

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
)
Implementation of Section 4(g) of the)
Cable Television Consumer Protection) MM Docket No. 93-8
Act of 1992)
)
Home Shopping Station Issues)

COMMENTS OF
CAMPAIGN LEGAL CENTER
BENTON FOUNDATION
NEW AMERICA FOUNDATION
COMMON CAUSE
AND
OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST

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SUMMARY

The use of scarce and valuable television spectrum for home shopping is antithetical to the public interest standard under which the Commission determines whether to award broadcast licenses. Broadcasters are expected to educate and inform the public in exchange for their exclusive right to use publicly owned spectrum. Home shopping stations cannot satisfy this obligation.

In abandoning limits on commercialization, the Commission predicted that marketplace forces would constrain broadcasters. It is clear that these predictions have been disproved. In light of this fact, the need to promote programming which advances the public interest and to fulfill the mandate to restrain excessive commercialism, the Commission should rule that stations carrying home shopping programming for half of more of their broadcast day are not operating in the public interest.

The Commission's 1993 decision to the contrary was flawed and tainted by the reliance on hundreds of letters and other filings which are not part of the record in the case and were never seen by the affected parties. Moreover and in any event, the material facts relating to the Commission's decision have changed:

- MVPD penetration has soared.
- Cable MSO's no longer have ownership interests in the major home shopping networks.
- The digital transition has greatly exacerbated spectrum scarcity and underscored the highly valuable nature of the spectrum reserved exclusively, and without competition, for terrestrial broadcast use by incumbent broadcast licensees, and broadcasters may now use TV spectrum for non-broadcast uses.
- The 1996 Telecommunications Act dramatically modified the Commission's broadcast renewal process.
- The advent of the internet has dramatically expanded the options for stay-at-home consumers. These changed circumstances change each of the three factors enumerated in Section 4(g)(2) of the 1992 Cable Act.
- The Commission previously ruled that over the air home shopping viewership was significant; it is now much lower.
- The Commission had found that the broadcast licensing process in use as of 1993 adequately reflected the competing demands for spectrum, but the process has now changed. In particular, the comparative renewal process, upon which the Commission placed major reliance, has been repealed. Moreover, the Communications Act now allows non-broadcast use of TV stations' spectrum. This, plus the fact that vacant channels are now auctioned, establish precise measures of competing demands for spectrum and show that the demand is high.
- The Commission was concerned about competition from cable-owned home shopping services, but there are now no such services.

One other important changed circumstance is the importance of over-the-air home shopping for the home bound. Now that MVPD passes nearly all TV homes, nearly 90% of TV homes subscribe to MVPD services, and the internet offers an important alternative, this factor has been negated.

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COMMENTS OF CAMPAIGN LEGAL CENTER, *ET AL.*

Campaign Legal Center, Benton Foundation, New America Foundation, Common Cause and Office of Communication, Inc., United Church of Christ (“CLC, *et al.*”), by their counsel, Media Access Project, respectfully submit these comments in response to the Commission’s request to refresh the record in this proceeding.

As set forth in more detail below, CLC, *et al.* believe that the Commission must vacate its July, 1993 decision, *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 (Home Shopping Station Issues)*, 8 FCCRcd 5321 (1993) (“1993 Order”) and undertake a *de novo* analysis based on the substantially different factual and legal circumstances which currently apply to the questions before the Commission.

CLC, *et al.* urge the Commission to define the statutory term “predominantly utilized” in Section 4(g)(2) of the 1992 Cable Act as meaning more than half of the broadcast day.

CLC, *et al.* ask that the Commission then rule that “broadcast television stations predominantly utilized for the transmission of sales presentations or program length commercials”¹ do not operate in the public interest.

¹CLC, *et al.* will use the term “home shopping” to refer to “broadcast television stations predominantly utilized for the transmission of sales presentations or program length commercials.”

CLC, *et al.* further urge the Commission to adopt suitable reporting requirements and a processing guideline for TV license renewal applications, under which stations devoting one-third or more of their broadcast hours to sales presentations will be required to make an affirmative demonstration that their overall programming provides service in the public interest.

