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REMARKS OF

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

before

National Association of Broadcasters

50th Annual Convention
Conrad Hilton

Chicago, Illinois

April 10, 1972

I've been called a lot of names since becoming the Director of OTP. The one that has intrigued me most is "Czar of the Airwaves." I've thought about this and have concluded that having a government broadcasting czar would be in the public interest. If you will indulge me for a bit, I will try to explain why.

The knowledgeable people in this country--our elite citizens--realize the basic flaw in our broadcast system: Broadcasting is just too important to be left in private hands. Instead, the Government should control what the people see and hear--for their own good, of course. There are a lot of ways we could do this. We could nationalize the broadcast industry and run it ourselves. But it would be easier to leave broadcasters in place and simply make them agents of the government. Then broadcasters, as the government, would be subject to First Amendment restrictions but would have no First Amendment rights.

In short, the rights of listeners and viewers would be paramount. Of course, no individual would have the right to express his views on the air, or see any particular program. You see, it is the people as a whole who have free speech rights on the airwaves. Government alone can be trusted to control programming, in order to make broadcasting function consistently with the First Amendment.

Once the rights of the viewer and listener are firmly established, no matter what the problem may be, the Government can readily solve it. What about the constant pressure for higher quality programs? Government could simply require greater percentages of broadcast time for drama, ballet, opera, and blue grass music. Is there concern about violence on the home screen? Government could rule all violent

programs off the airwaves. If news and football must be kept, however, we could require warnings that they may be injurious to the viewer's mental health. Is there a groundswell of opinion against ads in children's programs? Government could forbid broadcast advertising for any product that may appeal to children. Do many believe that the consumer's anguish could be alleviated by counter advertising? A responsive government could handle this by making advertisers buy spots for split-screen presentation--one half for the ad and one half for the counter. Is there a clamor for personal access to the broadcast media? Government could respond to it by using the old soapbox technique, only Government decides who gets on the soapbox for what purpose. We'd rely on the stations' traffic departments to schedule appearances and to make sure that no one's right to be heard in prime time is infringed.

Of course, there will be some drawbacks to this type of broadcast system. The programming may turn out to look, in fact, like a typical license renewal application. That is, it may consist of programs that the government thinks are in the public interest, but do not attract audience attention or advertiser support. If this happens, we may need to subsidize broadcast stations to keep up the flow of programs that are good for the public. Talk about real public broadcasting!

But discounting the drawbacks, there could be a lot of advantages for broadcasters in the Czardom. For example, broadcasters would be relieved of the time-consuming responsibility of exercising judgment

and discretion in serving the public interest, there would be no need to limit multiple ownership and cross-ownership, no need to assure that the best qualified person has the license, and no need for license renewals. In the words of a famous broadcast personality: "Try it, you'll like it."

That's enough fantasy. Let's get back to reality. I'd like to talk about two current matters--a pending Supreme Court case and a regulatory proposal. The court case involves a group called Business Executives Move for Vietnam Peace (BEM) and its attempt to purchase anti-war spot announcements. The Supreme Court will be reviewing a decision of the D.C. Court of Appeals, which states that broadcast licensees are agents of the government --in effect, are the government--for First Amendment purposes. The decision in this case may well determine whether the government-controlled broadcast system I described is only my fantasy or your future reality.

Most public discussion of the BEM case has centered on the result which required the sale of some broadcast time for editorial-type ads. But, as with most Supreme Court cases, the implications will be much broader. Without getting too deeply involved in the legalities, let me explain. We would not expect to see a BEM-type result if a newspaper were involved in the case rather than a broadcast station. A privately-owned newspaper or magazine can't violate anyone's First Amendment rights by refusing to print a letter to the editor or run an editorial ad. That's because the courts have held that the private

sector enjoys the benefits of the First Amendment and only government is subject to the restrictions.

Until BEM, it was thought that the different treatment accorded the print media and the broadcast media was constitutionally justified because of the scarcity of spectrum space. That was a rationale that left broadcasters separate from the government and entitled to most of the benefits of First Amendment protection. But the Appeals Court in BEM moved far beyond the spectrum scarcity approach to create a new rationale for singling out the broadcast media for unique treatment under the Constitution. An outline of the BEM reasoning goes like this: (1) Broadcasting is now the most important public forum; (2) the content of such an important medium must be regulated for the public to derive full benefit from it; (3) the First Amendment barrier to content regulation of a communications medium does not shield government activities; and (4) therefore, content can be regulated if broadcasting is found to be the government for First Amendment purposes.

However, the logic the court relied on to make this key finding is a tautology--that is, true simply because its truth is asserted. The BEM tautology is that, in the past, something unique about broadcasting justified extensive government involvement, now the extent of government involvement is the thing that makes broadcasting unique. This kind of logic is specious and cannot support unique treatment for broadcasting under the Constitution.

When the faulty logic of the BEM case is exposed, all that remains is the effort to control content in broadcasting because it is an important and effective communications medium, and this effort, the Constitution forbids. The court made this effort simply to create a personal right of access mechanism for the broadcast media. But, in using a government instrumentality theory to accomplish this, the end result is an abridgeable right of access--abridgeable at the discretion of the government. There may indeed be legitimate reasons for creating a right of access to broadcasting. If so, it should be a right that does not depend on government discretion for its implementation. Furthermore, it should be created under clear legislative guidelines and not under a conceptual approach that distorts the First Amendment protections of broadcasting simply as a convenience.

This same type of approach also underlies the recent counter advertising proposal of the Federal Trade Commission (FTC). The FTC proposed that time be given to discuss advertising claims that are disputed within the scientific community, or to discuss the negative aspects of advertised products. What this boils down to is that there would be government-controlled access to the broadcast media to state a personal opinion on almost any matter. Although this proposal was made in the FCC's Fairness Doctrine inquiry, it has little to do with that Doctrine Rather it would shape the Doctrine into a new tool to regulate advertising, and thereby expand it far beyond what was originally intended and is now appropriate.

The Fairness Doctrine has usually been justified as serving the need to inform the public on important issues in a balanced manner. But this is not the goal of counter advertising. That goal is to give the consumer more realistic information about the products he is being urged to buy. That's a fine objective. It's the objective of the FTC's regulation of deceptive and misleading advertising in all media. But it's not a goal that the Government should try to achieve through content regulation of the broadcast media. There are substantial practical problems involved in implementing counter advertising via that route that the FTC never considered. Free access could be required to respond to almost any broadcast ad. Any one of them could cut into broadcast time and set off a barrage of charges and counter-charges, resulting in a bewildering clutter of opinions. Equally important, the counter advertising proposal could not be sustained in the courts without faulty logic similar to the reasoning in the BEM case. How else could a broadcaster be forced to provide free access?

Once access were provided for the counter advertising purpose, neither practical problems nor the dangers of faulty logic are likely to prevent this government-controlled access right from being applied to programs as well as ads. It's not as farfetched as it may sound. How would the courts respond to claims that a weekly series on the FBI suppresses negative aspects about this agency; or that the doctors and lawyers appearing on the audience's favorite programs are not representative of those the average viewer meets; or that Sesame Street's Cookie Monster encourages poor eating habits and Big Bird is a male

chauvinist pig. It could get so bad that Archie Bunker could kickoff the broadcast week on Saturday nights and the rest of the week would be devoted to rebuttals. Some may think that the public wants endless debate on the merits of aspirin, household cleaners, the FBI and Marcus Welby, but I hardly think that an infinite variety of charges and counter charges is what the public wants or what advertisers will underwrite.

As with all discussions of broadcast regulation, and its theory and practice for fun and profit, we eventually get around to the public, and ask about the government's and the broadcaster's responsibility to the listeners and viewers. Some seem to believe that broadcasters and the public sit at opposite ends of a seesaw and as broadcasters lose their freedom, the public's freedom is increased. But this is a dangerous and grossly oversimplified view. It tempts those who hold it to back into a broadcast system in which the government decides what the audience sees and hears. However, it is one thing to back into this type of system and quite another thing to advocate its adoption purposefully. It is particularly distressing, in this regard, to see an FCC Commissioner acting as one of the most strident proponents of this type of system. Does Commissioner Johnson consciously realize where his advocacy will take us, or is he so dazzled by his own rhetoric that he fails to see the consequences? When he charges some broadcasters and some government officials with activities running the gamut of morality from child molesting to murder, is this merely the

latest escalation of rhetoric or is it a calculated device to enlist public support for the denial of constitutional rights to broadcasters? In any event, no one should be led blindly to a government-controlled broadcast system by proponents of an elitist philosophy that masquerades as populist, while presuming that government knows what's best for the people.

Of course there is room for improvement in many aspects of broadcasting. But in the areas that I have discussed today, the broadcaster and the public he serves are on the same side, and the broadcaster's loss of independence diminishes us all.

The problems I have discussed today are complex. I honestly do not have the complete solution to all of them. But I do not feel too badly about it, because I don't think anyone does. I do know that the status quo has slipped beyond our ability to bring it back and there are no simple changes to be made. Change must come, but it must be orderly and it must be planned responsibly. Perhaps it is too late for this. Maybe it is too late to preserve the private enterprise system of broadcasting in our country. This Administration hopes not. We hope that it's not too late to fight for freedom in broadcasting. For when we do so, we preserve the public's interest in a free press and in a medium of expression that is open to diversity and change.

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REMARKS OF

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

before the

California Community
Television Association

Anaheim, California

November 16, 1972

I am always glad to have the opportunity to return to California. It may be true what they say about Maine in regard to our national elections. But in many phases of our national life, we have to look to California to see the future trends.

I have read of the accomplishments of the cable industry here in California and have also kept in touch with some of your future plans. The development of the potential of cable communications is a challenging task, and I commend your efforts at meeting this challenge.

However, the development of the cable television industry cannot proceed much further until it is put on a solid structural foundation. Right now cable television is suffering from an identity problem. What type of business are you? Are you a public utility? Are you an adjunct to the broadcasting business? Are you merely in the business of laying copper and stringing wires? Are you in the pay television business? Are you multi-channel broadcasters? Is this one business or many separate businesses?

It is important that the cable industry's identity crisis be cured. The public wants to know what services the

cable industry will provide; the Government needs to know what kind of industry it is going to regulate; and the financial community wants to know in what kind of business it is going to invest.

In order to answer these questions, a number of thorny policy issues must be resolved. Both the Office of Telecommunications Policy (OTP) and the Cabinet committee on cable television have exhaustively studied these issues and have sought solutions which will result in a more up-to-date regulatory framework for both cable and over-the-air broadcasting.

These policy issues cannot be postponed. And it is important that resolution come in the form of legislation from Congress. If there was ever any doubt as to the necessity for Congressional legislation in this area, it was dispelled by Supreme Court Chief Justice Burger. The Chief Justice recognized the immediacy of the problem and the need for Congressional resolution when he stated in the Midwest Video case: "The almost explosive development of CATV suggests the need of a comprehensive reexamination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."

In enacting this legislation, Congress should bear in mind two important principles that have been distilled from past experience with legislation in the regulatory areas.

First, it is dangerous enough to give vague mandates to the regulatory agencies when drafting legislation dealing with fixed technologies. And when you have to deal with a rapidly expanding technology like cable, the problem becomes even more complicated.

The legislation, therefore, should not be cast in any permanent mold but rather should allow for the evolving status of cable. This could best be done by Congress defining specifically what the public interest is in this area and also the scope and limits of the FCC's jurisdiction. Thus the FCC would have clearly defined regulatory standards to follow. Moreover, the statute would be flexible enough to accomodate itself to the changing face of broadband communications technologies.

Second, the legislation should come in one comprehensive legislative package and not be done on a detail-by-detail, "as need arises" basis. If Congress were to adopt this piecemeal approach, the cable field would be replete with

a number of very specific bills dealing with particular problems at particular points of time. The result would be a complicated set of rules and regulations and the total absence of any comprehensive policy standards and goals to guide the FCC.

Along with the development of a legislative framework for cable itself, the copyright issue is of immediate importance. This problem stands squarely in the way of any long-range development of the cable industry and must be resolved in the near future. The Administration is firmly committed to a regulatory structure for cable and over-the-air broadcasting that is posited on free and open competition. But this competition must be fair; and until this copyright issue is resolved, the possibility--and the appearance--of unfair competition by cable operators remains. An equitable solution to this copyright problem must be found.

In legislation dealing with the cable medium in its own right, two of the most important issues are access, and the division of regulatory responsibilities.

The access issue must be resolved. Everyone agrees that no private entity should be allowed to control all the

cable channels in a given community. The problem is in developing a flexible means for preventing such potential concentrations of power.

There are three major policy options available to the Cabinet committee and OTP for dealing with cable monopoly problems. One option would be for cable companies to be regulated from the beginning as public utilities; the problems of monopoly abuse, thus need never arise. However, cable television is a dynamic, evolving business and to subject it at the outset to the whole panoply of public utility rules and regulations would very likely have the effect of inhibiting its growth and viability to the point of denying its usefulness.

A second option would be simply to leave the industry as it presently exists under FCC regulation. But this approach also raises problems. It may only postpone the inevitable transition to public utility regulation. Cable television systems are natural monopolies in specific geographic areas and as their penetrations into the markets increased under this policy so would their monopoly power. The Government would have to gradually tighten its regulatory control. And to protect the public from the monopoly

power it sanctioned, the Government would have to bind the cable system owner so tightly in Government red tape that he would be unable to use his monopoly power. The end result--public utility regulation--would be the same as the first policy option.

A third option would be for the Government to recognize the several different businesses involved in cable communications--program creation, origination, supply, and program transmission--and to separate those aspects that are tied to the technical or transmission monopoly from those, such as program supply, that are characterized by free and open competition. Only the former would be subject to the strict type of regulation in order to avoid monopoly power.

This last option places primary reliance on an effective structuring of the cable television industry and on our free market incentives. It is also more consistent with the private enterprise system and our traditional Government-business relationships.

The second issue is the division of regulatory responsibility between Federal, State, and local authorities over cable television. As you well know, the cable television

industry inevitably will be subject to Federal and local, and probably State, regulation. The potential of cable television is so great that effective regulations may be needed at all levels; but these regulations need not be overlapping and duplicative. The goal should be a balance among Federal, State, and local regulation--not a confusing balance of power but sensible, clearly delineated responsibilities and functions. And to avoid any possible conflicts, the functions granted at one level should be denied at the other levels.

The cable policy will also have to determine under what conditions the public will be allowed to buy and the industry to sell programming. This is not the old pay television siphoning problem.

It is clear that advertisers are not likely to be allocating much more than present amounts for television coverage. The search for new revenues, therefore, must go elsewhere and what could be a better source than the television viewer?

Why not allow a mixed system of funding program costs? Such a system--tapping advertisers and subscribers--

would provide the sort of incentive needed for expansion of consumer program choice. Since mass appeal program revenues are limited, television would have to turn to the more specialized viewing audience. And these specialized audiences would be willing to pay only if the programming presented something above and beyond the current mass appeal offerings. This type of programming--dependent as it would be on its attractiveness to a specialized audience--would thus represent a net addition to, rather than a replacement of, our mass appeal programming. Moreover, advertising revenues would still continue for these mass appeal programs. The mixed system would simply provide a whole new source of funding. And the benefits from this funding would be evident in an increased diversity in programming.

The important thing is for the public's interest to prevail in the area of pay cable television. The viewing public should have the opportunity to decide whether it wants to pay for the kind of specialized programming above and beyond current offerings that pay cable television can provide. The television consumer should be able to vote with his dollars on the issue of pay cable television.

