative requirement were the United Way, the Boy Scouts of America, the President's Council of Physical Fitness and Sports, the Lexington League of Women Voters and the United Negro College Fund. Non-broadcast parties supporting the requirement included the United Church of Christ, the Federal Trade Commission, the Southern California Committee for Open Media, and the Council on Children, Media and Merchandising.

thought, revealing. The average television and radio station aired one to two PSAs per hour, about 200 per week, the equivalent of one to two percent of all broadcast time. PSAs ran from 10 seconds to 60, with most running 30. PSAs were "not necessarily aired in graveyard hours," the FCC reported, but neither were they "centered in drive and prime-time periods."²⁵ About 7 percent of all PSAs were directed to children under 12, though only 20 percent of child-oriented PSAs aired during programming directed to children.²⁶

In 1980, the most common PSAs concerned health and safety issues, followed by social services, civic activities and environmental concerns. "PSAs concerning controversial matters," the FCC found, "are not usually aired."²⁷ Broadcasters themselves reported that local public service was the criteria by which they chose to air PSAs, though they also said they rarely solicited any PSAs but rather chose from what was provided them and usually acquired PSAs in packages rather than individually. Not surprisingly, non-broadcast parties responding to the FCC's inquiry were of the view that availability and convenience were the chief criteria governing PSA selection.

In evaluating responses, the FCC questioned whether the PSA definition should be modified to reflect the particular purposes for which PSAs are aired, or perhaps to encourage attention to controversial subjects.²⁸ The agency was convinced to avoid any such modification, but did choose to change its procedures to enable licensees to receive greater credit for their PSAs in the "other" programming category of their annual programming report and in their renewal application forms.²⁹ The agency also abandoned its practice of distinguishing between collective PSAs (community bulletins) and individual PSAs. In either case, the agency said, licensees could receive public service credit.³⁰

Years later, in 1993, the FCC noted that PSAs were among the "public interest programming" offered by home shopping channels when it qualified such channels as local commercial television stations for purposes of mandatory cable carriage.³¹ At one point the FCC also accepted PSAs as legitimate public service programming under the 1990 Children's Television Act.³² In 1996, however, a divided FCC disqualified PSAs as meeting any part of its core children's programming requirement under the Act.³³ Core programming, the Commission has said, consists of programs at least 30 minutes in length.³⁴

Finally, to be consistent with the provisions of the Americans with Disabilities Act, the FCC required in 1991 that PSAs produced by the federal government carry closed captioning; otherwise, the agency exempts PSAs from closed captioning requirements.

The Advertising Council, for example, offered this definition: "A PSA is an announcement for which no commercial charge is made by the broadcasters or by the non-profit agency, government body or individual providing the message, the purpose of which is to improve the health, safety, welfare or enhancement of people's lives and the more effective and beneficial functioning of their community, state or region. Such messages shall not be commercial, political or designed to influence legislation."

The Committee for Open Media suggested: "A PSA is a non-routine, non-billable message which 1) informs viewers and listeners about a service, program or activity of community interest or 2) which provides a form for individuals or groups to express their ideas, viewpoints or opinions. Time signals, routine weather announcements and station promotional announcements are not PSAs."

Chairman Hundt Raises the Bar

In March 1997, then FCC Chairman Reed Hundt complained publicly that television public service advertising on the four major networks had "dried up and disappeared like rain in the desert" following a critical report on the subject by the American Association of Advertising Agencies and the Association of National Advertisers.³⁵ According to the report, the amount of network time devoted to PSAs peaked in 1992 at about 11 seconds per hour during prime time but by 1995 had fallen to 4 seconds per hour; over the same period, the report said, time given to other kinds of commercials, and in particular network self-promotions, had increased by 8.5 percent to almost four-and-a-half minutes. While not endorsing the report's data, an Ad Council spokesperson quoted in the *Washington Post* agreed with the report's general findings, attributing the loss of PSA time to a strong economy that left little advertising time unsold and to increased competition among the networks for viewers.³⁶