I. INTRODUCTION.

The factual predicates of the Commission's initial determinations in this docket are no longer tenable. Because television is on the eve of the transition to digital transmission, it is not only appropriate, but necessary, for the Commission to address home shopping formats and to rule that they are not operating in the public interest.

The use of scarce and valuable television spectrum for home shopping is antithetical to the public interest standard under which the Commission determines whether to award broadcast licenses. Broadcasters are expected to educate and inform the public in exchange for their exclusive right to use publicly owned spectrum. Stations which are predominantly devoted to home shopping programming cannot satisfy this obligation.

From a public interest perspective, there is a hierarchy of broadcast programming. Material which assists in the creation of a well-informed electorate are of the greatest importance, for "speech concerning public affairs is more than self-expression; it is the essence of self-government."

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964):

Indeed, "it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"" *United States v. Midwest Video Corp.*, 406 U.S. [649], at 668 n.27 [1972] (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. [1] at 20 [1943]; see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-64 (1994). Because Section 307(b) of the Communications Act places special emphasis on localism, programming pertaining to the needs of the community of license, are especially valued.

In 1960, the Commission adopted its definitive, and still operative, exegesis on what constitutes broadcasting in the public interest, enumerating 14 “major elements necessary to meet the public interest, needs and desires of the community....” *1960 En Banc Programming Statement*, 44 FCC 2301, 2314 (1960).² Programming devoted to pure commercial speech, *i.e.*, sales presentations,³ offers less to the public than any program format containing entertainment, sports or any other category of programming recognized under the *1960 En Banc Programming Statement*. Indeed, from the very inception of broadcast regulation, the public interest standard has been regarded as requiring that licensees be precluded from excessive commercialization, and giving the government the power to so regulate. *See, e.g., 1960 En Banc Programming Statement*, 44 FCC at 2313 (“[T]he licensee has the additional responsibility...to avoid abuses with respect to the total amount of time devoted to advertising continuity....”). *See also Great Lakes Broadcasting Company*, 3 FRC Ann. Rep. 32, 35 (1929), *aff’d sub nom. Great Lakes Broadcasting Company v. FRC*, 37 F.2d 993 (D.C. Cir. 1930) (“the amount and character of advertising must be rigidly confined within the

²“The major elements usually necessary to meet the public interest, needs and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.” *Id.*

³*See Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (speech is deemed commercial if it “proposes a commercial transaction”).

limits consistent with the public service expectations of a station.”).

For most of the Commission’s history, it regulated excessive commercialization on a case by case basis. *Radio Deregulation*, 84 FCC2d 968, 1091-92 (1981). As the Commission noted in its NOPR in this docket,

Between 1969 and 1984, Commission policy precluded or discouraged home shopping station formats based on a perception that such formats ‘subordinate[d] programming in the interest of the public to programming in the interest of its salability.’

Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 (Home Shopping Station Issues), 8 FCCRcd 660 (1993)(citing *Topper Corporation*, 21 FCC2d 148 (1969)). See also *Notice Concerning Applicability of Commission Policies on Program-Length Commercials*, 44 FCC2d 985 (1974), *Rush Broadcasting Corp.*, 42 FCC2d 483 (1973). While the Commission eliminated these guidelines in 1984, it did not then, and has not since, relinquished its authority to insure that public airwaves are not misused for excessive commercialization. *TV Deregulation*, 98 FCC2d 1076, 1104 (1984); *Radio Deregulation, supra*, 84 FCC2d at 1006. Even as it expressed confidence that marketplace forces would prove adequate to the task, the Commission promised that

[i]f prolonged and blatant excesses occur in defiance of the best interest of the public, then again, we can revisit the area and take appropriate action in another rulemaking.

Radio Deregulation, 84 FCC2d at 1007-08. See also *UCC v. FCC*, 707 F.2d 1414, 1438 (D.C. Cir. 1983) (“The Commission may well find that market forces alone will not sufficiently limit over-commercialization. In that event, we trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding.”).