The Administration's interest in cable television is the public's interest. And we believe that the public's interest can be best served by properly structuring the cable industry in the free enterprise mold. Cable television ought to be allowed to grow as a business proposition. With the proper checks and balances, the public is best served by businesses growing and developing as businesses.

I should stress, however, that cable television's impact stretches beyond its everyday business operations. Cable television is becoming an important new public medium as well as a big business. Thus although we support cable television, we cannot simply support everything that is good for the cable business in the short-run. We also have to focus necessarily on the long-run and on the checks and balances that should be established for you.

Cable television is on the verge of becoming a very important industry. It is no longer the "poor relation" in the family of communications industries. Rather it has the potential to become a full-fledged member of the family and even give birth to some new offspring of its own. If it wishes to become such an adult, it must accept the

long-term public interest responsibilities that come with such status.

The Administration wants the long-term resolution of these cable policies to result in a regulatory framework that is favorable to the growth and development of the cable industry. We hope you recognize this fact and work with us in developing these policies for the cable industry.

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Remarks of

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

at the

Arts/Media Conference
National Council on the Arts
National Endowment for the Arts

National Academy of Sciences
Washington, D.C.

December 1, 1972

When OTP got into operation in 1970, we immediately became involved with a number of specialized and often heavy communications issues--frequency spectrum management, the President's war powers in communications, common carrier regulations, international communications conferences, the economic regulation of broadcasting, and the rights and obligations of the First Amendment.

You can see why I was so pleased to receive a memo from the President not long ago asking all agency heads to develop programs for aiding the arts. It gave me an excuse to spend some time thinking about the arts. And it also gave me the chance to spend some time with Nancy Hanks and others of the Endowment. The result is that we are beginning to have conferences like this.

When we talk about communication technologies and the arts, we have to be careful. Most Government bureaucrats, lawyers, and engineers look at communication technologies as mediums for transmission--"mediums" meaning "channels" or "pipelines" of communications. But to perhaps a majority of this audience, a "medium" is the substance the artists work with--oils, acrylics, and clay. The new communications technologies have an important impact on mediums in <u>both</u> senses of the word--in the first sense and in the second sense.

The presentation here today shows the potential impact communications technologies can have on mediums in the artistic sense of the word--Medium Sense 1.

It is always hazardous to predict the future of art and of technology, and it is particularly hazardous to predict the combination. But if history is any guide, we are likely to see a development along the lines already followed by the film medium--a progression from accurately depicting reality--to transforming reality--to the creation of a new abstract reality of the artist's own making.

You are seeing some of this progression today in the form of video and audio synthesizers, strobe lights, stop action, animation, computer-generated art, and video paintings.

While it is exciting to think about communications and Medium Sense 1, Government policy is usually concerned with Medium Sense 2; and it is interesting that the new technical arts are compatible with the new electronic transmission mediums -- radio, TV broadcasting, cable TV, etc.

It is interesting that the compatibility between these new technologies exists; but what practical meaning does it have, especially when you consider that already well developed art forms don't find their way onto the television screen?

The problem is not the limitation of the stereo FM channel or the video broadcast signal. The problem is what we put into it. And the current priorities favor soap operas, reruns, situation comedies, and news as higher priority over the best of our arts and cultural programs.

Why don't we find room? Is no one interested in seeing it? Is no one interested in producing it? On the contrary, we are in a period of great growth and ferment in artistic and cultural interests not only in New York and San Francisco, but in Minneapolis, Dallas, Atlanta, and even Washington, D.C. But why is none of that evident when you're watching your television screen? Why are classical music stations going off the air at a time when classical record sales are expanding? Of the programs that receive critical acclaim, why are so many British rather than American? Do they have better television transmitters? Are they culturally and artistically more diverse than the United States?

Maybe it is the structure of broadcasting. British television is essentially noncommercial. They can produce a program schedule to satisfy the special interests and hopefully to raise the public taste. We, on the other hand, are the only country with a predominantly private enterprise broadcast system. Other than in broadcasting, our private

enterprise system has been able to support the arts and, indeed, a growth of the arts along with some intelligently directed Government assistance. Why aren't we able to do that in television? Is it because there is a conspiracy by the TV networks and advertisers against artists? Are there more skilled TV managers in England? Does England have more money to spend on television?

These aren't the problems. The problem is that we have placed our national television system into an economic and regulatory box that has little room for the arts. One side of the box is the limited number of television channels available. The second side is the commercial incentive to please most of the people most of the time. Third, is the vast concentration of economic power in the three television networks. The fourth side is public policy, the side that, depending on your point of view, holds or forces the other three together.

How does public policy affect the other three sides? The limited number of channels is the result of regulatory decisions as much as technology. The commercial incentive to appeal to a maximum aduience can be tempered with public subsidy such as we have done with public broadcasting and the Endowment. And public policy can sanction or diminish concentrations of economic power in private hands.

Where should public policy focus? Not with Medium Sense I. We all agree that public policy should not make judgments about good or bad programming any more than good or bad art. Rather it should focus on Medium Sense 2. The objective of public policy should be to get as much of the diversity and creativity that is in this country through the transmission medium and onto the home television screen.

Two ways come to mind for the Government to achieve this goal. The first is the "Government push." Government could foster economic monopoly in television in order to saddle the TV industry with even more programming responsibilities. The Government could push into the system programming that is of higher quality, more diverse, more artistic, and the like. We could then require the commercial broadcasting system to provide so many hours of classical music, literature discussions, video art, and the like. And set up a Government-funded network to do what is totally uneconomical, since even monopolies can be saddled with only so much public service responsibilities.

The problem with "Government push" is that it involves the Government in the medium in both senses of the word. The Government could not avoid determining which art or which artistic mediums are good art or good programming. In order to decide what to push through the system, the Government and the political process one way or another would become an arbiter of public taste.

The alternative to "Government push" might be called "Demand Pull." Under this policy, the Government would implement policies which would reduce the economic concentration in the system and would expand outlets. Viewer demand forces would "pull" whatever types of programming they wanted right through the transmission medium onto their TV screen.

This "Demand Pull" route would rely on an effective harnessing of the free enterprise system -- to apply in television the incentives which are so successful in other sectors of our economy. People can buy what they want in movies, records, books, magazines, etc. Perhaps a tremendously diverse market for the arts might be possible in television too.

The "Demand Pull" system would also achieve two further important goals. First it would minimize the need for Governmental decisionmaking as to what the people should see. There would be minimal interference with the "medium" in the first or artistic sense of the word. The people would decide what they wanted to see by voting for programs with their dollars in the diverse marketplace rather than voting in the ballot box.

Secondly, and more importantly for this conference today, this route would enlarge the base of economic support for the arts. Public subsidies, no doubt, will continue to be needed for the traditional arts as well as for

the arts intended for the television screen. But the emphasis of public subsidy would be properly placed on creative people, as Nancy Hanks has done so well, rather than on edifices.

Television will always reflect someone's concept of quality, reality, and art. The question is whose concept. It can be the voter, the Government and the television networks; or it can be the artist and his audience. We think the freer the flow there is between the artist and the audience the better. And I hope you will think carefully which philosophy is best for the arts in the long run.

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Remarks of

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

at the

National Academy of Arts and Sciences

Americana Hotel
New York, New York

January 11, 1973

A few weeks ago in Indianapolis, I delivered a speech which some people misinterpreted and, even worse, quite a few people misunderstood. The speech was about the responsibilities of broadcasting licensees and about the Administration's proposals to change the license renewal process. Most of that speech dealt with the first issue -- the licensee's responsibilities -- and today I want to focus on the second issue, and give you the facts about our license renewal bill.

Our system of broadcasting presents this country with a unique dilemma which goes back to the basic policy embodied in the Communications Act of 1934. Section 309(a) of that Act requires the Federal Communications Commission (FCC) to grant applications for broadcast licenses if "the public interest, convenience, and necessity will be served thereby." This necessarily means that the government will be involved, to some extent, in passing judgment on the heart of the broadcast service -- the broadcaster's programming. But then section 326 of that same Act specifically denies the FCC the "power of censorship" and the power to "interfere with the right of free speech" of the broadcaster.

The implementation of these two statutory goals requires a difficult balancing act. On the one hand, the broadcasting industry must be responsible to the public in its use of the public air waves -- and it is only through the legal processes of the Communications Act that the public has recourse to see that this responsibility is being exercised. On the other hand, the Government can't use the Act to be too active an intermediary between the public and the industry -- even with the best of intentions -- because the net effect would be to make Government agents out of broadcast licensees, rather than establish them as independent voices and sources of information in our marketplace of ideas.

The place in the federal licensing system where these competing statutory goals are most clearly evident is the license renewal process. The burden of balancing these interests is thrust squarely on the FCC's shoulders by the Communications Act, and the Act contemplates that they will

be maintained in a state of equilibrium. But recently instability and uncertainty have developed in the broadcast licensing process. And when something as sensitive as licensing a medium of expression is involved, this instability and uncertainty gives rise to the threat of arbitrary and subjective determinations that promote the Government's own view of what programming is good for the public to see and hear. In this unstable environment, the broadcaster will seek the shelter of whatever safe harbor is available. To ensure that his license is renewed, he will operate his station in a manner that pleases the government, and not one that best serves his local audiences.

To evaluate our proposal, it's important to know what our bill does do, and what it doesn't do. That is what has been most misunderstood and what I want to clear up for you today.

What our bill does not do is change the broadcaster's present obligations to be responsive to his community and to be even-handed in covering important public issues. These long-standing obligations of the broadcaster constitute the two principal criteria for license renewal in our bill: (1) the broadcaster must be substantially attuned to community needs and interests, and respond to those needs and interests in this programming -- this is known as the ascertainment obligation; and (2) the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues -- this is known as the fairness obligation. These criterion represent a distillation of what the public interest standard means in the context of license renewals, as stated by the Congress and the FCC.

These obligations bear repetition and emphasis, and serve as ideal criteria for license renewal because they require the broadcaster to turn toward his local audiences. He must serve their needs and see that they are adequately informed on public issues. If the broadcaster can render satisfactory service to his communities, based on these two criteria, then his license should be renewed.

Now for what our bill does do. It improves the license renewal process by making four changes in the present practices: (1) it extends the term of broadcast licenses from three to five years; (2) it eliminates the requirement for a comparative hearing whenever a competing application is filed for the same broadcast service; (3) it prohibits any restructuring of the broadcasting industry; and (4) it prohibits the FCC from considering its own predetermined program criteria in applying the ascertainment and fairness standards of the bill.

In the interests of clarity, if not scintillating style, I'd like to bore you with the details of these provisions of our renewal bill.

The first change would extend broadcast license terms from three to five years. When the Communications Act was passed in 1934, the short three year license term was a reasonable precaution in dealing with a new and untried industry. A five year period, however, seems to be a more reasonable period at this stage in broadcasting history. It would inject more stability into the license renewal process and allow the broadcaster more time to determine the needs and interests of his local community and plan long-range programs of community service.

A longer renewal period would also go a long way toward lightening the serious burden that processing applications for renewal places on the FCC's resources and reducing the paperwork backlogs that cause delays in re-licensing stations. For example, as of this week, the trade press reports that 143 television and radio licenses are in limbo awaiting renewal.

Moreover, an extension to five years of the broadcaster's license does not mean he will be put out of the reach of the FCC or that he may ignore his public interest responsibilities for five years at a time. The bill would not affect the powers of the FCC to deal with complaints raised by the public. The licensee would continue to be answerable to his community at any time during the five year period.

The second change the bill would make in the renewal process would be to eliminate the requirement for a comparative hearing whenever a competing application is filed for the same broadcast service. Presently, when a broadcaster's license comes up for renewal and it is challenged by a competing application, the FCC must set a comparative hearing in which the competing applicant and the performance of the present applicant are evaluated together.

The FCC under current procedures, is forbidden from exercising its independent judgment as to whether a comparative hearing is even necessary. Without initially assessing the past performance of the incumbent licensee, the FCC must throw him into a comparative hearing, which usually involves substantial expenditures of time, money and manpower. The comparative hearing is not unlike the medieval trials by battle, and the winner of this trial is not necessarily the person who will best serve the interests of the local community but rather the one who can afford to stay in the heat of battle the longest -- the one with the most time, the deepest pocket, and the best lawyer. Certainly, in this day and age, we can devise more rational and equitable procedures especially when, in all cases, a substantial public interest is at stake.

Our license renewal bill would revise these procedures so that a hearing would be required only if the competing applicant has raised a substantial question regarding the present licensee's performance under the criteria set out in the bill. If the FCC determines there is no question, then the license would be renewed. Only if the Commission is unable to conclude that the licensee's performance warrants renewal would a hearing be required.

The third change in the bill would preclude the FCC from restructuring the broadcasting industry through license renewal hearings. Presently, the Commission can implement policy relating to industry structure -- such as a policy restricting the types of companies that can own TV stations -- through the criteria it uses to decide renewal hearings. This means the policy could be applied in a highly subjective and inconsistent manner.

Restructuring of the broadcasting industry in this manner should not be allowed. Rather, if industry-wide policies are to be changed, they should be changed through the general rulemaking procedures of the FCC, with full opportunities provided to the entire broadcast industry and all members of the public to participate in the proceeding.

The fourth and last change our license renewal bill would make in the renewal process would be to forbid the FCC use of predetermined performance criteria for the evaluation of renewal applications.

The Communications Act of 1934 does not anywhere define what constitutes the "public interest, convenience and necessity." And so, the responsibility for doing so has fallen on the FCC and the courts. As a result the "public interest" has come to mean no more than what the FCC and the courts want it to mean.

Presently, an important factor in determining the licensee's public interest performance is the extent to which he has programmed in 14 specific program categories predetermined by the FCC. And the trend is toward more detailed program categories, more program quotas and more percentages.

The Administration's bill is designed to halt this trend toward quantification of the public interest. Confining the FCC's evaluation of the licensee's performance to the bill's ascertainment and fairness criteria makes the local community the touchstone of the concept of public service embodied in the Communications Act. Serving the local community's needs and interests instead of the desires of the Washington bureaucrats would become the broadcaster's number one priority.

* * * * * * * * *

You will recall my description of the dilemma that the Government faces in regard to the regulation of broadcasting. A lot of criticism that is being levelled at our license renewal bill seems to be coming from those who are unaware of this dilemma or misunderstand the present nature and extent of broadcast regulation.

The critics seem to want it both ways. They say they want to preserve absolutely the broadcaster's First Amendment rights. But they are uncomfortable about leaving such a powerful medium of expression unchecked by Government supervision. So they also feel that the public should have unrestricted rights to bring Government power to bear on the licensee at renewal time.

There is legitimate room for disagreement about how this balancing process can be best achieved. But the dilemma will not go away and those who criticize our bill can't have it both ways. Don't you want limits on government power such as those in our bill? Or do you prefer the current scheme, with its burgeoning program categories, percentages, and renewals every three years? Do you want the Government to exercise more control over broadcasting? Or should the Government withdraw completely from broadcasting regulation and tell minority groups they have no recourse against the licensee?

When I say critics of our bill can't have it both ways, I mean they can't answer yes to all of these questions. There are a number of quite different, and mutually exclusive, approaches to broadcast regulation.

Under one approach, we could expand the present trend of Government control and have the Government take over the broadcaster's responsibility to his local community. Under another approach, the Government could withdraw completely from regulation of broadcasting. This Administration has chosen a third approach, one that would restore equilibrium to the broadcasting system and balance the competing goals of the Communciations Act. This approach relies on the exercise of more private responsibility and voluntary action by broadcast licensees who truly dedicate themselves to the communities they are licensed to serve. Which approach will you choose?