Hundt promptly asked the NAB to supply time and dollar figure data for both PSAs and network promotions for the previous 10 years, and asked further whether "broadcasters have any obligation to run any PSAs as a condition of receiving a broadcast license."³⁷ A month later, at the annual NAB convention, Hundt stated his view that "liberal use of public service announcements" were among the essential ingredients of public service, suggested that 60 prime-time seconds each night was about right,³⁸ and urged broadcasters to draft a voluntary code for their use.³⁹

Going still further, the chairman criticized the networks' practice of using celebrities from their own programs to discuss social issues. NBC, for instance, featured on-air talent in its "The More You Know Campaign," and ABC used its stars for a series of announcements called "Children First."⁴⁰ These spots, Hundt said, did not really count as PSAs even "by the networks' own definition"; such ads, he said, served a "commercial purpose rather than the public interest."⁴¹ In response, ABC said that celebrity spots constituted as much as a third of its overall PSA program, and both ABC and NBC provided anecdotal evidence that their use of celebrities greatly improved the effectiveness of these announcements. An NAB spokesman called Hundt's attack on celebrity spots "mind-boggling" and asked rhetorically, "Who would be more effective delivering an anti-violence PSA than Bill Cosby?"⁴²

The NAB never gave Hundt the information he had requested, saying it did not exist and implying that the lack of data was the FCC's own fault. "Your focus on PSAs as a unique measure of public service is indeed difficult to understand in light of the Commission's outright rejection of educational PSAs" as counting toward children's programming obligations, NAB President Edward Fritts wrote. Hundt fired back with the last word, saying that if the NAB could not provide the information the Commission wanted, "perhaps it would be a good idea to seek to gather such information as part of our larger public interest inquiry."⁴³ Hundt's displeasure was magnified a year later when news broke about the editorial and financial negotiations that the Office of National Drug Control Policy had used to secure prime-time network placement of its anti-drug messages. Why, he asked General Barry R. McCaffrey, head of the ONDCP, should the public have to "buy the right to use its own medium?"⁴⁴ By January 2000, Hundt had left the FCC and been succeeded as chairman by William E. Kennard, but as Hundt had promised the FCC's Notice of Inquiry on the Public Interest Obligations of Television

Broadcast Licensees included language concerning the proper role of PSAs in public service.⁴⁵

The NAB responded in April 2000 with the announcement that the nation's radio and television broadcasters contributed \$8.1 billion of "public service" to their communities between August 1998 and July 1999. Of that sum, the single largest amount, \$5.6 billion, came in the form of airtime "donated," in the NAB's words, to the broadcast of public service announcements, or PSAs.⁴⁶ The NAB data were based on a survey of broadcasters by Public Opinion Strategies, and the \$8.1 billion figure, said NAB President Edward Fritts, was "honest, conservative and unassailable."⁴⁷

Critics assailed anyway, questioning the methodology and sample used in the survey, and thus the validity of its results. Even trade magazine *Broadcasting & Cable* reported that the survey's methods may have accounted for the increase over comparable data from 1998, when the NAB had valued its total public service contribution at \$6.8 billion, its PSA activity at \$4.6 billion.⁴⁸ Moreover, the earlier study was itself suspect. Norman Ornstein, a resident scholar at the American Enterprise Institute, was quoted as saying it had "a lot of huge question marks."⁴⁹

The Gore Commission

It seems reasonable to speculate that one reason for the NAB's public service accounting was to counter any perception that the broadcast television industry received a financial windfall when, in April 1997, the Federal Communications Commission set the terms for awarding spectrum assignments for digital television. Unlike other spectrum allotments, those for digital television were not open to competitive bidding, but were available only to incumbent license holders. Congress declined to charge a fee of any kind for the spectrum, in 1996 leading then-presidential candidate Bob Dole to characterize the licensing process as a "giveaway" of public property worth \$70 billion.⁵⁰

More generally, many commentators thought the terms of the 1996 Telecommunications Act extraordinarily generous to broadcasters; while the Act made profound changes in the regulatory regime governing virtually every other communications industry, it made no changes in the underlying system of broadcast spectrum allocation that has existed since 1927. At the same time the law dramatically loosened ownership rules in broadcasting (radio and television), made license renewals easier, and in television extended license periods from five to eight years.⁵¹ What was not clear was just what the public was to get in return.