In the years which followed these promises, the Commission spurned numerous warnings

that marketplace forces would not always restrict excessive commercialization. It refused to address complaints of excessive commercialization by home shopping stations. *See, e.g., Family Media, Inc.*, 2 FCCRcd 2540 (1987), and ultimately held it would not even consider the nature of applicants' programming in processing applications. *Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments*, 3 FCCRcd 5467 (1988).

In Section 4(g)(2), Congress called upon the Commission to revisit commercialization in home shopping stations. The legislative history demonstrates that the authors of Section 4(g)(2) expected the Commission to undertake this review without regard to prior deregulatory decisions. In particular, CLC, *et al.* note the colloquy between Rep. Eckhard and Commerce Committee Chairman Dingell, who also served as Chairman of the Conference Committee, which was intended to be "considered a dispositive interpretation of the home shopping station provisions." 138 Cong. Rec. E2908 (daily ed. October 2, 1991). In it, Rep. Eckhart obtained Chairman Dingell's confirmation that Section 4(g)(2)

requires the Commission to conduct a *de novo* review of the overall regulatory treatment of [home shopping stations], notwithstanding prior proceedings the FCC has conducted which may have permitted or had the effect of encouraging such stations' practices.

Id., *see also*, H. Rep. 102-628 at 171-174 (additional remarks of Reps. Ritter, Tauzin, Slattery, Kostmayer, Oxley and Fields). He also received assurances, *inter alia*, that it was intended that the Commission

in determining whether these program formats are consistent with the public interest, [the Commission should consider] whether it should take steps to prohibit, limit, or discourage such activities, and whether prior agency decisions should be revised in

light of this new statutory mandate.

Id.

It is clear that the Commission's predictions have been disproven, and that marketplace forces have not constrained excessive commercialization. In light of this fact, the need to promote programming which advances the public interest and to fulfill the mandate to restrain excessive commercialism, the Commission should rule that home shopping stations are operating contrary to the public interest.

II. THE 1993 DECISION IN THIS DOCKET IS FATALLY FLAWED.

It is regrettable that the Commission has failed to adhere to the clear Congressional desire to obtain a prompt and final resolution of the question of how to treat over the air stations utilizing a home shopping format. Section 4(g)(2) of the 1992 Cable Act directed the Commission to act within 270 days. The Commission technically met that deadline by issuing a decision adopted prior to the 270th day (but released after the 270th day). However, it is fair to say that by failing to bring the proceeding to finality over the course of thirteen years, the Commission has not met Congressional expectations.

Under the unique and unfortunate circumstances present here, the Commission should grant the long-pending *Petition for Reconsideration* timely filed by the Center for Study of Commercialism and re-examine its prior decision in light of current conditions. CSC has persuasively demonstrated that the Commission's initial decision was based on a record tainted by what seem to be hundreds of ex parte communications.⁴ It is undisputed that these communications, many of

⁴Chairman Quello referred to, and said that he relied upon, some 125 letters, none of which appear in the record of Docket 93-8. *1993 Order*, 8 FCCRcd at 5337-38 (Statement of Chairman Quello. Several appear to be dated during the seven day "sunshine period" which predated

which appear to have been submitted during the “sunshine” period when such communications are absolutely prohibited, were not properly placed in the record. Moreover, as the Commission has acknowledged by reopening the docket for new comments to update the factual record, there have been very substantial changes since the Commission took its initial action in this matter.

III. MATERIAL FACTS HAVE CHANGED.

In the thirteen years that this docket has lain fallow, there have been material changes in six major factual elements which affect the Commission’s analysis of the issues presented.

First, MVPD penetration has soared. DBS service did not yet exist in July, 1993, and cable penetration was about 60 per cent. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 9 FCCRcd 7442, 7566 (1994). According to the Commission’s most recent annual report, as of June 2005, approximately 86 per cent of the nation’s TV homes were served by MVPD’s. *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 21 FCCRcd 2503, 2506 (2006). Penetration is surely higher today.