NEWS CONFERENCE

FOLLOWING

Remarks of

CLAY T. WHITEHEAD, DIRECTOR

Office of Telecommunications Polciy
Executive Office of the President

National Academy of Television Arts and Sciences

Americana Hotel
New York, New York

January 11, 1973

Lee Polk: Mr. Whitehead, I noticed that in the New York Times you mentioned 1984 as the target date for ... it occurred ... I just wanted to ask ...

CTW It occurred to me first.

Lee Polk: I wanted to ask you about government regulation. You say it would seem as if broadcasters, and I know that you have not been in the broadcasting to the point you have in telecommunications, but that you indicated that there should be less Government control of broadcasting. I was in Miami when you made the speech about Mr. Vanocur and public affairs programs on public broadcasting. Since that time, Mr. Vanocur has resigned and public affairs broadcasting has diminished to the point where no one resists or it would be eliminated publicly. Wouldn't you say that your Office, as a direct arm to the President, would be, in a sense interferring with what's going on in other programs?

CTW No. First of all the speech I gave in Miami was not a speech about Sander Vanocur. It was not a speech about public affairs programming on public television. The speech was about the nature of public broadcast system where the control was to lie, where the funding was going to come from and pointing up some of the dilemmas that we face when we undertake to use the taxpayers' dollars to fund a medium of expression, and how does the responsibility and the answerability get sorted out.

Secondly, I don't see that there's anything particularly improper about a government official giving a speech about how government monies are used. We have that kind of responsibility. We feel very strongly that public television should develop and this President has steadily increased the funding from 5 million dollars when he took office to the current figure of 45 million dollars that he requested for this year. And, we certainly do think that there is a role for public affairs programming on public television. We simply are honest enough to say that we haven't found out a way to fund public television with the federal dollars and have those federal dollars go for controversial politically-oriented programming in a way that does away with the suspicion that there is some kind of political control. To the extent that public television wants to use foundation funds, to the extent that public television wants to use private funds, what have you, for public affairs programming that's not only appropriate to the Communications Act, it's their responsibility.

Q I would like to identify myself. I am Senator Cox. I am former Chairman of the Board of the Academy and for further purposes of identification, I should say I am also Vice President of Corporate Communications and attorney of litigations before the FCC and a licensed pilot. Now that that's out of the way, I'll get on with it. I have studied your speech; I have also studied your Bill; I have also studied your letter of transmittal and accompanying bill to the House. And one thing really puzzles me. It seems to me that there's a dichotomy between what one Bill says, and what the rhetoric of your speech addresses itself to. The speech certainly raised a very profound issue in terms of the goals of a federally licensed media and a free society. It involves the First Amendment clearly. And I think it's the speech that probably has many of us quite a bit frightened, because it raises the specter of a government standard which you have now spoken of at great lengths this afternoon in connection with the Bill as something you don't want to get involved with. But when you speak of ideological plugolas ... you are faced with the problem of finally adjudicating what constitutes those things. That leads to a line which I read today in theTimes which sounds like something by Franz Kafka as told to . . . "And every housewife knows what an elitist is," now I don't know where you took your poll . . .

CTW Among housewives, obviously.

Q Maybe around the White House. What I'm trying to come to grips with here is, exactly what is your intent, because the Bill does not speak to the intent expressed in your speech of holding the local stations responsible for what the networks are putting on down the line, and how exactly do you want the local stations to control the networks? Because I don't think that your Bill really speaks to that issue at all.

CTW You're quite right. We don't want to set up a Federal standard for these kinds of things, but that doesn't mean that the problems don't exist. We have kind of come to a rather unhappy state of affairs in this country, I think, when we feel that responsibility can only be exercised in Washington, and it's Washington that somehow is the final arbitor of what's going to happen and what needs to be done. If this President is trying to change anything in the domestic scene, it's to change that concept. Now, let's consider how that's applied to broadcasting. Just because we think the

Federal Government shouldn't enforce the standard, just because we in the White House don't try to identify and define who are the "elitists" and what's "gossip" and what's "plugola" and what's not, it's not because those things don't exist. I wouldn't have given the speech that I did in Indianapolis if there weren't some concern that these things do, from time to time, and in various places, exist. The question that I have to address, in my responsibility in Washington, is what is the Federal system whereby these abuses will be checked. Now, if you want to argue that there are no abuses, that none of this exists, the broadcasting industry is somehow perfect or is somehow above criticism, then you can ignore the rest of my remarks.

But if you feel that the profession of broadcasting should concern itself with self-improvement, should concern itself in finding where the professionalism is not being lived up to, and should take corrective measures, then it seems to me, you have to ask yourself where those corrective measures should come from. My speech in Indianapolis gave our conclusion. It said it should not come from Washington because there is too much potential for abuse, because it erodes too seriously the separation between the Government and the media. Alright, then it's got to come from somewhere. The place it should come from is the viewing public and the professionals who have responsibility within the broadcasting system. And those people are the network executives, the network presidents, the station owners, and the station managers. They should be paying more attention to the exercise of voluntary responsibility. The thing about a community leader is that he undertakes to define on behalf of his community, what is responsible. And that's what he ought to be doing, and he ought to be doing it as a community leader on a voluntary basis. And, that's what we think the country has every right to expect of the broadcasting business. That is the only alternative to the people coming to Washington and saying, "Hey, it's not being done within the industry itself. We're complaining to you and we want you to deal with our complaints."

Q Dr. Whitehead, I'm from CBS News. A lot of people watching the progress of public television in the past year have concluded that there has been less and less public affairs as a result of White House pressure to the point where at least one television critic refers to public television now as the "Nixon Network." They think that has happened in part because the White House has driven a wedge between public television stations and central suppliers of programming. Your speech here and the one in Indianapolis don't seem to differentiate between news and public affairs programming, and entertainment programming. And I think that many people fear that by saying the responsibility should rest with the local affiliates, you will similarly drive a wedge between commercial television stations and their central suppliers. How can you assure the American public, let alone the networks, the same kind of "Nixon Network" will not result in commercial television?

CTW But let me tell the people don't trust the rhetoric that comes out of the press either. The only thing that's going to make any difference to the people is what actually happened. Now, our point of view, that we have urged upon the Congress, that we have urged upon public television is not inconsistent with what I've been urging more recently for commercial broadcasting.

The idea of local responsibility is central to our broadcasting system. This country has never tolerated excessive concentrations of power; it doesn't tolerate them in Washington, where we have checks and balances; it doesn't tolerate them in private industry. If the public doesn't like Richard Nixon, they simply don't re-elect him. Do they have that opportunity with the three television networks?

Now, what we're trying to do with public television is to establish a system whereby the needs and interests and education and information and culture and what have you, as defined by the local community, can be met. And we think that the Public Broadcasting Corporation which receives federal money and distributes it and uses

it for the purposes of these local stations should exist to serve them, not to become their headquarters and their master. We don't think it's useful to have a federally funded corporation become the headquarters for a television network, and we don't think that that kind of a system should be allowed, because of its political sensitivity. We don't think that that federally funded entity should be funding highly controversial political programs. It is too tempting to make it into a Nixon network or a Kennedy network, or a Johnson network, or a Muskie network. And if we really wanted to make it into a Nixon network, you might ask yourselves how you would do it. Would you take off public affairs from the federally funded part of public television, or would you replace the Bill Moyers Show with the Ron Ziegler Show? If you really had a malevolent intent, how would you do it? And decide for yourselves, are we malevolent, are we dumb, or are we trying to be responsible? Look at what we're doing.

Q Dr. Whitehead, in your speech you noted correctly that currently before your legislation that the responsibility belongs with the local broadcasters. Why is it necessary for this campaign of rhetoric and charges which were, as you said, you wouldn't want documented in the Times this morning, if we already have the responsibility for broadcasting resting with the local broadcasters should this stay the same, and shouldn't the FCC stay powerful and independent and a bi-partisan regulatory agency without the appearance of a White House agency, which as I understand, was originally for the purpose of only coordinating inter-governmental communication?

CTW The FCC certainly should remain a bi-partisan and independent agency. We have two questions there: One, why the rhetoric if we don't change the responsibility. Second, how should we deal with the FCC?

Reading for the rhetoric is quite simple. We think, along with many, many public critics of public broadcasting that that responsibility could be better

exercised. More importantly, we think the responsibility has to come out in the open; it has to be focused upon. When we are undertaking to change the Government control of broadcasting in the direction of less control, you simply cannot afford to have in this country an institution that is above responsibility. We just can't have that. There has to be responsibility and answerability to someone. Now, as we begin to take away the centralized government control over broadcasting, which I hope and pray is what the people in the press and the industry want, because that's the core of the First Amendment, then we have to ask somebody to take over that responsibility. And, I can't think of anyone better than the people in the industry, the people who have risen to the top who claim to have the responsibility for that institution and claim to be the best people to exercise it.

Now, secondly, how should this Administration, or how should any Administration deal with the FCC? I think it's far better that the FCC remain independent; that it remain bi-partisan; that we not engage in the delusion that it is somehow part of the Executive Branch. The minute that Dean Burch was appointed as Chairman of the FCC, he ceased to work for the President of the United States, and he became answerable to the Congress of the United States. We think that's a sound concept.

How, then, is the Administration, how is the President to get his point of view across to the FCC, across to the public? Is he going to do it quietly through telephone calls from anonymous White House aides who are not answerable to the Congress, over to the FCC? Now, that's quite a plausible way to work, but there's another way to work. And that is to set up a focal point within the Executive Branch, someone who is answerable directly to the President and who speaks publicly, raises these questions publicly, asks that there be public debate about what is now going on, public debate about where we ought to be going, somebody that specifically raises the question about how are we going to get to 1984, rather than try to slide that under the table in

the name of very noble causes insidiously moves us to the result of 1984. Those who would consider 1984 ought to go back and re-read the book. Remember that the large percentage of the people in that society liked what Big Brother was doing for them, because Big Brother was doing in their interest, in their name.

I appreciate that there are those in the audience who feel that this is a malevolent Administration. But, go home tonight and ask yourselves if we're really as dumb as you also seem to think.

Q One of the things that concerns the average citizen today and those of us in the industry, and I speak of those of us in the industry in quotes and address myself to your area, is the private feeling, and I'm not mistaking that for malevolence, and, therefore, I would like to ask you for clarification on two points; if there isn't time, on one point. You have addressed yourself, and I appreciate this, to the public broadcasting area. Those of us who feel strongly in the industry about improving programs are very concerned about the public broadcasting system, Channel 13 and others. The excellence of programming, I think, needs no comment from me. If it is a tendency because of public affairs, aren't we doing a disservice to the industry by the funds are withdrawn and the public broadcasting area is no longer, where do we go towards guidelines for improving our programming.

Number two, in your discussion and comments about the increasing new responsibilities on the local area, I quote you, "the broadcaster, it seems, is substantially attuned to the needs and interests of the community he serves," but what burns me about this is the going into the local level. For example, if something offends me in a local area pertinent to their areas, how do we undo that, or don't we? Is it quantity or quality? These things disturb me very much.

CTW I think both of your points are disturbing. They're disturbing things going on in the communications business and the communications regulation today. And, I think it is healthy that there is some discussion. I quite agree with you that if excessive emphasis on the public affairs being funded by the Federal Government causes the rest of public television to be a casualty, that would be a sad thing. Public television has done many marvelous things and should continue to do so with healthy support from the Federal Government. But, to the extent it is made political, to the extent that we have to have continual debates in the Congress about how public dollars are being used for these controversial things, then it is inevitable that everyone has to pay the consequences of that political discussion.

Secondly, there are many ways one could answer this question about how the local responsibility should be traded off with some national sensibilities, and awareness of national concerns. All I can say to you, I think, is that any weighing of those two concerns is imperfect and everyone has to balance it for himself. We feel that it is the responsibility of a local licensee to be sure that his public is informed about national and international issues. He hardly would be a community leader if he didn't live up to that responsibility. That's not what really is at stake; that's not what is at question. The question is, who will enforce that? And, we are simply saying that it has drifted too far in the direction of Washington enforcement. And we think it would be best to curtail that trend and move back a little bit in the direction of more local entertainment.

Q Two questions on journalism. Primarily, first, when you say the "community should be aware of its leaders," would you care to comment on the idea that Mr. Nixon hasn't held a press conference for the past three months?

CTW I think Mr. Nixon is the best judge of how he can best inform the country, and I don't presume to make that judgment for him.

Q The second question means a very great deal to broadcast journalism: Recently there have been a couple of court decisions, one in Newark and one in Los Angeles, denying, so far, the right of newsmen to protect their sources of information. Would you care to comment on this, the Government's position on that?

CTW It's a very disturbing trend to see reporters being forced by Government to reveal what they view as confidential sources. It's a trend that should not be allowed to develop too far. The question again, is how do we balance competing interests of society. The First Amendment is a very important consideration; public safety, law enforcement, the judicial system, those represent very important considerations. Again, the process has to balance these two considerations out. The position of this Administration is the mandatory legal requirement that reporters turn over their notes should be relied upon only in the direst of circumstances, only when there is an overriding concern on the other side and that, by and large, that is best enforced through the courts rather than trying to define the balance in national legislation -- where, I think, inevitably, the press would suffer more than they are suffering at the hands of the courts.

Q One more, also, don't think this is in line with denying this privilege of that in the same way that the pressure was put on CBS for "The Selling of the Pentagon Papers"?

CTW I don't see the connection.

Q I have to hark back to those three phrases, the "ideological plugola," "elitist gossip," and "accountability" which, whether you like it or not, may become as famous in our times as Rome and "Romanism" and those types and, I thought I had heard the tenor of this phraseology somewhere before. It happened that I was doing a little historical research, and, indeed, I found the granddaddy of your attitude. It was something called the Sedition Act of 1798 which went on the law books of this country, but

briefly, because the country became so ashamed of itself. It resembles your phase of "accountability" is that this Act provided punishment by fine up to $2,000 or imprisonment up to two years, hark the language, Mr. Whitehead, for anyone who should by writing, or the spoken word, bring the Government, the Executive, or the Congress, into disrepute.

Now, what is a $2,000 fine along side the loss of a license because the phraseology did not suit the writer?

CTW The gentleman obviously did not listen to my speech very carefully. Because, I think I made it quite clear that we would oppose any governmental enforcement to correct the abuses that are contained in those somewhat colorful words. Now, I wonder if the questioner is suggesting that elitist gossip and ideological plugola do not exist anywhere at any time . . .

Q It's hardly to be distinguished from the words of the Sedition Act about bringing the Government and the Executive into disrepute. . .

CTW They are equally subjective.

Q Can you make the distinction with the difference or without?

CTW They are equally subjective.

Q Do you have proof that those statements exist?

CTW The Government should not be in the business of enforcing these kinds of things. The Government should stay out of that. The place it should be enforced is within the industry itself. I hope no one here disagrees with that.

Q In the prepared text of your Indianapolis speech, you twice referred to a broadcaster's demonstrating responsibility and accountability at license renewal time, and yet when you delivered that address, you deleted the phrase "at license renewal time." This has been interpreted by some as some kind of implied threat. License renewal time will not be the time the broadcasters would be held accountable. The Government had something else in mind. We're responsible.

CTW Yes. None of us are exactly perfect. I did see the television coverage of that, and I did omit those phrases. They appeared in the credit text, and it was an inadvertent omission on my part, because I was trying to hurry through what I thought was an overlong talk. I stand by the written version of that speech. However, I should point out that in many press reports the phrase in that same sentence "be held responsible by the broadcaster's community at license renewal time" was also omitted. I just wonder if the elimination of the phrase "by the broadcaster's community" was meant to suggest something to the reader that was not suggested in the actual statement. I hope that was equally inadvertent, and for the purposes of clarity.