In response to that uncertainty, the White House in 1997 convened an advisory committee composed of 22 representatives of the broadcasting and computer industries, the public interest and labor communities, and academics -- and chaired by Norman Ornstein and CBS executive Leslie Moonves -- to examine the future of digital television and to make recommendations concerning the public service obligations that should attach to it.* Formally known as the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, the group was typically identified in press

* Arguably, the commission's work represented to first basement-to-attic review of the social compact in broadcasting since 1946, when the FCC published its ill-fated "Blue Book," a critical review of broadcaster public service. See *The Public Service Responsibility of Broadcast Licensees*, Federal Communications Commission, March 7, 1946. To date, Congress has not held a single hearing addressing any of the PIAC recommendations.

reports either as the public interest advisory committee, or "PIAC," or as the "Gore Commission." In its final report, issued in December 1998, the committee specifically identified public service announcements as a potentially important component of public service.⁵²

More specifically, the committee proposed that "a minimum commitment to public service announcements should be required of digital television broadcasters, *with at least equal emphasis placed on locally produced PSAs addressing a community's local needs. PSAs should run in all day parts including in primetime and at other times of peak viewing.*"⁵³ This recommendation, with its focus on local community needs, was augmented by two others: that licensees make a greater effort to disclose and publicize their public service activities and programming on a standardized reporting form; and, second, that the FCC reinstate a needs-ascertainment requirement for broadcasters.⁵⁴ (The standardized disclosure proposal is now before the FCC in a Notice of Proposed Rule Making,⁵⁵ discussed below; the requirement for ascertainment – the process by which broadcasters were once required to actively canvass their communities to see what concerned them – was dropped by the FCC in 1984.⁵⁶) Finally, PIAC recommended that PSAs be closed-captioned.⁵⁷

Appendix A of the PIAC report -- a proposed "certification form" with which broadcasters could, through their responses to 24 questions and submission of several evidentiary exhibits, record and quantify their fulfillment of their public service obligations on a quarterly basis -- is now part of the NPRM on standardized disclosure. With respect to PSAs the form offers these questions, numbers 14 through 18:

The licensee airs at least [-] locally originated public service announcements during a three-month period. YES or NO*

At least [-] of these public service announcements are aired between 6 a.m. and midnight. YES or NO

The licensee airs at least [-] other public service announcements during a three-month period. YES or NO

*List in Exhibit E a representative sample of no fewer than five local and five national issues addressed by public service announcements during the past three months.*⁵⁸

In undertaking the two proposed rulemakings it has so far -- the one on disclosure and a second on the obligations digital broadcasters owe to children⁵⁹ -- the FCC has chosen to focus on low-hanging fruit so far as policy is concerned. The importance of broadcaster obligations to children is captured in a federal statute, the 1990 Children's Television Act,⁶⁰ and in the larger context of the PIAC recommendations the disclosure requirements are relatively noncontroversial. Whether either will succeed is another matter.

PSAs and Public Service: Future Regulatory Scenarios

* Minimums to be determined by the Federal Communications Commission.

Whatever the future holds for public service announcements in broadcasting, it will unfold against the same broad backdrop of public service regulation that has existed since the passage of the Radio Act. The 1996 Telecommunications Act saw to that, despite long-standing proposals from across the political spectrum for regulatory reform.

In 1982, for example, President Reagan's FCC Chairman, Mark Fowler, called the fiduciary model of the public interest a collection of "legal fictions" that served primarily to insulate broadcasters from competition and, indeed, to give them certain competitive advantages.⁶¹ Fowler urged that broadcasters be relieved of their public interest obligations, be given "squatter's rights" in their spectrum assignments and pay a small fee for them, with the fee going to support public broadcasting and other broadcast services poorly served by the market. More recently, long-time FCC counsel and broadcast lawyer Henry Geller has also urged Congress to forgo the current regulatory system on First Amendment and administrative grounds, and instead "substitute a modest spectrum usage fee based on a percentage of gross revenues."⁶² Geller's proposal is briefly described and included for consideration in the Gore Commission report as an alternative to imposing public service obligations.⁶³ So too, is a modified fee proposal known as "pay or play," in which commercial broadcasters can essentially avoid their obligations through payment.