Second, as of 1993 there was one dominant cable-delivered home shopping network and one major home shopping network which relied on over-the-air broadcast television for much of its distribution. Cable MSO’s had significant voting ownership interests in both of these networks, thereby posing a theoretical barrier to competitive entry. As of today, there are two major networks, two significant medium-sized networks, and several smaller networks, none of which have any cable

Commission action at a public meeting on July 2, 1993. Commissioner Duggan referred to “a stack of perhaps 1,000 pages of correspondence...delivered to my office.” *Id.*, 8 FCCRcd at 5339 (Statement of Commissioner Duggan). None of these are in the record, as determined by the Commission’s history cards, and none are listed in the Commission’s ECFS system.

MSO ownership.

Third, the nation is on the verge of the long-awaited digital television transition, a circumstance which will require the Commission to revisit and redefine public interest obligations for all terrestrial television licensees.

Fourth, the digital transition has greatly exacerbated spectrum scarcity and underscored the highly valuable nature of the spectrum reserved exclusively, and without competition, for terrestrial broadcast use by incumbent broadcast licensees. Among other things, the 1996 Telecommunications Act authorized non-broadcast use of spectrum licensed to TV broadcasting, subject to payment of a spectrum fee. *See* 47 U.S.C. §336(e).

Fifth, the 1996 Telecommunications Act dramatically modified the Commission's broadcast renewal process by lengthening the term of licenses from five to eight years, *see* 47 U.S.C. §307(c)(1), abolishing comparative hearings, *see* 47 U.S.C. §309(k), and making renewal much easier to obtain. *Id.*

Finally, the advent of the internet has dramatically expanded the options for stay-at-home consumers. Retail sales on the internet dwarf those of home shopping stations, and offer an alternative for many of the customers who might previously have relied upon home shopping outlets.

IV. EACH OF THE THREE STATUTORY FACTORS IN SECTION 4(g)(2) HAVE BEEN SIGNIFICANTLY ALTERED BY CHANGED CIRCUMSTANCES.

Section 4(g)(2) directs the Commission to decide “notwithstanding prior proceedings” whether home shopping stations operate in the public interest. Congress directed the Commission to take at least three factors⁵ into account:

⁵Although the Commission solicited comment on other factors, *Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 (Home Shopping*

- As to viewership, the Commission concluded that full-time “home shopping stations have significant viewership, and that this supported affording must carry rights to such stations.”⁶ *1993 Order*, 8 FCCRcd at 5322.
- With respect to the competing demands for spectrum allocated to home shopping stations, the Commission determined that the licensing process in use at that time “adequately takes into account the competing demands ...for the television broadcast spectrum.” *1993 Order*, 8 FCCRcd at 5323. It specifically found that “the lack of competing applications against the renewal of home shopping stations...[was]...a compelling indication that the level of competing demands for the spectrum utilized by home shopping stations is minimal.” *Id.*
- Looking at the third factor, competition with non-broadcast home shopping services, the Commission concluded that it could make no findings as to whether broadcast home shopping stations are at a disadvantage vis a vis cable, *1993 Order*, 8 FCCRcd at 5324, but did conclude that “the existence and carriage of home shopping broadcast stations play a role in providing competition for non-broadcast services supplying similar programming.” *Id.*, at 5326.

Each of these three findings are rooted in factual circumstances which are substantially different today.

A. Viewership of Home Shopping Stations Has Dropped.

Since home shopping programming is not rated, it is fruitless, as well as of dubious value, to attempt to measure the number of individual viewers of over-the-air services. A much more

Station Issues), 8 FCCRcd at 661, the Commission’s July, 1993 decision does not expressly consider whether the three enumerated factors are the exclusive bases on which it may rely. However, the Commission did consider other factors, and, given the expansive nature of the public interest standard to which Section 4(g)(2) refers, the statute clearly gives the Commission latitude to take other factors into account.