Q Mr. Whitehead, Dave Pressman, Channel 5 in New York. I think I can focus on the one basic concern of broadcasters and broadcast journalists. In your speech you said that those network executives and station managers who fail to correct your words "imbalance or consistent bias" would be held fully accountable at license renewal time, what we were just discussing.

CTW By their community, at license renewal time.

Q And if the community doesn't hold them responsible, then will the FCC, will the Federal Government?

CTW It's a little hard to see how they could, under our bill, because the only criteria that are allowed are criteria that are based on the local community; and the FCC, under our bill, is explicitly prohibited from considering their own criteria. We, in the White House, are explicitly excluded in this process from telling the FCC what we think are good criteria.

Q But, if the FCC is the traffic cop, if there is an objection from the local community, the FCC makes the decision, is that correct?

CTW That is correct.

Q And the FCC is appointed by the White House, is that correct?

CTW That is correct.

Q So, therefore, what you're saying is that if there is consistent bias as interpreted by the FCC after hearing from the local community, then licenses will be denied.

CTW It would depend on the FCC's judgment as to how serious that was in terms of the total service to that community.

Now, I unfortunately can't figure out a way to do away with the FCC and license renewal time. We are talking about a balance of people's concerns here. We have suggested a way that we think is an improvement over the current situation. Now, I realize there are many people who oppose our change. If they would like the current situation, with its more open opportunity for the FCC to apply its own standards, to work its way every three years instead of every five years and to not justify what it's doing in terms of local community performance and concerns, but simply because it happens to think something is worthwhile and useful, then I suggest that that shows there is something wrong. If we wanted to appoint people to the FCC who would be sufficiently irresponsible, to enforce the short-run political views of this Administration, I suppose we could do that. But we haven't.

Similarly, if we wanted to keep the Communications Act criteria vague, if we wanted to keep it out of the public eye, I suppose we could do that. But we haven't done that. We've tried to strike what we think is a responsible balance. We hope that when the people in this industry look at how we have struck the balance, between the rather extensive regulation that we have today and the total lack of regulation which would leave the community with no recourse, that they will see it as a net improvement.

Q — But, ultimately, Federal officials will decide what "bias" is.

CTW — I see no way to insulate the people from their government. As I said, they can always un-elect Richard Nixon.

Q — What about the question of whether the press, the electronic press, is free to criticize the Government?

CTW — There is no question that they are. There is question that they shouldn't be. One of the least noted statements in my speech was that the First Amendment has to apply fully and completely to broadcasting or it doesn't mean a thing in this age of electronic journalism. That is the touchstone, and that ought to be the touchstone of where we're going in broadcasting.

MC — Thank you, Mr. Whitehead. And we have one more question, and then we must conclude.

Q — Dr. Whitehead, wouldn't the best watchdog over a station's performance be someone who was seeking to take that station away, possibly, on some kind of local violation; and in that regard, wouldn't it be better to maintain the comparative hearings, even if it meant beefing up the staff of the FCC in order to assure that these opposition voices will be heard not someone to refer to as "community leaders," but don't identify.

CTW — I don't think so because as the questioner before you pointed out very clearly, it's ultimately the Federal Government that has to make the decision between the competing applicant, the existing licensee, and what the local community needs and wants. As long as we're licensing the use of the public's airways, the Government has to make that kind of decision for the public. The public has every right to look to the Government to make that decision. What we are talking about here is the process and how much insulation does the industry have from the Government as to how much opportunity the Government has to impose its will on the industry.

Q By extending the hearing period from three to five years, you shut off the voice for another two years.

CTW We haven't completely shut it off, what we've said is that we'll take a rather serious complaint to raise the question in the interval.

MC Thank you very much, Mr. Whitehead. Agree or disagree, we are most appreciative to you for keeping up in the avenues of communication of our industry. Thank you again.

Sandie
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STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR

OFFICE OF TELECOMMUNICATIONS POLICY

ON

PUBLIC BROADCASTING AUTHORIZATIONS

before the

Subcommittee on Communications
Honorable John O. Pastore, Chairman
Committee on Commerce
United States Senate

March 28, 1973

Mr. Chairman, and members of the Subcommittee, I welcome the opportunity to appear before you today to discuss the two pending public broadcast authorization bills, S. 1090 and S. 1228.

Federal funding of public broadcasting presents a dilemma. On the one hand there is a need for the government to support public broadcasting. On the other hand it should be insulated from government interference. The Public Broadcasting Act of 1967 attempted to deal with this dilemma by creating a system based upon the "bedrock of localism" and, by creating an institution--the Corporation for Public Broadcasting--to serve the needs of local stations.

Unquestionably, the Corporation in the few years of its existence has made important contributions to our nation's educational and cultural life. In view of these achievements and the promise of educational broadcasting in general, this Administration has demonstrated its support. We have sought increased appropriations for the Corporation, from $5 million in Fiscal Year 1969 to the present $45 million requested in Fiscal Year 1974. Moreover, the Administration has supported steady increases

in funding for the Educational Broadcast Facilities Program.

Nonetheless, despite public broadcasting's positive achievements, there remained serious deficiencies. The purpose of the 1967 Act was to prevent local stations from ever becoming mere conduits for the programming of centralized production sources. But there was a tendency toward centralized program decision-making by CPB and PBS, its wholly-funded interconnection service.

Interconnection was viewed by the Congress primarily as a means of program distribution and not as a means of establishing a fixed-schedule network. But the distribution of programming over the interconnection system by PBS amounted to precisely the kind of federally-funded "fourth network" which the Congress sought to avoid. Such a monolithic approach to public broadcasting is inimical to the letter and spirit of the Public Broadcasting Act.

Another problem area is the funding of public affairs programs. Public affairs and current events programs are important components of public broadcasting's contribution to the flow of information. Indeed, this type of programming is recognized as part of every broadcaster's responsibilities under the Communications Act of 1934. But there

is great concern regarding the use of federal appropriations to produce and disseminate such programming at the national level. This is especially true in view of the tendency to centralize its production in New York or Washington. In short, reliance on federal monies to support public affairs programming is inappropriate and potentially dangerous. Robust electronic journalism cannot flourish when federal funds are used to support such programming.

All of these problems affecting the structure and operations of public broadcasting vitally affect the issue of long-range funding. It is, of course, possible to amend the Public Broadcasting Act to convert the system into one built upon the concept of a centralized network. The Congress could then consider long-range funding for such a system. But unless and until Congress abandons public broadcasting as a community centered enterprise, multi-year funding must await the resolution of the present uncertainties and deficiencies. The problems facing public broadcasting in 1973 are quite similar to those that confronted the Congress in 1967. There is no greater rationale for large-scale, multi-year funding now than there was then.

In 1967, the question of public broadcasting's role was vigorously debated. The debate was thorough and resulted in legislation which placed the stress on localism--a system in which control would flow upward from strong local stations to the national entities. The future funding of such a system, which was the result of much thoughtful and constructive debate, should be right rather than rapid.

We must support public broadcasting, both for what it has accomplished and for its future promise. This is the reason the President is requesting measured increases in funding for CPB.

With this as background, let me turn to the specifics of S. 1090. First, the level of funding, is in my judgment, too high. When all of the demands of the Federal budget are considered, it is impossible to devote $140 million to public broadcasting in Fiscal Years 1974 and 1975. Second, until the basic problems that I have discussed are resolved, the Congress should review the funding authorizations annually and observe the Corporation's progress in dealing with these problems.

The Administration's bill--S. 1228--provides for the sound development of public broadcasting by extending for

one-year CPB's current authorization. This one-year extension would allow for the growth of public broadcasting to proceed soundly while all elements of the system make progress in resolving the issues under debate.

Continuing the Administration's record of requesting increased funds for public broadcasting, the authorization would add $10 million to CPB's current level of funding, for a total of $45 million. Unfortunately, CPB did not receive its full authorization for Fiscal Year 1973. Recognizing that CPB appropriations were caught up in the President's veto of the Labor-HEW appropriations, we now ask for the same increase requested in Fiscal Year 1973 and regret that it is now one year later. In addition, the HEW request for Fiscal Year 1974 funding of the Educational Broadcast Facilities Program will be at a $13 million level, despite severe budgetary pressures affecting other HEW programs.

Mr. Chairman, I should like to close on a hopeful note by alluding to the efforts now underway to rationalize and improve the relationship between CPB and the local stations. The Corporation must take into account and respond to the needs of all classes and categories of public broadcasting stations around the country. In undertaking these efforts,

a fundamental principle must be maintained. It is that decentralization of programming activities is the cornerstone of the public broadcasting structure. Local stations should play a major role in decision-making in matters of programming and ultimately must have a realistic choice available in deciding whether to broadcast any CPB-supported or distributed programs. But this cannot be accomplished if the role of the local station is limited to some form of representation in national entities that make program decisions.

The best way to proceed is to implement the plan of the Public Broadcasting Act and its rejection of use of interconnection facilities for fixed-schedule networking. This would give local stations the autonomy and authority for complete control over their program schedules. In particular, it would be unfortunate if we were to have a centralized bureaucracy through which the Corporation would have to deal with the stations. The goal should be to create an environment in which the Corporation works directly with all the stations and seeks at all times to preserve their independence and autonomy.

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STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR
OFFICE OF TELECOMMUNICATIONS POLICY

before the

Subcommittee on Communications and Power
Honorable Torbert H. Macdonald, Chairman
Committee on Interstate and Foreign Commerce
U.S. House of Representatives

April 17, 1973

Current procedures in the license renewal system -- and the trends in broadcast regulation generally over the last decade -- raise the possibility of an unnecessary and unhealthy erosion in First Amendment rights in broadcasting. This could happen if broadcasters, affected by the uncertainty and instability of their business, seek economic safety by rendering the type of program service that will most nearly assure renewal of their license; and that license is, after all, the right to function as a medium of expression. If the Government sets detailed performance criteria to be applied at renewal time, the result could be that the Government's criteria, instead of the local community's needs and interests, would become the touchstone for measuring the broadcaster's public interest performance. Stability in broadcast licensing is, therefore, an important goal of public policy.

Counterbalancing the goal of stability in the license renewal process, however, is the prohibition in the Communications Act against anyone acquiring a property right in the broadcast license. The public has access to the broadcast media only through the broadcaster's transmitter, unlike their access to printing presses and the mails. The First Amendment rights of those who do not own broadcast stations

thus must also be recognized, along with society's interest in a diversity of information and ideas. The Government has an affirmative duty under the Communications Act and the First Amendment, therefore, to foster competition in broadcasting. So the spur of competition and the threat of non-renewal also are indispensable components of the renewal process.

These are lofty and complex considerations. There is room for differing views on the priorities and about the proper balance to be struck. This Administration is convinced, however, that the issues at stake warrant widespread public awareness and debate. They transcend short-run political differences. The age of electronic mass media is upon us; the decisions the Congress makes on license renewal and on other broadcasting and cable matters it will face in the next few years will have a major effect on the flow of information and expression in our society for the rest of this century.

I would now like to address myself, briefly, to the provisions of H.R. 5546 -- the Administration's license renewal bill.

H.R. 5546 would, if enacted, make four major changes with respect to present practice and procedures in the license renewal process: (1) it extends the term of broadcast

licenses from three to five years; (2) it eliminates the requirement for a mandatory comparative hearing for every competing application filed for the same broadcast service; (3) it prohibits any restructuring of the broadcasting industry through the renewal process; and (4) it prohibits the FCC from using predetermined categories, quotas, formats and guidelines for evaluating the programming performance of the license renewal applicant.

Mr. Chairman, my letter to the Speaker of the House transmitting the Administration's proposed bill sets forth in detail the reasoning behind each of our proposals. With your permission, I would like to insert that letter into the record at this point and discuss briefly the four changes we propose.

1. Longer License Term

The first change in the Act made by the Administration's bill would extend broadcast license terms from three to five years.

In 1934, when the Communications Act was enacted, a three-year term was a reasonable precaution in dealing with a new industry. All other transmission licenses are issued for five years, however, and a five-year term would seem

more in keeping with the present maturity of the industry and the modern complexities of broadcasting.

An increased license term would strengthen the First Amendment rights of both broadcasters and the public. It would reduce the opportunity for government interference and the disruption that more frequent, often capricious, challenges can have on the free and unfettered flow of information.

2. Comparative Hearing Procedures

The second change would eliminate the present requirement for an automatic, lengthy, and costly comparative hearing whenever a competing application is filed for the same broadcast license. The FCC would be able to exercise its independent judgment as to whether a comparative hearing is necessary. In the initial stage, the renewal challenger would bear the burden of demonstrating that the renewal applicant has not met the criteria of the Act; a hearing would be required only if the Commission had cause to believe that the broadcaster's performance might not warrant renewal.

It is important to remember that at stake in a comparative hearing is not only the incumbent's license, but also his

right to do business as a private enterprise medium of expression. The incumbent, therefore, should not be deprived of the right to stay in business unless clear and sound reasons of public policy demand such action. This change would afford the licensee a measure of stability and some necessary procedural protections.

Nothing in this second change would affect the ability of community groups to file petitions to deny license renewal applications. Many of these petitions have in the past served the important purpose of bringing the licensees' performance up to the public interest standard and driving home to broadcasters the interests of the communities they serve.

3. Prohibition Against Restructuring Through the Renewal Process

The third change is designed to preclude the FCC from any restructuring of the broadcasting industry through

the license renewal process. Presently, the Commission can implement policy relating to industry structure -- such as a policy restricting newspaper ownership of broadcast stations -- through the criteria it uses to decide individual renewal challenges. This allows for the restructuring of the broadcasting industry in a haphazard and inconsistent manner.

This change would prohibit the FCC from using against the applicant at renewal time any of its policies that were not reduced to rules. If the FCC wished to impose or change industry-wide policies affecting broadcast ownership or operation, it would have to use its general rulemaking procedures. Besides preventing arbitrary action against individual broadcasters, this has the benefit of assuring that the entire broadcasting industry and all interested members of the public would have full opportunity to participate in the proceeding before the rule was adopted.

By securing important procedural protections for licensees, this change recognizes more fully the First Amendment rights of broadcasters to be free of unpredictable, disruptive Government interference. It also recognizes the public's important right to full participation in any restructuring of such an important medium of expression.

4. Clarification of the Public Interest Standard and Prohibition Against Use of Predetermined Performance Criteria

The Communications Act of 1934 does not anywhere define what constitutes the "public interest, convenience and necessity," and in the intervening years this standard has come to mean all things to all people. To delegate important and sweeping powers over broadcasting to an administrative agency without any more specific guidelines as to their application than the "public interest" is to risk arbitrary, unpredictable ever-increasing regulation.

The FCC has been under pressure to reduce the arbitrariness inherent in this vague standard and establish ever more specific criteria and guidelines. Presently pending before the FCC in Docket Number 19154 is a proposal to establish quotas in certain program categories as representing a prima facie showing of "substantial service." These quotas would be used in the evaluation of a television applicant's program performance in the context of a comparative renewal hearing.

While the Administration recognizes the necessity for a clarification of the FCC's public interest mandate, this clarification should not risk an abridgement of the First Amendment rights of broadcasters and the public.