Presumably broadcasters should embrace deregulation of this sort, particularly where, as in Geller's case, it rests on the idea that broadcasting should enjoy the same First Amendment protections and editorial discretion as print media. Yet even in the midst of the recent FCC inquiry into the public service obligations of digital broadcasters, NAB Chairman Edward Fritts told an audience of broadcasters that the "NAB has never questioned that the FCC can and should impose on broadcasters a commitment to serve the public."⁶⁴ As Fowler and many others have argued, broadcasters favor the fiduciary model because its obligations are vague and its competitive advantages substantial, the most obvious recent example being the process that awarded digital broadcast spectrum only to incumbent licensees.

For its part, Congress has since at least 1978 rejected proposals to substitute a fee for public service regulation,⁶⁵ though for constitutional, competitive and public service reasons the idea continues to bubble up, particularly as a funding mechanism for public television, radio and other telecommunications. Importantly, the idea now has firm footing: Congress has required digital broadcasters to pay fees on revenues earned from any ancillary and supplementary services they may choose to provide.

⁶¹ Fowler was the first FCC chairman directly to challenge the fiduciary model as offensive to the First Amendment, noting, as many others have, the unsavory intertwining of broadcaster influence and Congressional oversight. A PSA example illustrates the point: The NAB, in partnership with the Congressional Club, has each year since 1987 offered to congressional spouses and their children the opportunity to tape PSAs on topics such as alcohol abuse, pre-natal care and cancer prevention for distribution in their home districts. Whatever the public service value of such messages, they are presumably helpful to Congress members eager to appear engaged with their communities but who may not themselves appear in PSAs without invoking the equal time rule. It seems reasonable to ask whether the arrangement also benefits broadcasters eager to maintain their unique status under the law. See, for example, David Rosenbaum, "TV Ads by Congressional Wives are a Sweet Deal for All Involved," *New York Times*, July 13, 1999, A1.

⁶² More generally, PSAs have in the past been the subject of complaints under the Fairness Doctrine, which the FCC stopped enforcing for First Amendment reasons in 1987.

For now, however, the backdrop against which the FCC is conducting its inquiry is based on the old, contentious regulatory formula: What is the public quid for the broadcasters' quo? The most detailed proposed answers to this question lie in the 1998 recommendations of the President's Advisory Committee (PIAC),⁶⁶ and now with the FCC's NPRM regarding broadcaster disclosure of local public service.⁶⁷

A safe bet but a disappointing one -- based on history and the law -- is that these proposals will come to nothing. Broadcasters will object, with cause, 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."⁶⁸ On the same grounds they will object to the "pay or play" proposal included in the PIAC report. At the same time, broadcasters will cling tenaciously to their statutory status as privileged citizens in the telecommunications universe. The Public Interest Council, a group of broadcast industry lawyers writing for The Media Institute, have for instance argued that the mere provision of "free, local, universally available, over-the-air television...is an entirely sufficient 'paypack' for the so-called 'gift' of additional spectrum for the transition to digital."⁶⁹ The Council's criticisms ignore entirely the alternative Geller proposal that broadcasters pay a fee of 1 to 2 percent of revenues and be relieved of content regulation entirely.

Before stepping down as FCC chairman in January 2001, William Kennard urged Congress to re-examine the terms by which television broadcasters are supposed to convert fully to digital, and he blasted broadcasters for having "increasingly elevated financial interest above the public interest."⁷⁰ Just before leaving office, Kennard released an FCC report outlining 11 principles for broadcaster public service, part of which sharply criticized broadcasters for failing to give adequate time or opportunity to PSAs of local origin and relevance. "Given the importance of PSAs to their communities," the report said, "broadcasters should exercise their best efforts to attract and then air locally produced PSAs. Airing these announcements during peak viewing hours will ensure that such PSAs have maximum exposure for maximum service to the community."⁷¹