⁶Implicit in the reference to must carry is an unstated suggestion that viewership demonstrated operation in the public interest. This is neither intuitive nor necessarily logical; for example, a station exclusively carrying indecent programming between the hours of 10pm and 6am might achieve high viewership, but the Commission might well question whether it was operating in the public interest. The Commission should revisit this determination as part of its reconsideration.

useful measure of viewership is the number of home shopping stations. By that standard, viewership of stations “predominantly utilized for...sales presentations” is substantially lower than in 1993. The number of over-the-air stations devoting full-time to home shopping is now a fraction of what was the case in 1993.⁷ Because the Commission did not define the term “predominantly utilized for...sales presentations...,” it is not possible to draw an exact comparison as to stations devoting half or more of their broadcast time to home shopping, but it appears that the number of such stations is also substantially smaller than before.⁸ Moreover, the President of ION Networks, which operates a significant proportion of these stations, has indicated that ION intends to reduce or eliminate its home shopping programming.⁹

CLC, *et al.* respectfully suggest that this factor - viewership of over-the-air home shopping stations - should in any event be afforded far less weight in the Commission’s re-examination than it may have received in 1993. To the extent the over-the-air platform was regarded as important or

⁷As of 1993, the Home Shopping Network was carried on approximately 100 over the air stations, almost all of them on a full-time basis. A search conducted on backchannelmedia.com, indicates that there are now approximately 11 TV stations broadcasting home shopping on a full time, or nearly full-time, basis. There are approximately 76 additional stations broadcasting home shopping for at least half of their broadcast day.

⁸It is quite possible that in absolute terms the cumulative number of viewers of some amount of over-the-air sales presentations has increased. This because many more TV stations carry “infomercials” during small portions of their broadcast day, often just an hour or two. If this is the case, however, it is irrelevant to the task before the Commission.

⁹“In recent years, before my arrival, the company had discontinued production and had repurposed a lot of the dayparts to paid programming. I'd like to see us reverse that over time. We can't do it immediately, but my hope is to really use the platform for entertainment and informational programming where we get an audience base that I think will be able to allow us to achieve higher revenues than we do now with the infomercials. But that can't happen overnight. I think the first phase of this is to revitalize 6 to 11.” “Q&A : ION Chief Expanding Definition of ‘Wholesome’,” *Electronic Media*, November 27, 2006, p. 32. *See also*, “ION’s Ready for Prime Ad Time,” *Cable World*, June 4, 2007, <http://cable360.net/cableworld/programming/networks/23775.html>

even essential in 1993, this is no longer the case in light of the nearly uniform availability of home shopping *via* MVPD and the evolution of internet commerce as an option for the home-bound.

B. There Are Now Important Competing Demands for Broadcast Spectrum.

In concluding that “the existing renewal system, as well as the initial licensing process adequately takes into account the competing demands of television broadcasters for the television broadcast spectrum...,” *1993 Order*, 8 FCCRcd at 5323, the Commission ignored evidence of important alternative demands for spectrum. However correct or incorrect this determination may have been in 1993, it is completely undermined by subsequent legislative developments.

As noted above, the TV license renewal process has been substantially revised since 1993. License terms have been extended, and the criteria for grant of renewal have been significantly relaxed. Most importantly, comparative renewal challenges, the factor which the Commission found to be a “compelling indication...that the level of competing demands for the spectrum...is minimal...,” have been abolished. *Id.*

Based on these changes alone, the Commission must re-examine this question. *CLC, et al.* respectfully submit that the level of competing demands for the spectrum held by stations predominantly utilized for home shopping is far greater than it was in 1993. There is very little opportunity for new entrants into television, a fact demonstrated by the very substantial increase in the sales price of terrestrial broadcast stations since 1993. Of particular significance is the absence of any opportunity to file competing applications. This greatly reduces opportunity for obtaining licenses and increases demand for the spectrum.