Our bill is designed to balance this need for clarification of the public interest standard--and the reduction of the potential for arbitrary and intrusive regulation--with the mandates of the First Amendment. It would stipulate that in addition to compliance with the requirements of the Communications Act of 1934 and the FCC rules when evaluating a licensee's performance under the public interest standard, the FCC could apply only the following two criteria: (1) the broadcaster must be substantially attuned to community needs and interests, and respond to those needs and interests in his programming--this is known as the ascertainment obligation; and (2) the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues--this is known as the fairness obligation. The FCC would be prohibited from considering any predetermined performance criteria, categories, quotas, percentages, formats, or other such guidelines of general applicability with respect to the licensee's broadcast programming.

These two criteria represent a distillation, as stated by the FCC and the courts, of what the most important aspects of the public interest standard mean in the context of license renewals. They do not add anything new to the broadcaster's responsibilities and have routinely

been applied to licensees in the past. However, in addition to these obligations, the FCC (often at the urging of the courts) has been imposing other less certain and less predictable obligations on licensees under the vague "public interest" mandate.

This fourth change in the Administration's bill is also designed to halt the FCC's movement toward quantification of the public interest. The pending FCC Docket 19154 extends the trend to establish ever more specific programming guidelines as criteria for renewal, and indeed it seems that nothing short of Congressional action can stop it.

The statutory scheme for broadcasting envisions the local broadcaster exercising his own independent judgments as to the proper mix and timing of programming for his local community. The FCC's proposed predetermined program quotas and categories further substitute the Government's judgment for that of the local

licensee. Instead of reflecting a public trust, the broadcast license would be a Government contract with the programming designed in accordance with the specified quotas and categories of the Government.

Mr. Chairman, I would now like to address myself briefly to some of the concerns that have been raised during these hearings and in the press concerning the Administration's bill.

First, some critics have argued that if the Administration feels that the current "public interest" standard is too vague and too sweeping, it should support the enactment by Congress or the FCC of specific program standards such as those proposed by the Commission in Docket 19154. Such criticism seriously confuses the issues. Stability in licensing is, as I have already discussed, an important ingredient in securing First Amendment freedoms in broadcasting. But the ultimate stability of specific and detailed program categories and percentages set by the Government is grossly incompatible with the letter and the spirit of the First Amendment.

The First Amendment expressly prohibits the Congress from abridging the freedom of speech and of the press. Yet when the FCC, as an arm of the Congress, begins determining what is

or what is not good programming and what programming is required in order to be permitted to stay in business, surely this threatens nothing less than abridgment of important First Amendment rights.

The FCC's proposal in Docket Number 19154 would intrude the Government into the content, extent, and even timing, of the broadcaster's programming. Moreover, even if such intrusions are disregarded for the purpose of affording licensees some certainty at renewal time, the FCC's proposal appears to be illusory. As Chairman Burch stated before this Subcommittee, "Quality is what we are after rather than number." Nor, I might add, would there be any assurance that the standards would not be expanded over time.

The second concern centers on the bill's "good faith effort" criterion for evaluating the broadcaster's responsiveness to the needs, interests, problems, and issues he ascertains in his community. This "good faith" standard, along with the fairness obligation, would further elaborate on the present "public interest, convenience, and necessity" standard used by the Commission at renewal time.

This "good faith" standard is an important elaboration of the present vague "public interest" mandate. It is the standard the FCC usually uses to describe the essential responsibility of the licensee, namely to make good faith judgments as to how to meet his community's needs and interests. It also appears in the FCC's 1960 Programming Policy Statement and is reprinted from this statement in an attachment on the renewal form. Moreover, the standard is used successfully in other areas of the law where the Government seeks to strengthen incentives for cooperation by private parties without directing the actual outcome of such cooperation.

The most important point about the good faith standard is that, in the context of FCC review of broadcaster performance, "good faith" is an objective standard of reasonableness and not a subjective standard relating to the broadcaster's intent or state of mind. It makes clear the intent of Congress that the FCC is to focus on the community's definition of its needs and interests in programming rather than imposing on the broadcaster and the community the Commission's own judgments about what is good programming.

Under the "good faith effort" test, the FCC would still have to make judgments about broadcaster performance, but those judgments would be more neutral as to program content.

Moreover, the courts would have less amorphous issues, with more direct relationship to relevant constitutional considerations in considering appeals from FCC actions.

The third concern is directed toward the Administration's supposed "backtracking" on the Fairness Doctrine. The supposed evidence from this "backtracking" is the inclusion of the Fairness Doctrine as one of the renewal criteria under our bill.

The licensee's fairness obligation in Section 315(a) of the Communications Act to present representative community views on controversial issues is a long-standing requirement, upheld in the Supreme Court's Red Lion decision, and an established practice of the Commission. It is an unfortunate, but for the time being necessary, protection of the free speech rights of those who do not own broadcast stations and of the broader interest of the public to a diverse flow of information and ideas.

The Administration has supported the enforcement of this fairness obligation as long as it is done principally on an overall basis at renewal time. What we have not supported is the Commission's present approach of enforcing this obligation on an issue-by-issue, case-by-case basis. It is

this enforcement process that has come to be known commonly as the Fairness Doctrine and has become so chaotic and confused.

The renewal criterion in our bill is not the Fairness Doctrine, as that term has been used to indicate issue-by-issue enforcement. Rather it is the fairness obligation: the unchanged, long-standing requirement of the licensee in Section 315(a) of the Act to "afford a reasonable opportunity for the presentation of conflicting points of view on controversial issues of public importance." Its inclusion in the renewal standards would serve as an expression of Congressional intent as to the preferred method for its enforcement.

A fourth concern is the one voiced by most of the representatives of the minority groups that have appeared before your Committee. They are concerned that the Administration's bill would effectively cut off the rights of minority groups to challenge the actions of incumbent licensees on their community responsibilities in such areas as minority hiring and minority programming.

It is true that competing applications based on frivolous or unproven grounds would be more easily rejected. But responsible competing applications based on real evidence of the incumbent licensee's abrogation of his public trust are in no way penalized and would still have the benefit of a thorough public hearing.

Indeed, with the explicit language of the ascertainment criterion we propose, the focus of the hearings would be shifted to the community's concerns in each case, away from legalistic conformance to uniform FCC percentages.

Moreover, the Administration bill does not change the existing procedures for petitions to deny, the tool that has been the traditional and most useful recourse of the minority groups; it will still be available to them intact. I should also point out that the extension of the license term is not going to put licensees out of the reach of their local communities or the FCC for the five-year term. Community groups may still file complaints at any time, and the FCC would still have ample interim tools available to it -- such as short-term renewals, license revocations, suspensions, and forfeitures -- to protect the public interest.

Finally, Mr. Chairman, I would like to address the concerns that have been voiced during these hearings and elsewhere about my remarks in a speech in Indianapolis last December 18. There apparently is some puzzlement over the relationship between our bill and that speech, in which I announced our intention to submit license renewal legislation. There also has been concern about the motives behind our bill. I would like to set the record straight.

The central thrust of my Indianapolis speech was that broadcast licensees have not, by and large, been doing an adequate job of listening to their communities and correcting faults in the broadcasting system--faults that are not, and should not, be dealt with through use of government power. Important First Amendment freedoms were secured to broadcast licensees under the Communications Act of 1934. And with these freedoms came important responsibilities for licensees to ensure that the people's right to know is being adequately and fully served. As has so often been pointed out in Congressional hearings over recent years, the licensees have not, unfortunately, always met these responsibilities--in part because it is easier to let Government define the limits of those responsibilities.

My speech was intended to remind broadcasters and the public that such attention takes on even more importance if governmental controls are to be reduced, as we have proposed. The speech and the bill are related--but <u>not</u> in the way portrayed in the press coverage of my speech. The relationship between the proposed bill and my speech is no more than the relationship between freedom and responsibility we find everywhere in our society. This Office has steadily promoted the cause of <u>less</u> rather than more regulation of broadcasting. But the public and the Congress should not think of increasing the freedom in broadcasting by easing government controls

without also expecting some indication that voluntary exercise of responsibility by broadcasters can operate as an effective substitute for such controls.

The core issue is: Who should be responsible for assuring that the people's right to know is served, and where should the initiative come from -- the government or the broadcasters. The speech focused on the three TV networks as the most powerful elements in the broadcast industry and asked how this concentration of power was to be effectively balanced. Some, who now profess to fight for broadcasters' freedom, would rely on regulatory remedies such as increased program category restrictions, burdening the broadcaster and the audience with the clutter of counter-advertising, banning ads in children's programs, ill-defined restrictions on violence, and the like.

Anyone who has followed OTP policy pronouncements knows that we reject this regulatory approach. We have always felt that the initiative should come from within broadcasting.

The broadcaster should take the initiative in fostering a healthy give-and-take on important issues, because that is the essence of editorial responsibility in informing the public. That does not mean constricting the range of information and views available on television.

The public has little recourse to correct deficiencies in the system, except urging more detailed government regulation. The only way broadcasters can control the growth of such regulation is to make more effective the voluntary checks and balances inherent in our broadcast system.

Some broadcasters, including network executives, have claimed they believe the Administration bill to be a good one, but only if clearly separated from the speech in which it was announced. But freedom cannot be separated from responsibility.

Some observers profess to see in our bill a conspiracy to deprive broadcasters of their First Amendment freedoms. But, clearly, it is others, not this Administration, that are calling for more and more government controls over broadcasting.

Many newspaper editors and columnists have opposed the Administration bill, preferring apparently to keep the current panoply of government control over broadcasting. Freedom from government

regulation for part of the printed press, but not for the electronic press escapes reason, especially when many of those who wish to expand government controls over broadcasting would also see these controls as the precedent for similar controls over the print media.

Other critics, I fear, do not wish to diminish the government's power to control broadcast content. They seem quite willing to create and use powerful tools of government censorship to advance their purposes and their view of what is good for the public to see and hear. We disagree. The danger to free expression is the existence of the legal tools for censorship. We are proposing actions to begin to take those tools from the hands of government.

The Administration bill is designed to strengthen the First Amendment freedoms of broadcasters. All four changes promote the cause of less -- rather than more -- government regulation and substitute, as much as possible, the voluntary exercise of responsibility by broadcasters for the often heavy hand of government. I challenge anyone to find in our bill any increase in government power over the media.

In my judgment, Mr. Chairman, the Administration bill is not only the most comprehensive of the many bills before you; it also represents the best attempt at balancing the

competing statutory goals of the Communications Act. The dilemma the Government faces in regard to the regulation of broadcasting is by no means insoluble. And our bill is a step in the direction towards a solution--a solution which means less Government control and more reliance on the licensee's individual initiatives. We are asking the Congress to reduce controls not because broadcasting is perfect, but because its problems should be corrected by the broadcasters and their employees, rather than by government action. Indeed this was the intent of Congress from the very beginning as embodied in the Communications Act. And it is time for Congress now to take an important step towards furthering these long-standing statutory goals.

In your opening statement, Mr. Chairman, you indicated that it was the intention of the Subcommittee to make as complete a record as possible of the many viewpoints and interests affected by the proposed license renewal legislation. You and your Subcommittee are to be commended for focusing attention and debate on these issues, and I welcome the opportunity to add the Administration's comments to this important record.

Speech Book
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REMARKS OF

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

before the

Indiana Broadcasters Association
Holiday Inn
Indianapolis, Indiana

June 8, 1973

Six months ago, here in Indianapolis, I spoke on the subject of broadcaster responsibility and the web of relationships linking the broadcaster, his community, the TV networks, and the government. It's a little early, but Indianapolis evokes memories, and today I'll attempt Phase I of what will have to be a continuing evaluation.

First of all, the speech didn't just happen; it had a context. To understand the speech you have to understand the context -- the history of regulatory and legal decisions that have affected broadcasting during the past ten years. Let me review some of the highlights of that history to show you what I mean.

- In 1962, FCC Chairman Minow complained about the "vast wasteland," and President Kennedy stated that this was an attempt to persuade the networks "to put on better children's programs, more public service."

- In 1963, the FCC placed a new burden on stations, forcing them to program "Fairness Doctrine" responses to their own programs at their own expense.

- In 1964, the FCC set an uncontested TV application for hearing, because, in effect, the applicant hadn't proposed programs of a type the Commission favors.

- In 1968, cigarette commercials were held subject to the Fairness Doctrine and broadcasters (not advertisers) were forced to program information the government thought the people should have.

- In 1969, the WHDH case shattered the broadcaster's belief that he knew what renewal factors he would be judged upon by the FCC.

- And the 1970's opened with the FCC considering proposals to force broadcasters to carry counter-advertising, to take away the broadcasters right to choose what paid messages he should carry, to prescribe how children's programs should be improved, and to set mandatory percentages of various types of TV programming.

During the same time, the courts were expanding the role of the Federal Government, requiring the FCC to monitor what broadcasters are programming and to correct what the courts considered to be defects. In the 1969 Red Lion case, the Supreme Court blessed the vague, yet sweeping,

power of the Fairness Doctrine; other courts went even further in expansive decisions to diminish the editorial judgment and responsibility of the broadcasters.

The trend is clear and it reached its peak when the FCC and the courts deprived Reverend Carl McIntire of a radio station license, essentially for violations of the Fairness Doctrine. Reverend McIntire now thinks his only option is to move his station to a ship to continue broadcasting "outside the domain of the United States." Think of it; with close to 7,000 radio stations in this country, we may be treated to the spectacle of a broadcaster being forced to resort to an off-shore radio station to air his views.

From time to time the Congress has also gotten involved in broadcast program content.

- In 1968 hearings were held on news staging allegations arising out of network coverage of the Democratic Party convention.

- In the summer of 1971 a confrontation was precipitated over CBS's editorial judgment in its documentary, "The Selling of the Pentagon," and Dr. Stanton

narrowly avoided being cited for contempt of Congress for refusing to hand over all the unedited film shot for the program.

- Hearings on violent television programs, children's programs, and sports programs were also a common occurence in the Congress; the object being to get the networks to change their programming.

Of course, the FCC, the courts and the Congress haven't had this territory entirely to themselves. Executive Branch officials have also expressed their concerns about broadcast program content; most notably Vice President Agnew's expressions of concern. But the Executive Branch has no life and death control over broadcasters, as do the other branches of government, so broadcasters can pay the Executive Branch less heed. But, given the trend of increasing government controls, it's easy to see why broadcasters might get edgy when any official makes a critical comment.

* * * *

This then, was the clear trend of regulatory history when I spoke here last December. But before I get too deeply involved in evaluating that speech, there's one

other bit of background information that you should have; and that is how we at OTP viewed the trends in broadcasting's regulatory history.

It is the function of OTP to back off from the day-to-day happenings in telecommunications and suggest policies to be applied. When we did this in broadcasting, it took no great discernment on my part to see that something was fundamentally wrong in the relationship between the broadcast media and the government. The media, especially television, seem so powerful, so influential, and so licensed by the government. Many people, including government officials, find it a great temptation to grab hold of television by the license and shake it a bit to achieve some goal that they view to be in the "public interest." Do you think deceptive advertising is a problem? It's easier to force the broadcaster to offset it in counterads than to prove a case at the Federal Trade Commission. Do you think discrimination in hiring should be reduced? The broadcaster is more vulnerable to equal opportunity enforcement by the FCC than the EEOC. Are drugs, violence, and sexual permissiveness current problems? It's easier for the Congress and others to appear to deal with these problems by resorting to the raised eyebrow license renewal threat than to come to grips with these problems in a substantive way.

The list could go on, but there are enough examples to make the point. The point is not that it is bad to find easier ways to solve real problems. The point is that none of us would think it proper for the government to push newspaper or magazine editors around like this. And we simply cannot have an important medium of expression, such as broadcasting, subject to government control of its content, no matter how good the short-run goal, without doing serious damage to the spirit of free thought and expression, which is, after all, the goal of the First Amendment.