It is too early to say how President George W. Bush's new appointee as FCC chairman, Michael K. Powell, will view these recommendations, but Powell's initial public remarks on the agency's oversight duties suggest that he will move much more cautiously.⁷² With respect to the disclosure NPRM now before the agency, for example, Powell said last year that "the recommendation that certain categories of programming be identified on the form raises serious First Amendment concerns" because they "involve the Commission in content-based regulations."⁷³

As a matter of regulatory policy, then, one can imagine two possibilities for public service announcements in the digital future. One relies on the PIAC proposals meeting some success in the Notice of Proposed Rule Making such that PSAs are codified as a public service, with some minimum quantitative standards, as a useful adjunct to the committee's proposed ascertainment and disclosure requirements. A second future scenario for PSAs is little different from the present: Broadcasters will have little incentive to air PSAs except as a matter of community goodwill, as filler for unsold advertising time, or, in the case of paid campaigns, as a source of revenue. These incentives would presumably be unchanged even if at some point Congress and the FCC were to abandon the fiduciary model, with or without spectrum fees -- or, for that matter, if the FCC were to disappear tomorrow. The blunt fact is that in the two programming areas upon which broadcasters rely in advancing the social compact argument -- news

and PSAs -- profits come before public service. News makes money and establishes the audience flow for prime-time programs; PSAs are useful as nods to community goodwill that do not interfere with broadcaster commercial operations.

It may be -- a subject for another paper -- that the future of PSAs in digital broadcasting will depend less on regulation and much more on the economic models that come to define that business. If broadcasters multiplex, as some are expected to do, it is certainly conceivable that PSAs may be welcome as filler for unsold ad time on multiple channels. The ratio of sold to unsold time, however, depends on among other things the size and composition of the viewing audience available to advertisers. Thus in the short term PSAs may see more airtime but smaller audiences; in the long term they may face the same barriers they do now.

Endnotes

¹ 44 Stat. 1162 (1927).

² 37 Stat. 302 (1912).

³ Robert W. McChesney, "Conflict Not Consensus: The Debate over Broadcast Communication Policy, 1930-1935," in *Ruthless Criticism*, ed. William Solomon and Robert McChesney (Minneapolis: University of Minnesota Press, 1993), 224.

⁴ Erik Barnouw, *Tube of Plenty* (New York: Oxford University Press, 1990), 23.

⁵ *United States v. Zenith Radio Corporation*, 12 F2d 614 (N.D. Illinois, 1926).

⁶ 44 Stat. 1162.

⁷ Willard Rowland, Jr., "The Meaning of the Public Interest in Communications Policy, Part II," paper presented at the International Communication Association, May 28, 1993, 12.

⁸ Robert McChesney, "Free Speech and Democracy! Louis G. Caldwell, the American Bar Association and the Debate over the Free Speech Implications of Broadcast Regulation, 1928-1938," *The American Journal of Legal History*, October 1991.

⁹ McChesney, "Conflict, Not Consensus," 227.

¹⁰ William S. Paley, "Radio and the Humanities," *Annals of the American Academy of Political and Social Science*, January 1935, 23-24.

¹¹ McChesney, "Free Speech and Democracy!"

¹² Federal Communications Commission, "DTV Stations on the Air," available at www.fcc.gov/mmb/vsd/files/dtvonair.html, April 13, 2001.

¹³ See generally *In the Matter of Petition to Institute a Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, 81 FCC2d 346, 1980.

¹⁴ 47 CFR 73.3526(e)(11)

¹⁵ FCC Rules, Section 73.1810 (d) (4)

¹⁶ Don Shultz, author interview, October 25, 2000. Shultz is an advertising consultant and professor of Integrated Marketing Communications, Northwestern University. One kind of paid PSA is known as a "noncommercial sustaining announcement" (NCSA), and such ads typically are placed at sharply discounted rates paid not to individual stations but to state broadcasting associations, which actually place the ads. The state broadcasting associations are free to use the revenue from NCSAs as they see fit, including for lobbying activities. See Doug Halonen, "When Free Ads Aren't: Some Nonprofits Pay for Promos," *Electronic Media*, February 15, 1999, 23.