Moreover, there are other new circumstances which affect this determination as well. In particular, the fact that broadcasters are now free to use digital TV spectrum for non-broadcast uses

requires the Commission to revisit its prior determination that it would not take into account other possible non-broadcast uses of the TV spectrum in making its Section 4(g)(2) findings. Given changes in technology, this factor clearly creates a new and competing market for alternate uses of the same broadcast spectrum being used for home shopping, and will likely create greatly increased demand for this spectrum.

Further, even under the Commission's narrow definition of "competing demands" for spectrum allocated to stations predominantly engaged in home shopping, the Commission today has far better indicators of the value of spectrum than that employed by the *1993 Order*. There are now two significant measures of demand: auctions for available full power television stations and the value of the spectrum for unlicensed use following conclusion of the Commission's "white spaces" proceeding. See *Unlicensed Operation in the TV Broadcast Bands*, 21 FCCRcd 12266 (2006). Both these measures indicate that, contrary to the Commission's analysis using license challenges in 1993, there is robust "competing demand" for the spectrum allocated to stations predominantly engaged in home shopping.

The Commission has held several auctions to allocate available broadcast television stations. The most recent auction of full power television station licenses, Auction 64, attracted 25 qualified bidders and over \$23 million in net bids. See *Public Notice, Auction of Full Power Television Permits Closes*, 21 FCCRcd 3010 (2007); *Public Notice, Auction of Full Power Television Construction Permits, 25 Bidders Qualified To Participate in Auction No. 64*, 21 FCCRcd 2132 (2006). In Auction 80, a single UHF station in Blanco, TX attracted 11 bidders and fetched nearly \$19 million dollars. See *Public Notice, Blanco Texas Broadcast Auction 80 Closes*, 15 FCCRcd 12793 (2000); *Public Notice, Auction of New Television Station Construction Permit at Blanco, TX*, 15 FCCRcd

11670 (2000) (11 qualified bidders). *See also Public Notice, New Analog Stations Auction Closes, Winning Bidders Announced*, 17 FCCRcd 3091 (2002) (11 qualified bidders, \$6 million raised, on auction of four analog full-power TV licenses). These figures demonstrate the strength of the “competing demand” for the spectrum used by home shopping stations, even if one only considers the use of the spectrum for similar broadcasting services.

C. Competition With Non-Broadcast Television Home Shopping Services Is No Longer A Significant Problem.

The Commission’s 1993 analysis of the third statutory factor - competition with non-broadcast home shopping services - is equally obsolete and must be revisited. As noted above, there are now four nationally distributed home shopping TV networks, none of which have any cable MSO ownership. Moreover, there is no home shopping network which relies on terrestrial broadcasting as its primary platform. Thus, there is no foundation for a determination that terrestrial home shopping broadcasts play any meaningful role in providing needed competition for non-broadcast services.

V. THE DIMINISHING NEED FOR SERVICES PROVIDED BY HOME SHOPPING STATIONS.

One additional non-statutory factor in the Commission’s 1993 analysis is especially ripe for re-examination. According to his separate statement, Commissioner Quello placed particular importance on claims that “home shopping stations provide a needed or valuable service for people who either lack the time or the ability to obtain goods outside the home or who otherwise benefit from the type of marketing services involved. *1993 Order*, 8 FCCRcd at 5327 (Statement of Chairman Quello). The Commission stated that “[n]o commentator disputes that home shopping stations meet such specialized needs...,” *id.*, and concluded that “home shopping stations provide an

important service” in this regard. *Id.*

While it may be that home shopping stations can meet such “specialized needs,” the changed circumstances over the last thirteen years raise significant doubt as to the weight which should be attached to this factor in the Commission’s public interest calculus.

First, very few people are now in need of over-the-air home shopping service. Virtually every MVPD provider offers home shopping networks. As noted above, MVPD penetration is now nearly 90%, and DBS or cable is available to almost every TV household.¹⁰ Moreover, only a relatively small proportion of any group of viewers utilize home shopping services. As a consequence, the number of people who can afford to subscribe, but lack access, to an MVPD service is negligible.¹¹

Second, there is now an important alternative to home shopping services, namely the Internet. E-commerce retail revenues now dwarf television home shopping sales.¹² While online sales and television home shopping are not exact substitutes, the availability of Internet options clearly

¹⁰See *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 21 FCCRcd at 2512 (cable systems pass approximately 99 percent of homes with a television).