Realizing this fundamental point, OTP began to speak out. We criticized the intrusive manner in which the broadcasters fairness obligation was being enforced by the government; we said that the First Amendment was a better guarantee of freedom of expression in broadcasting than the Fairness Doctrine. We called for a substantial lessening of regulation in radio, where a multiplicity of competitive outlets has obviated the need for detailed government control over programs. We stressed the need for more diligent exercise of the broadcaster's private judgment and responsibility, so that government exercise of responsibility may be decreased. We called for changes in the license renewal process so that broadcasters would be less vulnerable to government control

for either good or bad ends -- the definition of which depends, of course, on who's controlling what. At the same time some elements of the working press were involved in a counter-convention, I spoke to the newspaper publisher's association and told them that they were in the same boat with the broadcasters; that government intrusion in broadcasting's journalistic freedom was also a threat to newspapers.

* * * *

This then, is the full background of the speech; the historical trends and OTP's position on broadcast regulation. These were my positions before I came to this city six months ago; these were my positions when I spoke, and they are my positions today. But the Indianapolis speech means more than a reiteration of prior positions.

For the first time a government entity seriously proposed a concrete piece of legislation to lessen governmental power over broadcasting. In the speech, I unveiled an Administration license renewal bill, which would affect a real change in the decade-old trend of increasing government controls over broadcast program content.

But the speech was a cause celebre' and the bill that bears my name has strong odds against its passage, simply

because it bears my name. Did I fail, and, in failing, damage the cause of increased freedom from government control of broadcasting?

I can't answer that question yet. It's too soon to tell. I'm sure that cooler rhetoric and a clearer description of our proposal might have helped get my message across. Perhaps less attention would have been devoted to my speech writing ability and more to my legislative drafting ability. But its too late for these "might have beens." For now, I'd like to explain what I hoped to accomplish last December, what I learned, and what, if anything, was actually accomplished.

What we hoped to accomplish was a rational debate on some very fundamental questions regarding the government's legal relationship with the only medium of expression it licenses.

One question was: Who should exercise responsibility for program content -- broadcasters or the government? The answer that I suggested is that, contrary to the trend, this should be the broadcaster's responsibility in our kind of society and very little of the government's business.

The Communications Act places this responsibility and power in the hands of hundreds of private broadcasters and not government officials, or even a handful of network officials. Government does, and under the Communications Act must, establish the broad outer limits of broadcaster performance, but within what must be broad limits, the broadcaster must determine what programs will best serve his community.

Another question was: When there are abuses in this system of private responsibility, who should correct them -- broadcasters or the government? Here again, whether the concern is children, or racism, or "ideological plugola," the answer must be the broadcaster, and not government power. For better or worse, under the constitutional protection of free speech and free press, we must take our chances with the private broadcaster, if the concept of private licensee responsibility is not to degenerate into a smoke screen for indirect government censorship.

The last question was: Where should responsibility and power over program content go when they are relinquished

by the government, as they would be under our renewal bill? I answered that the responsibility and power should be exercised by the broadcasters themselves who, under present law, are directly responsive to the needs and interests of TV viewers and radio listeners throughout the country. These local stations should act as responsible community leaders and as responsible affiliates of the three national networks in exercising their power. Government can relinquish its power and still assure that the public interest will be served only when program judgments are shared among many diverse broadcasters, responsive to their varying constituencies. This is the rationale of our broadcast system, the rationale of my speech last December, and the rationale of the license renewal bill we sent to Congress.

In expressing this rationale, I learned a number of things. I learned that a communications policymaking office associated with this Administration invariably has its motives questioned and its intentions distorted. The "leads" on news coverage of the speech said that, "White House drafts tough new legislation making stations responsible for network programs." Broadcasters, who should know better,

were quoted as saying that this signalled government censorship of news and entertainment and we might as well be living in the Soviet Union.

Within two or three days the nation's editorial writers and columnists were unlimbering their rhetoric and decrying what they viewed as a White House attempt to shackle the press and increase government regulation.

The Chicago Tribune stated that:

> "Bias, like beauty, is in the eye of the beholder. For government to make a determination of bias, particularly in the media, is tantamount to censorship, especially if government threatens TV or radio stations with the loss of their licenses."

I agreed: I thought that was what I said. The Washington Post said:

> "It is clear that the press does not always live up to the standard which editorial writers sometimes are tempted to ascribe to it. But it is also clear that one man's bias is another man's ultimate truth and that the founding fathers never trusted the government -- any American government -- to be the arbiter between the two as far as speech is concerned. The essence of press freedom is that professional discipline and consumer pressures constitute the safest corrective devices. The antithesis of press freedom is for those correctives to be supplied by the government."

I agreed: I thought that was what I said.

I even said amen to Tom Wicker's New York Times column, pointing out that the remedy for journalistic abuses should not be government regulation of the content of news broadcasts.

But where we parted company was that virtually everyone in the print media thought that the point I was making about the station's responsibility for its programming was a new legal obligation that we had put in our renewal bill. The fact that this is not even mentioned in our bill, and that this responsibility is already the law, shows that the publishers and the press have not been paying attention to the vital issue of law under which broadcast stations are regulated.

In short, their first reaction was automatic; for years they had seen government power being brought to bear on broadcasting. They couldn't believe that we would move to lessen government control of the electronic press. When they finally read the bill and saw that this was in fact the case, their second reaction was one of mistrust. They suspected a deal: the proverbial carrot and stick approach -- the carrot of renewal security and the stick to beat the networks into submission to this Administration. There is

no "stick," and the charge is ludicrous, but the analogy should tell broadcasters something about the esteem in which they are held by those making the charge.

* * * *

It's time now to assess what we have accomplished in our effort to reverse the trend of government's censorial power over the broadcast media.

First of all, we finally got the debate going in earnest on the government's role in regulating broadcasting by focusing public attention on the present degree of control over programs. There is now a greatly heightened awareness of the problems and risks of such regulation. It is ironic that most of this awareness is due to the fact that I have been painted in the press as the principal proponent of the government censorship I oppose. But the important thing is that the awareness exists now and, if it can lead to constructive action to increase freedom of speech in broadcasting, my major goal will have been achieved.

But even short of attaining this major goal, there are a number of hopeful signs. One is that the congressional discussion of our renewal bill's prohibition on FCC-established quotas and percentages of TV programs may well preclude the adoption of the Commission's proposal to this effect. On the Fairness Doctrine aspect, the decision to take away Reverend McIntire's broadcast license proved to be the last straw for Chief Judge Bazelon of the District of Columbia Court of Appeals, who had earlier been a staunch supporter of the Doctrine. In his dissent to the Court's action, he said:

> "In silencing WXUR, the Commission has dealt a death blow to the licensee's freedoms of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial views . . . . if we are to go after gnats with a sledgehammer like the Fairness Doctrine, we ought at least to look at what else is being smashed beneath our blow."

Another very hopeful sign is the Supreme Court's recent decision in the BEM case, which draws an important line against undue government encroachments on the broadcasters' First Amendment rights and editorial responsibility.

Most importantly, we also have an intelligent and comprehensive approach to license renewals being actively considered by the Congress. The Administration's bill does not simply give broadcasters more license security, important as that is in reducing the broadcaster's vulnerability to the government. The bill also would prevent the government from exacting a high price in exchange for license security. Broadcasters would not have to surrender their responsibility for program judgments to the government in order to obtain a reasonable assurance of renewal. I said before that our bill may well not be enacted by the Congress. But unless its key provisions are reflected soon in some license renewal legislation, broadcasters will eventually succumb to the government, and the hopeful signs that I have noted will prove to be nothing but illusions. That's why this Administration will continue in its vigorous efforts to have the Congress enact a comprehensive renewal bill that strengthens the broadcasters' First Amendment rights.

Unless the Congress passes such a bill, the only standard that will guide broadcast regulation will be the double standard.

There are many people, in and out of government, who really do not want to diminish government power over broadcast content. They would rather use the tools of government content control to achieve ends that they believe are good. They would expand the power of government over broadcasting to achieve their ends and deny that power to those with whom they disagree. It's time to start calling this approach by its ancient and dishonorable name -- censorship.

A continuing tug-of-war between competing philosophies using government power over the media is not the answer. The answer is to take the censorship tools from government's hands, in order to make government power a neutral factor in broadcast regulation, with an absolute minimum of content controls. And this is our goal.

Some fear that conservatives will capture the power to bend broadcasting to their will. Others fear just the opposite. But it shouldn't matter to broadcasters in doing their job who is in power in the White House or the Congress any more than it should to newspaper or magazine

publishers. We simply have to take our chances with a free press, which hopefully will be a constructive and responsible institution. A truly free society has no other choice.

~~Draft~~
Speech
Book
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STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR

OFFICE OF TELECOMMUNICATIONS POLICY

ON

PUBLIC BROADCASTING AUTHORIZATIONS

before the

Subcommittee on Communications and Power
Honorable Torbert H. Macdonald, Chairman
Committee on Interstate and Foreign Commerce
U.S. House of Representatives

June 12, 1973

Mr. Chairman and members of the Subcommittee, I welcome the opportunity to appear before you today to discuss the proposed authorization for public broadcasting.

As you know, OTP supports the principle of long-range financing and acknowledges the inadequacy of current funding arrangements for public broadcasting. We have, nevertheless, taken the position that long-range funding cannot be undertaken before there exists a greater proximity between the goals of the 1967 Public Broadcasting Act and the public broadcasting system's present structure and operation.

Appearing before this Subcommittee in February of 1972, I attempted to outline the areas in which the public broadcasting legislation and public broadcasting operation had gone their separate ways.

I noted at that time that lack of CPB financial support for station operations seriously undermined the autonomy of local stations, the keystone of public broadcasting; that a fixed-schedule, real-time network was coming to

pass, despite the plain meaning of the 1967 Act; that homogeneity through centralized program centers and mass audience techniques existed where the Act called for diversity; that public broadcasting too often failed in striking a reasonable balance between local and national programming, and among cultural, entertainment, informational and instructive programs.

Now this is not to say that public broadcasting did not have many substantial achievements. Along with the achievements there has been continued support from the Administration in the form of requests for appropriation from $5 million in 1969 to $45 million in 1974. I think this demonstrates a real recognition of the achievements of public broadcasting, and demonstrates the falsity of the charge that we are trying to dismantle the system. We must recognize, however, that public broadcasting is meant to be more than a government-funded, high-class variation on the commercial network theme. Therefore, we have taken the position that, until there is whole-hearted compliance with the policies of the 1967 Act and the future directions for public broadcasting are clear, the Congress should not be expected to adopt a plan of long-range insulated funding.

Permit me then, against such a background to turn to the CPB-PBS agreement, which has dealt with some of these concerns, and which, I am delighted to say, has made progress in some areas. For example, OTP had called for a graduated distribution formula to assure local stations of financial support for their local operations. The CPB-PBS compromise incorporates this proposal, and strengthens the autonomy and independence of local public television stations by permitting local stations to share CPB funds on a proportion which increases as the level of Federal funding increases.

The consultative process created by the Agreement may not be the final answer to the problem of local station participation in program decision making, but it does remove some of the obstacles and inspires confidence that CPB and the local stations can work together in finding an equitable solution. Yet the strength of local stations in a public broadcast system of checks and balances will not be felt until the stations have realistic programming alternatives to the programs fed by the national network. We shall continue to work toward that goal.

Similarly, the Agreement's approach to the interconnection problem is a positive step in attempting to minimize the dangers of a fixed-schedule, real-time network, although there remain questions which only time and experience can answer. Whatever your opinion of the CPB-PBS compromise, several major areas require watchful waiting; indeed, if the compromise itself calls for quarterly review by the Partnership Review Committee, is it not appropriate for Congress to review that partnership in an authorization hearing one year from now?

But there are additional reasons why a one year authorization would be appropriate at this time. The future of public broadcasting is still left somewhat uncertain by this compromise. It is only realistic to adopt a wait and see attitude when faced with something which promises to do so much in so vast an enterprise as public broadcasting. It was appropriate in 1967 when Congress wrote the Public Broadcasting Act; it is appropriate now. Indeed, it is not inappropriate to recall that the one time Congress did provide multi-year authorizations, public broadcasting moved to centralized program production and fixed-schedule networking, the two major causes of our present difficulties.

Although the CPB-PBS agreement represents a step forward in dealing with such problems, the new PBS must use caution or else it could itself become a centralized bureaucracy, unresponsive to the needs of its members and forcing them to remit a portion of their grants from CPB to finance PBS operations.

Further, still unresolved is the question of journalistic public affairs programming on a taxpayer-supported broadcasting system. While the Agreement's plan to monitor objectivity and balance in programming is a good faith effort to deal with the problem, it is still fraught with danger.

If Federal funds are used to produce controversial public affairs programming without strong assurances of the objectivity and balance called for in the 1967 Act, the government has abdicated its responsibility to see that public broadcasting is used for all citizens. If the government itself oversees the balance and objectivity, it by that very fact has a chilling effect on vigorous broadcast journalism. It is a dilemma inseparable from government-funded news and information programming.

With this background, let me turn to the specifics of H.R. 2742 and H.R. 5045, which are identical, as well as S. 1090, which was passed by the Senate and referred to the House. First, the level of funding in these bills is too high. When all other demands in the federal budget are considered, it is unfortunately not possible to devote $340 million to public broadcasting for Fiscal Years 1974, 1975, 1976 and 1977 (H.R. 2742; H.R. 5045), or $130 million for Fiscal Years 1974 and 1975.

Appropriations at this level would represent an extraordinary increase in the rate of funding. Moreover, until the basic problems underlying public broadcasting are resolved, and until the CPB-PBS Agreement can be assessed in its operation over a year, the Congress should review the funding authorization next year and observe the Corporation's progress in its new partnership role with PBS.

The Administration's bill, H.R. 4560, provides for the healthy development of public broadcasting by extending for one year and by significantly increasing CPB's current authorization. This period would allow public broadcasting a real test under its new agreement and allow Congress time for evaluation. The Administration's bill requests $10 million increased funding for public broadcasting, for a total of $45 million. In addition, the HEW request for Fiscal Year 1974 funding of the Educational Broadcast Facilities Program will be at a $13 million level, even though other HEW programs are feeling severe budgetary pressures.

Mr. Chairman, Dr. Killian has referred to the CPB-PBS compromise as beginning a new era in public broadcasting. I have noted necessary reservations to certain provisions of that Agreement, but I should like to say for the record that public broadcasting has demonstrated real progress in getting its house in order. The time is now right for the Administration, the Congress and the CPB Task Force on Long-Range Funding to renew our joint efforts at achieving a meaningful, long-range funding program for public broadcasting. We hope that with all of us facing up to the problems there can be a more constructive mood among government, CPB, and the local educational stations.

~~Luncheon~~
Lunch Cook

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REMARKS OF

Clay T. Whitehead, Director

Office of Telecommunications Policy
Executive Office of the President

before the

National Cable Television Association
Anaheim Convention Center
Anaheim, California

June 20, 1973

A little over a year ago, one commentator stated that cable television was going to be just the same thing as regular television, only worse. "Real television," he stated, "dreary, hackneyed, boring, and gutless as it is, is at least run by professionals. All the guys in the cable television companies are the guys who aren't good enough to make it in real television." He then lamented that the only things he had seen on his cable set were old British movies -- which he had seen a thousand times before.

This type of comment about cable is not unique. People have made such statements about every new technology or new service that has ever been introduced in the country. Let me read you some of the things that people were saying in the past about a few new-fangled ideas.