¹⁷ *NAB Survey of Public Affairs Activities: Interview Schedule for National Report*, Public Opinion Strategies, Alexandria, Va., August 1997. The key questions concerning PSAs in the survey instrument are nos. 11 (concerning issues addressed by PSAs); 19 (concerning the total dollar value for PSAs for 1996-97); 20 and 22 (concerning number of PSAs aired per week and per day, respectively); and 21 (concerning the percentage of PSAs that were locally produced or concerned local issues).

¹⁸ Halonen, "NAB touts PSAs."

¹⁹ Michael Wagner, author interview, October 26, 2000. Wagner is a staff attorney in the Mass Media Bureau, Federal Communications Commission.

²⁰ *Notice of Inquiry and Proposed Rule Making on the Airing of Public Service Announcements by Broadcast Licensees*, 81 FCC2d 346, 1980, at 366, n42.

²¹ Memorandum Opinion and Order, FCC 77-865, 1977.

²² Notice of Inquiry, 43 *Fed. Reg.* 37725, 1978.

²³ *On the Airing of Public Service Announcements by Broadcast Licensees*, at 348.

²⁴ *Ibid.*, at 348-50.

²⁵ *Ibid.*, at 352.

²⁶ *Ibid.*

²⁷ *Ibid.*, at 353.

²⁸ *Ibid.*, at 363.

²⁹ *Ibid.*, at 367-68.

³⁰ *Ibid.*, at 368.

³¹ Federal Communications Commission, *Cable Television Service; Cable Carriage of Home Shopping Broadcast Stations*, 58 *Fed. Reg.* 39156, 1993.

³² Federal Communications Commission, *Radio Broadcast Services; Children's Television Programming*, 58 *Fed. Reg.* 14367, 1993.

³³ "Rules 'Mock Reason': Ex-NAB TV Chairman Gabbard Proposes Kidvid Compromise to Hundt," *Communications Daily*, July 25, 1996, 4.

³⁴ Federal Communications Commission, *Broadcast Services; Children's Television*, 61 *Fed. Reg.* 43981, 1996.

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- ³⁵ "Hundt Blasts PSA Lack," *Television Digest*, March 10, 1997.
- ³⁶ Paul Farhi, "Time for a Public Service Renouncement; Clinton's Anti-Drug Campaign Bucks a Television Trend," *Washington Post*, March 12, 1997, C10.
- ³⁷ Heather Fleming, "PSA slice shrinks as commercial pie grows; public service announcements are 'disappearing like rain in the desert,' Hundt says," *Broadcasting & Cable*, March 31, 1997, 19.
- ³⁸ Chris McConnell, "Got a Minute? Hundt wants 60 seconds of PSAs a night from each network," *Broadcasting & Cable*, April 21, 1997, 4.
- ³⁹ "Hundt states his public interest mandate for broadcasters," *Communications Daily*, April 9, 1997.
- ⁴⁰ McConnell, "Got a Minute?"
- ⁴¹ "Mass Media," *Communications Daily*, May 5, 1997.
- ⁴² McConnell, "Got a Minute?"
- ⁴³ "Mass Media," *Communications Daily*, May 12, 1997.
- ⁴⁴ Judy Pasternak, "Ad Plan: Your Tax Dollars on Drugs," *Los Angeles Times*, August 20, 1998, A1.
- ⁴⁵ Federal Communications Commission, *In the Matter of Public Interest Obligations of TV Broadcast Licensees*, MM Docket No. 99-360, *Notice of Inquiry*, 14 FCC Rcd 21633, 1999. See also Federal Communications Commission, *Public Interest Obligations of Television Broadcast Licensees*, 65 *Fed. Reg.* 4211, 2000
- ⁴⁶ Paige Albiniak, "Service with an \$8B Smile," *Broadcasting & Cable*, April 10, 2000, 24.
- ⁴⁷ *Ibid.*
- ⁴⁸ Transcript of the morning session, Open Meeting of Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, National Association of Broadcasters, Washington, D.C., April 14, 1998, 6.
- ⁴⁹ Doug Halonen, "NAB Touts PSAs, Charitable Acts: But Some Critics Doubt Largesse Totals \$6.8 billion," *Electronic Media*, February 15, 1999, 3. That year the Advertising Council -- the single largest supplier of PSAs, producing about one-quarter of all public service advertising -- reported that total donated time for its spots for all media in 1998 was valued at \$1.2 billion. See also Bill McConnell, "Broadcast PSAs jump," *Broadcasting & Cable*, April 26, 1999, 26.
- ⁵⁰ Edmund Andrews, "Senators Resist Both Proposals for Auctioning TV Airwaves," *New York Times*, March 16, 1996, A1.
- ⁵¹ See generally Thomas W. Hazlett, "Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker," 29 *Conn. L. Rev.* 217, 1996.
- ⁵² *Report of the President's Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, Sec. 3, "Recommendations of the Advisory Committee," Washington, D.C., December 18, 1998.
- ⁵³ *Ibid.*, Sec. 3, No. 3.3.