¹¹While CLC, *et al.* are not unconcerned about those who cannot afford to subscribe to an MVPD service, the simple fact is that such people are unlikely to be able to purchase significant amounts of goods *via* home shopping, and perhaps should not be using home shopping services. See, e.g., Jane Glen Haas, *Homebound Are Easy Prey for TV Shopping Networks*, *The Record*, May 13, 2007, at F.04 (consumer taking out a reverse mortgage to pay for her purchases, which went largely unused), available at <http://www.backchannelmedia.com/newsletter/articles/13897>.

¹²According to the *2007 Statistical Abstract of the United States*, Table 1024, online retail revenue was about \$80 billion in 2005 and is projected at about \$95 billion for 2006. The sum of the four top home shopping services’ revenues for both cable **and** over the air, as well as for their online affiliates, was less about \$7.3 billion in 2005. “Attention Shoppers!”, *Broadcasting and Cable*, November 28, 2005, p. 12. (online and on-air revenues for QVC was \$4.41 million, for HSN was 1.906 million, for ShopNBC was \$615 million, and Shop At Home was \$293 million).

diminishes the need to devote scarce broadcast spectrum for pure commercial speech.

Thus, even if the Commission were right to have placed great weight on over the air home shopping's service to the home bound in 1993, this factor is inconsequential today.

VI. THE COMMISSION SHOULD RULE THAT STATIONS PREDOMINANTLY DEVOTED TO SALES PRESENTATIONS ARE NOT OPERATING IN THE PUBLIC INTEREST.

The statutory factors strongly point towards a conclusion that the Commission should declare that stations predominantly devoted to sales presentations are not operating in the public interest. Viewership is down; now that the Communications Act now contemplates that broadcast spectrum can be used for non-broadcast purposes and auctions are common, it is clear that there is significant and increasing demand for alternate uses of the broadcast spectrum; and there is no indication that over the air home shopping services are needed to remediate putative competition from vertically integrated cable systems' own home shopping services.

CLC, *et al.* recommend that the Commission adopt the suggestion in its NOPR that the statutory term "predominantly utilized" in Section 4(g)(2) be defined as meaning more than half of the broadcast day. Without resorting to a battle of dictionaries, this definition comports with the common understanding of the word as meaning "having superior strength," *Webster's Third International Dictionary* (2007), and provides sufficient latitude for marginal stations to provide at least some service in the public interest.

CLC, *et al.* then ask that having so defined the term, the Commission declare that "broadcast television stations predominantly utilized for the transmission of sales presentations or program length commercials" do not operate in the public interest. Under this finding, pursuant to Section 4(g)(2), stations utilizing such a format would be given a reasonable time to adjust their

programming. The Commission should further find that, in seeking renewal, stations carrying home shopping for between one-third and one-half of their broadcast day must make affirmative showing that their overall programming is in the public interest.

To implement and enforce this determination, CLC, *et al.* also urge the Commission to adopt suitable reporting requirements and a processing guideline for TV license renewal applications, under which stations devoting one-third or more of their broadcast hours to sales presentations will be required to make an affirmative demonstration that their overall programming provides service in the public interest. As is shown by the difficulty of obtaining reliable and comparable data for this proceeding, one of the greatest deficiencies in the Commission's regulatory scheme is the absence of data necessary for effective policymaking. *See* Napoli and Karaganis, *Toward a Federal Data Agenda for Communications Policymaking*, SSRC (2007). Regular reporting of the amount and time of day of home shopping programming will assist in the enforcement and meaningful analysis of the Commission's obligations under the public interest standard and Section 4(g)(2).

CONCLUSION

WHEREFORE, CLC, *et al.* ask that the Commission grant the relief requested and grant all such other relief as may be just and proper.

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