Most investors in the 1870's regarded Alexander Graham Bell's telephone invention as an interesting "toy for hobbyists," certainly not a serious long-term investment. One study reported as follows (see if it sounds familiar):

> Bell's proposal to place the telephone in every home and business is, of course, fantastic in view of the capital costs involved in installing endless number of wires.... Obviously, the public cannot be trusted to handle technical communications equipment. Bell expects that subscribers to his service will actually pay for each call made and

> they will agree to pay a monthly minimum if no calls are made. We feel it is unlikely that any substantial number of people will ever buy such a concept ...."

* * *

Obstacles of another sort were encountered by Lee De Forest, the inventor of the vacuum tube, which makes radio broadcasting possible. In 1913, De Forest was brought to trial on charges of using the U.S. mails fraudulently to sell stock to the public in his worthless enterprise. The District Attorney charged that De Forest made the absurd and deliberately misleading claim that it would soon be possible to transmit the human voice across the Atlantic. De Forest was acquitted, but advised by the judge to "get a common garden variety of job and stick to it."

Writing in the 1830's on the growth of the new railroad industry, one commentator argued that railroad growth should be curtailed. The reasons:

> Grave, plodding citizens will be flying about like comets. All local attachments will be at an end. It will encourage flightiness of the intellect. Veracious people will turn into the most immeasurable liars .... It will upset all the gravity of the nation.

* * *

The cable industry can expect to hear similar statements made against its development. In fact, the campaign to stop cable has already begun. Statements are being made in the

press; arguments are being made to the Government; and the public is being told how cable will end the American way of life. Let's take a closer look at some of these claims and charges against cable.

One is that cable must be stopped because viewers should under no circumstances have to pay (or for that matter, be allowed to pay) for what they watch on a television screen. People can buy paperback books, magazines, and movies, but not television shows. Paying for television is inherently against the natural order of things, and maybe even down-right-un-American.

Never mind that there may be many viewers who would be willing to pay to get programming that advertisers don't find it profitable to support. Never mind that the aged, infirm, and the deaf may benefit immensely from having special-interest programming brought into their homes via cable. And that they would be willing to pay for these benefits.

We all know how closed-circuit movies are catching on in hotels and motels. These critics don't seem to realize that they are creating another immoral purpose for renting a hotel room, namely, to pay for a TV program they can't see in their homes.

Others claim that mass appeal national television programming promotes a shared national experience. It inculates a unified national vision in our people. Cable's greatly expanded channel capacity would allow people to watch whatever they wanted, thereby fragmenting the audience and destroying this national vision. Cable might even bring low-cost channels devoted to single communities, or school districts, or even neighborhoods. This would turn communities inward, away from national goals, and it must be prevented.

Others charge that cable will violate the individual's right of privacy. A great deal of information on the subscriber's living habits would become available to industry, and government, resulting in "big-brotherism" in its worst form. Never mind the fact that in stopping cable's growth the Government would also be denying individual consumers the right to decide for themselves what they want to see and hear.

Concerns about privacy and security in cable communications are not only legitimate, they are extremely important; but these concerns are not reason enough for the Government to ban cable's development. As it is necessary it is possible to achieve a balance in protecting the right of privacy

while at the same time allowing customers to buy cable services.

Other complainers charge that cable's two-way educational, library, banking, shopping, and newspaper distribution services would put an end to human interaction. If people could handle their daily transactions via home cable hookup to stores, banks, and libraries, what would become of social contact? There would be an inhuman sense of alienation and individual anonymity (just as books brought about, I suppose).

Moreover, if people could see movies and sports in their homes, won't our theaters and expensive coliseums and sports arenas deteriorate with the rest of our inner cities? Without the bright lighting that is emitted from our arenas, movie and theater marquees, our inner cities and even suburbs will become even more crime ridden.

* * *

Some of these charges are obviously far-fetched, and others are merely self-serving claims advanced by those who stand to lose business by cable's development. Embedded in some of these arguments, however, are elements of fact. We <u>should</u> be concerned over cable's ultimate impact on society.

But before we can determine what cable's impact on society will be, we must know how it is going to develop. And at this point it is too early to tell. We have to have some solid data and, to date, very little is available. It is possible, however, to make a few predictions.

First, cable television is going to come.

It will come with a multiplicity of channels; the majority of our American homes will be wired for cable; and we will have an electronic information distribution system in which cable and related technologies will play a major part.

Regulation at all levels of Government will have to be sorted out, but the biggest point here is that Government should not block cable's growth. No one has done more to that end than Chairman Dean Burch at the FCC. The Commission has done an exceptional job of getting cable moving again. The cable industry and television public owe a great debt to Chairman Burch for removing the regulatory logjam blocking cable's growth.

Many regulatory issues remain, of course, and some important policy issues regarding the regulatory environment for cable must be resolved. The Cabinet committee on cable television has been studying these problems and,hopefully, its recommendations will match the dynamic character and promise of the cable industry. But uncertainties about policy or regulation should not be an excuse for inaction.

Government can go only so far. Cable, like broadcast TV, is going to have to be a profitable private enterprise activity, so don't wait for Government to tell you what to do. The cable industry is going to have to make the next moves. The industry will have to decide whether to expand the range of programming and services presently available to the viewing public and ultimately take its place as full-fledged member of the communications industry. Or whether, instead, to accept the view of many of cable's detractors and remain simply an ancillary retransmission medium or merely as a purveyor of stale old films.

Let's fact it, the viewing public can benefit from the full scale development of cable systems throughout the country only if it means more and better programming with more choice for

the viewer. The potential and capacity of cable to expand programming and the consumer's choice is great indeed. Granted, there will be problems and complications in cable's movement to industrial maturity. But they won't be any more difficult than those encountered by earlier entrepreneurs.

Some of the arguments lodged against the development of the railroads, telephone, and radio industries seem ludicrous to us today. But if you people gathered here measure up to those who went before in other industries, if your main concern is finding out what the public -- the consumer -- wants and needs, then I am sure that generations after us will be similarly amused at some of the exaggerated fears and short-sighted statements that were made against cable in <u>its</u> formative years.

REMARKS OF

Clay T. Whitehead, Director

Office of Telecommunitcations Policy
Executive Office of the President

at the

University of Maryland
College Park, Maryland

April 23, 1974

(transcript of actual remarks as delivered)

Thank you very much.

Listening to the introduction, I reflected very briefly on the relationship between all the policy and economic studies that I did in school and later at the Rand Corporation, and how well that prepared me for my life in the White House. In all deference to your faculty, I will only say to you students that I hope they do better by you as you go out into the world of journalism. On the job training is a very real thing in the White House, and a very real thing in Washington, and it is one of the miracles of our system that people, at least some people, learn as fast as they do.

I am supposed to talk to you tonight about communications and the future, and again, I thought back to my days at Rand when we were doing some studies and I was working with a number of people who were trying to predict what America would be like in the year 2000 (or the year 1976 for some studies) and being a bit of a cynic I began to compare some of their projections with what had actually materialized. As we did more and more analysis and more and more study of the projected studies, we came to the conclusion that predicting 25 years into the future (which is kind of an interesting timeframe) was totally impossible. Projecting ten years into the future, which is just far enough so that you begin to think you might see something interesting, the error rate was something approaching 95%. When you begin to predict one year in the future, no one liked to do that because people remember what you projected, and that was not one of the most popular areas of prediction at Rand.

When I came to my current job I began to think about communications policy, which to me meant how do we regulate communications in the country, what kind of communications do we want for the future, what objectives do we seek our communications systems to serve. In short, where ought we be going? I found very little concensus on any of that. So tonight, if I may, this being a university audience, rather than try to tell you how communications will develop in the future, I thought I would simply try to reflect to you some of the perspectives on what will guide the development of communications in this country and hope that will be of some value to you in drawing your own conclusions.

Much of the popular discussion of communications in the future centers on Marshall McLuhan and his concept of a global village. All of us everywhere in the world, or at least everywhere in this country, have access to much the same kind of information. And then I reflect about the theme of the Rand conference which was specialized communications, the media of the future. Superficially it might seem that there is a conflict between the two, but I think that the exact opposite is true. In the global village, or at least the American village, we are finding a whole host of new communities, non-geographic communities, communities of interest, and these communities need desperately communications. By definition we are talking about specialized communications. This kind of specialized

communications among non-geographic communities I think will be the predominant theme of communications in this country in the future. And also, more and more, our communications in this country will be electronic. I am not sounding the death knell to the Baltimore Sun, I am not sounding the death knell to print journalism, but simply reflecting that electronics is and will be playing a much larger role in our future. Already the lines in electronic and print communications are blurring. We have long distance xerography within the telephone lines. We have telex, and right now the Dow-Jones Company distributes the Wall Street Journal across the country by microwave where it is printed up in remote regional printing presses.

Since the war, since World War II (betrayed my age there in calling that the war), there has been a tremendous outburst of creativity and development in electronics, but unfortunately most of this creativity, most of this development, has not found its way into electronic communications. There are two big, big forces that are retarding experiment and growth in electronic communications.

The first is your friendly U.S. Government and the 1934 Communications Act, which this year is forty years old. By virtue of that Act, which I presume made sense in its day, no electronic communication service of any kind can be offered

in this country without the prior approval of the Federal Communications Commission. The FCC has a way of asking the would-be entrepreneur to prove that his service is worthwhile, to prove that his service is economical, to prove that the public wants it, before he is allowed to even try. I think you can see that that kind of discourages innovation.

The second force retarding innovation in electronic communications is monopoly. Private business in the electronic communications field today is very much characterized by monopoly. The common carrier field by the American Telephone and Telegraph Company, and the television field by the three television networks. Now it is argued, principally by those corporate vested-interests, that the United States has the best television system in the world; that the U.S. has the best phone system in the world; and, indeed, the status quo in communications in this country just turns out to be the optimum communications system for the future. But I think while I agree it is true that we do have the best television system, we do have the best telephone system, it's precisely because we do have the best that we in this country have the ability as no other country in this world does to look beyond basic telephone service, look beyond a basic level of national mass television service, and look to a whole host of new and specialized communications for those non-geographic communities of interest which I mentioned before.

Let me talk briefly about the common carrier field. The telephone business today has a lot in common with the automobile business. For years and years the only Ford that you could get was a black "Model T" and the same with the telephone. Today we have in both the telephone business and the automobile business a proliferation of colors and models, and a lot of optional equipment, but precious little real choice and precious little competition about totally different kinds of communications that we might want -- data, facsimile, computer terminals in the home. Just imagine all those little calculators made in Japan that you would plug into your telephone -- from there into the computer -- from there into the college -- from there into a friend's home -- from there to yourbank -- remote access to libraries. All of that is technically possible, and it looks economically possible. But none of it is going to come until we have some competition in common carrier communications the way the foreign companies gave us competition in the car business.

Let me turn then to television. It seems hard to believe that the public interest in this country could possibly be served by freezing the number of TV channels that we have today, and by blocking the growth of cable television which could greatly expand the number of TV channels each of us has to choose from. Yet if you listen to the broadcast industry today, if you listen to the three television networks, that is exactly what you will be told, that only by preserving the limited number

of channels to choose from can we have quality television. I think exactly the opposite is true. Cable television has to be allowed to grow on an economic basis, as a medium co-equal with broadcasting. It has to have its own regulatory framework passed by the Congress. It has to develop not as a second class medium, living off broadcast television, but rather a new medium encouraged to have a diversity of programming, a multitude of channels -- and that means much more choice for what each of us wants to see and hear.

In short, the world of the future is going to need more communications, it is going to need lower cost communications; and one way or another the great institutions -- the United States Government, the phone company and the three television networks -- are going to have to change in order to permit that to come into being.

Now let me shift and talk about what some of this means for journalism and the media. There are two main points that I would like to make about the media today and how it is different from what we think about it from the past, what so much of our theory of government-media relations is based on. The first difference is that the media in this country have become big business, as we have seen in many ways it has become monopolistic. We have a very limited number of television stations principally programmed by three New York City television stations, i.e., three television networks. We seem to have

fewer and fewer newspapers each year. With the limited number of TV stations, with the shrinking number of papers, with the TV stations often owned by a newspaper in the community, we find fewer and fewer media voices that are available to each of us as citizens.

The second big difference is that Government regulation of the content of television broadcasting is steadily expanding to the point where today we have a pervasive system of content controls administered by Federal bureaucracy over what we see and hear on television. A situation far different than any of us are accustomed to seeing in the print media. The FCC has 14 favored categories of programming, and now they are talking about setting minimum percentages to apply nationwide to what each television station has to program in order to keep its license. As we all know with the tremendous profits in television broadcasting, it would have to be a rather dumb or a rather courageous broadcaster who would not conform to what the FCC wants in the way of programming. We have a Fairness Doctrine, an old goal, something like what motherhood used to be in the days before zero population growth. None of you would be against fairness, but one can wonder about fairness in the media, when that fairness is decided by a Government bureaucracy. When a Government agency seriously undertakes to decide what are issues of public importance, how many sides there are to each of those issues, who qualifies as a legitimate spokesman, whether or not each of those sides on each of those issues has received adequate

coverage, you begin to wonder about censorship. Similarly the FCC's prime time rule,wherein they undertake to specify which hours of which days of the week, which kinds of programming can be taken from the network, which are to be produced locally or bought from syndicated sources.

In short, we have in place today a system of Government control of what we see and hear that seems at least superficially (there is nothing wrong with it being superficial in this regard) to be totally at odds with the First Amendment of our Constitution. How does that come to be? Well, this kind of regulation of broadcasting was based originally on the concept that broadcasters use the public airwaves, and there are a limited number of those airwaves, therefore the Government has some obligation to see how they are used on behalf of the public. But more and more in FCC decisions and in Supreme Court decisions, the rationale has subtly shifted -- shifted away from the use of the public airwaves, and shifted to the fact that there are a scarcity of broadcast stations available. But when scarcity becomes the rationale to the Federal Government deciding about the appropriateness of what the media are programming, we have to look rather nervously over our shoulder at what is happening in the newspaper business. With fewer and fewer newspapers, there are already fewer newspapers, pure daily newspapers in this country, than there are radio broadcast stations. In many communities there are more broadcasting television stations than there are newspapers. In short,

the scarcity rationale applies directly to newspapers, and particularly when you consider the joint ownership of a newspaper and a television station in a particular market, you begin to see scarcity with a vengence.

We look at the situation in Florida where a court of law requires newspapers to give space for the answering of editorials. We see that upheld by the Courts, and we look nervously at the Supreme Court with its justification of controls over the media base on scarcity. We really have to wonder where we are going.

Many people in this country would like to see a Fairness Doctrine for newspapers. They would like to see an equal space requirement in the newspapers just like we have an equal time requirement in broadcasting. If scarcity is the only thing we have to demonstrate as an excuse for Government regulation of the content of the media, there will be no shortage of self-appointed overseers of the public interest who will prove scarcity in order to justify using the processes of the Government to make sure that their point of view gets attention in each of the media.

But I think all of us, if we back-off a bit, even though we might approve of some of the specific results of some of that FCC regulation of broadcasting, even if we might like to see some group of poor people get free space in a newspaper in order to answer an editorial, we all have to ask ourselves if we really believe that a bureaucractically-administered press is a free press. In my judgement there is no way. There is no

such thing as a slightly-administered system of censorship -- be it negative censorship to get the media to delete certain types of coverage; or be it the equally pernicious positive censorship, whereby the Government requires the media to give prominent attention to favored points of view.