⁵⁴ *Ibid*, Sec. 3, Nos. 1 and 3.1.

⁵⁵ Federal Communications Commission, *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket No. 00-345, *Notice of Proposed Rule Making*, October 5, 2000. See also Federal Communications Commission, *Standardized and Enhanced Disclosure of Commercial Television Station Public Interest Obligations*, 65 Fed. Reg. 62683, 2000.

⁵⁶ See *Programming and Ascertainment Order*, 98 FCC2d 1076, 1984.

⁵⁷ *Ibid*, Sec. 3, No. 3.5.

⁵⁸ *Ibid*, Appendix A: *Public Interest Programming and Community Service Certification Form*.

⁵⁹ Federal Communications Commission, *In the Matter of Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, *Notice of Proposed Rule Making*, October 5, 2000.

⁶⁰ The 1990 Children's Television Act is incorporated into the 1934 Communications Act as Section 303 (b).

⁶¹ Mark S. Fowler and Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," *Texas Law Review*, Vol. 60, 1982, 253-54.

⁶² Henry Geller, *1995-2000: Regulatory Reform for Principal Electronic Media*, Washington: D.C.: Annenberg Washington Program in Communications Policy Studies of Northwestern University, 1994, 21-25.

⁶³ The PIAC report is available online from the Benton Foundation, at www.benton.org/PIAC/report.html. Geller's spectrum fee idea is discussed in the Section 3 of the report, "Recommendations of the Advisory Committee," under proposal 10, "New Approaches to Public Service Obligations in the Digital Television Environment." It is discussed in detail in Appendix D to the report, *Innovative Approaches to Public Interest Responsibilities: A Comparative Analysis*.

⁶⁴ Edward O. Fritts, *Speech to Electronic Media and the First Amendment Conference*, Washington, D.C., October 24, 2000.

⁶⁵ See for example H.R. 13015, *The Communications Act of 1978*, Subcommittee on Communications, Committee on Interstate Foreign Commerce, U.S. House of Representatives, 95th Congress, 2nd Session, June 7, 1978. The bill was proposed by California Rep. Lionel Van Deerlin, a Democrat and former newspaper reporter and television news anchor.

⁶⁶ PIAC report, Sec. 3, "Recommendations of the Advisory Committee."

⁶⁷ Federal Communications Commission, *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, *Notice of Proposed Rule Making*, 4-12.

⁶⁸ *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, at 2463 (1994).

⁶⁹ Laurence H. Winer, *Statement of The Media Institute's Public Interest Council in Response to the Commission's Final Report*, Washington, D.C.: The Media Institute, December 18, 1998. Available at www.mediainst.org/gore/reaction.html.

⁷⁰ William E. Kennard, “*What Does \$70 Billion Buy You Anyway?*” *Rethinking Public Interest Requirements at the Dawn of the Digital Age*, remarks at the Museum of Television and Radio, New York, New York, Oct. 10, 2000, 2.

⁷¹ William E. Kennard, *Report to Congress on the Public Interest Obligations of Television Broadcasters as They Transition to Digital Television*, Washington, DC: Federal Communications Commission, January 18, 2001, 11.

⁷² Christopher Stern, “New FCC Chairman Favors a Non-Activist Approach,” *Washington Post*, February 7, 2001, E1.

⁷³ Michael K. Powell, *Statement in the Matter of Standardized Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket No. 00-168, September 22, 2000.