The big challenge in electronic communications for the next few years is to make sure that we have a free electronic press and that we keep our free print press. The big challenge to that (the big danger that that will not come about) is not a number of special assistants in the White House who seem demonstratively lacking in judgement, who skirt the edge if not going over into the realm of illegality in using Government processes to coerce the media into providing coverage. I think what we are seeing today in our Government is a clear demonstration that people who lack the judgement to refrain from breaking the law to achieve those ends will be caught.

The real threat is not there. The real threat is the year by year gradual accumulation of perfectly legal Government administration by the FCC and the Courts of more and more details -- all for the best of causes, all for the public interest -- of what actually goes out over our airwaves. With concentrated effort and attention in the Government and with concentrated effort and attention on the part of journalists (be they print or be they in the electronic media), with a lot of public support,-- and

I am not sure that the press establishment in this country can demonstrate either much concentration of effort and attention for much public support, -- but if that could be... -- The way to do that is to systematically reverse the trend over the last ten years of creeping FCC controls over what our electronic media are programming.

What I have said applies with a vengence when it comes to cable television. In cable there seems no need to compromise the public interest and the private interest. Properly regulated, cable television guarantees no use of the airwaves, therefore, no rationale for Government oversight; no scarcity of channels, therefore no need to ration who gets access; it offers us low cost. In short, it all adds up to no excuse on cable television for the Government to control the use of channels or the content of channels as long as we simply assure that everyone has access to those channels, just as everyone today has access to the use of printing presses and the use of the mails.

But when all of that is said and done, when we have slowed the trend towards Governmental specification of what our television system is going to program, when cable television has come and brought lots of television channels, and when Government has no authority whatsoever over how those channels are programmed, when the battle for real press freedom is won and we have a free electronic press just as we have a free print press, when the Government has no legal way to compel fairness,

competence, judgment, accuracy and so forth on the part of the professional journalist, then when that nirvana arrives where does journalism go?

This country is a Government, is an economy and is a society full of checks and balances. The press loves to talk about itself as a vital check on Government and of course it is. In many ways the consciencious, the professional journalist is a guardian of the public interest in Government.

So after all is said and done we are left, and I leave you tonight with, what I think is the central question of a free press in a free society, the question originally asked nearly two thousand years ago, "Who is to guard the guardians?"

Thank you very much.

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STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR

OFFICE OF TELECOMMUNICATIONS POLICY

ON

BROADCAST LICENSE RENEWAL LEGISLATION

before the

Subcommittee on Communications
Honorable John O. Pastore, Chairman
Committee on Commerce
United States Senate

June 18, 1974

The basic structure for the American system of broadcasting, created in the 1920's and early 1930's, was premised on the twin concepts of private responsibility and public accountability. In that the broadcaster was authorized to use the public airways, a scarce resource, he would be responsible for serving the needs and interests of the people in his local community, and would thus be held accountable to the public for the service he rendered in executing this responsibility. As part of this structure, and clearly distinguishing broadcasting from other media, was the provision that broadcasters would be federally licensed. This fundamental decision was made by the Congress in the Radio Act of 1927 and again in the Communications Act of 1934.

The licensing system, thus, presents the Government with a unique dilemma. On the one hand, the Act requires the Federal Communications Commission (FCC) to grant and renew applications for broadcast licenses if the public interest, convenience, and necessity are served thereby. This necessarily means that the Commission will have to hold the broadcaster accountable for, and pass judgment in some way on, the broadcaster's programming. On the other hand, there is a fundamental Constitutional principle and public policy that the First Amendment should protect from governmental intrusion and interference those who

disseminate news, information and ideas to the public, so that the free flow of information to an informed electorate will be unimpeded.

This dilemma requires a particularly delicate balancing act on the part of the Government with respect to license renewal procedures. The manner in which renewals are treated is basic to the Government's relationship to broadcasting. The procedures and criteria governing the license renewal process inevitably have a profound effect on the daily operations of licensees and the way in which they determine and fulfill their public interest responsibilities. If broadcasters see instability in license renewal, they may seek economic and regulatory safety by rendering the type of program service that will most nearly assure renewal of their license. If the Government sets detailed performance criteria to be applied at renewal time, the result will most likely be that the Government's criteria, instead of the broadcaster's perceptions of his local community's needs and interests, will become the benchmark for measuring his public interest performance. Neither the broadcaster's nor the public's First Amendment interests in the free flow of information would be served in such situation.

Broadcasters should be permitted and encouraged to disseminate ideas and information, whether popular or unpopular, whether consistent or not with the views of any particular government. Broadcasters should be encouraged to serve the actual needs of their communities rather than some arbitrary definition of needs imposed by a federal bureaucracy. Yet, current and proposed license renewal procedures could give the FCC the power to renew licenses of only those broadcasters whose programming meets government-imposed standards or criteria. The price of achieving stability in broadcast licensing should not be the insulation of broadcasters from their local communities by making them more responsive to the Government.

Counterbalancing the goal of reasonable stability in the license renewal process, however, is the prohibition in the Communications Act against anyone acquiring a property right in the broadcast license and the First Amendment goal of promoting a diverse and unfettered flow of information and ideas. The Government has an affirmative duty under the Communications Act and the First Amendment, therefore, to foster competition in broadcasting and to assure that broadcasters are responsive to the needs of their communities. The spur of competition and the threat of non-renewal also are indispensable components of broadcast regulation.

These are lofty and complex considerations. There is room for differing views on the priorities and about the proper balance to be struck. The issues transcend short-run political differences. The decisions the Congress makes on license renewal and on other broadcasting and cable communications matters it will face in the next few years will have a major effect on the flow of information and freedom of expression in our society for the rest of this century.

The Congress can take an important step now by adopting a renewal policy that brings reasonable stability to the renewal process; that insulates the broadcaster from the effects of arbitrary and intrusive governmental influence; that turns a broadcaster toward community standards and away from Government standards; and that protects the public through clarification and enforcement of the broadcasters' public interest obligations.

I would now like to address myself primarily to the provisions of S. 1589, the Administration's renewal bill, and to H.R. 12993, the House bill, and analyze them in terms of the problems and objectives just discussed and needed changes in license renewals that should be made.

There are four essential changes that should be made with respect to present practice and procedures in the license renewal process:

(1) the term of broadcast licenses should be extended from three to five years; (2) there should be no requirement for a mandatory comparative hearing for every competing application filed for the same broadcast service; (3) restructuring of the broadcasting industry through the renewal process should be prohibited; and (4) the FCC should be precluded from using predetermined categories, quotas, formats and guidelines for evaluating the programming performance of the license renewal applicant.

1. Longer License Term

Both S. 1589 and H.R. 12993 would extend broadcast license terms from three to five years. We support this proposal as consistent with the public interest goal of stabilizing the renewal process.

In the early days of radio a three-year license term was a reasonable precaution for dealing with and supervising an infant industry. In keeping with the present maturity and modern complexities of the broadcasting industry, a five-year term for broadcasters would be appropriate and consistent with the terms for all other licenses granted under the Communications Act.

2. Comparative Hearing Procedures

Presently, the law requires an automatic, inevitably lengthy and costly, comparative hearing whenever a competing application is filed

for the same broadcast service. Under the Administration bill, S. 1589, the procedures presently applicable to a petition to deny renewal of a license, which are unaffected by our bill, would apply also to a competing application. Thus, the challenger would bear the initial burden of demonstrating that the renewal applicant had not met the renewal criteria of the Act; the FCC would be able to exercise its independent judgment as to whether a comparative hearing was necessary; and a hearing would be required only if the Commission had cause to believe that the broadcaster's performance might not warrant renewal.

It is important to remember that at stake in a comparative hearing is the incumbent licensee's right to operate as a private enterprise medium of expression. In order to insure that such expression is robust, wide open, and unintimidated, this right should be revoked only if clear and sound reasons of public policy demand such action. This change would afford the licensee a measure of stability and some necessary procedural protections. We should not lose sight of the fact that being put through the effort and expense of a five to ten-year comparative hearing is itself a penalty that can be imposed upon a superior broadcaster simply by filing of a competing application.

The expectation of receiving a hearing automatically, with no additional burden of establishing deficiencies in an incumbent's performance, can only encourage the filing of competing applications for bargaining leverage, or harrassment. This undermines the stability of the renewal process, turning it into a forum for inflated promises, and increasing the risk that the process will be abused for ideological or political purposes.

H.R. 12993 lacks procedural safeguards incorporated in S. 1589 and thus fails to afford the broadcaster sufficient procedural protection from these risks.

3. Prohibition Against Restructuring Through the Renewal Process

The third necessary change is to preclude the FCC from any restructuring of the broadcasting industry through application of various policy criteria in individual renewal cases. Under S. 1589, the FCC would be prohibited from using against the renewal applicant any uncodified policies. If the FCC wished to impose or change industry-wide policies affecting broadcast ownership or operation, it would have to use its general rule making procedures. This proposal would prevent arbitrary action against individual broadcasters; would foster the certainty and stability necessary to good broadcast operations; and would

have the additional benefit of assuring that all other interested parties would have opportunity to participate in the proceeding before the rule was adopted.

For that reason, we support that provision of H.R. 12993 prohibiting the utilization of cross or multiple ownership or integration of ownership and management policy principles as criteria in a renewal proceeding unless codified. It should be clear, however, that S. 1589, prohibiting utilization of any policy not reduced to a rule, affords both the broadcaster and the public much greater protection from capricious administrative action than does H.R. 12993, and is thus to be preferred.

4. Clarification of Renewal Standards and Prohibition Against Use of Predetermined Performance Criteria.

The Communications Act of 1934 fails to define what constitutes the "public interest, convenience and necessity," and in the intervening years this standards has come to mean different things to different people. Important and sweeping powers over broadcasting delegated to an administrative agency without any more specific guidelines as to their application than the "public interest," almost invite arbitrary, unpredictable, and ever-increasing regulation. Such vague standards also invite rampant second-guessing of administrative agency action by the courts.

While there is a need to clarify the public interest test used to evaluate the performance of a renewal applicant, we must avoid adopting a test that would risk abridging the First Amendment rights of broadcasters and the public. Such a risk is presented by the current impetus, expressed in the Commission's Docket No. 19154, for example, to establish performance quotas or program percentages as a means to judge a licensee's programming performance.

While such standards would appear to be purely quantitative criteria, it is difficult to conceive of an instance in which the Commission would not look beyond the mere numbers. Since program performance would be what is being measured, it seems reasonable to assume that the Commission would be driven inevitably to making qualitative judgments on program content within quantitative benchmark. If past regulatory history is a reliable indicator of future conduct, we could expect to see such quantitative criteria applied in an increasingly subjective manner and inflated over the years in an elusive game of measure and countermeasure between the regulators and the licensees.

If this should occur, the licensee would not be fulfilling his obligations to operate the station in accordance with the needs and interests of his community, but in response to the requirements of a Federal agency.

S. 1589 would therefore explicitly prohibit the FCC from considering any predetermined performance criteria, categories, quotas, percentages, formats or other such guidelines of general applicability with respect to a licensee's programming.

H.R. 12993 contains no prohibition against such quantification of the public interest and is deficient in that regard.

Both H.R. 12993 and S. 1589 would clarify present license renewal standards, but go about the task in different ways. S. 1589 provides that in addition to compliance with the technical, legal, financial and other requirements of the Communications Act of 1934 and the FCC rules, the FCC could apply only the following two criteria when evaluating a licensee's past or proposed performance under the public interest standard: (1) the ascertainment obligation, by which the broadcaster must be substantially attuned to the needs and interests of its service area and make a good faith effort to respond to those needs and interests in his programming; and (2) the fairness

obligation, by which the broadcaster must provide reasonable opportunity for discussion of conflicting views on public issues.

These two criteria represent a distillation of what the public interest standard means in the context of license renewals. First, that the broadcast license is granted in trust for public service to a particular locality, and second, that the licensee, as trustee, is responsible for providing such service. The FCC's role would be limited to review of the licensee's reasonable and good faith efforts in executing these obligations. In the context of FCC review of broadcaster performance, "good faith" is an objective standard of reasonableness and not a subjective standard relating to the broadcaster's intent or state of mind. It makes clear the intent of Congress that the FCC is to focus on the community's definition of its needs and interests in programming rather than imposing on the broadcaster and the community the Commission's own judgments about what is good programming.

H.R. 12993 also would condition the renewal of a broadcast license on the retrospective assessment of a licensee's ascertainment efforts and whether his operations have been responsive to the needs, views, and interests of the public

in his service area as ascertained. This provision is similar, of course, to that of S. 1589. Both bills would turn the broadcaster back to his community to find what programming will serve the public interest, and are thus designed to reduce the role of the government in the relationship between a broadcaster and the local community which he serves. We therefore support this aspect of H.R. 12993.

Although we do not consider the House bill's failure to address specifically in this context the broadcaster's fairness obligation as a serious deficiency, the Congress should not allow the opportunity presented by license renewal legislation to pass without expressing the need for some substantial improvement in enforcement of the fairness obligation under the FCC's Fairness Doctrine.

The broadcaster's fairness obligation to present contrasting views on controversial issues of public importance is a long-standing requirement. It is intended to protect the broad interest of the public in fostering a diverse flow of information and ideas. We support the enforcement of this fairness obligation as long as it is done principally, and as originally intended, on an overall basis at renewal time. What we do not support is the present approach of enforcing this obligation on an

issue-by-issue, case-by-case basis. It is this enforcement process that has come to be known commonly as the Fairness Doctrine and has become so chaotic and confused.

If the Congress decides to make no specific reference to the fairness obligation, then the legislative history of the renewal bill should include a congressional statement that the preferred way to evaluate the broadcaster's journalistic responsibility is by overall review of his performance under the fairness obligation at renewal time rather than on a case-by-case basis throughout the license term. The legislative history of H.R. 12993 is silent in this respect, and that in itself is a deficiency.

H.R. 12993 would add some provisions to the Communications Act that S. 1589 does not cover. These include addition of the word "views" to the usual formulation of the broadcaster's ascertainment obligation; a requirement for FCC procedures governing negotiations between broadcasters and persons raising significant issues about station operations; a requirement for strict adherence to time limits for filing petitions to deny; removal of the exclusive jurisdiction of the U.S. Court of Appeals for the District of Columbia over license renewal matters and other appeals of certain decisions and orders of the FCC; requirement for continuing FCC study of deregulation in the broadcast service; and a requirement that the FCC complete action on Docket No. 18110, regarding cross-ownership matters.

I have no quarrel with most of these provisions. I believe, however, that the addition of the word "views" would inject confusion into the ascertainment process, and I support Senator Scott's bill in its deletion of the word. Moreover, I object to the section dealing with FCC procedures for good faith negotiations with complainants during the course of the license period. Of course, broadcasters should always deal in good faith with persons raising significant complaints. This is an important obligation that most broadcasters have met throughout the years. But I see no need to invite further FCC regulation of the relationship between the broadcaster and the communities he is licensed to serve, nor to cast this relationship in an adversary mold. The license renewal process itself, if improved by the legislation before the Congress, will provide adequate incentives for the broadcaster to cooperate with local public groups and interests, if the license is to be renewed.

* * *

The major concerns with H.R. 12993 are that it does not provide adequate insulation from the harassment that can arise from the present automatic hearing requirement for competing applications and from the increase in Government control of program content that could result from adoption of illusory quantitative program

standards and guidelines. These are serious deficiencies in light of recent broadcast regulatory history which has witnessed an increase in filing of competing applications, and an apparently inexorable accretion in regulatory power, and willingness to apply that power, to force compliance with administratively imposed program requirements. The 1960's, for example, were marked by the administrative and judicial evolution and application of the Fairness Doctrine on a case-by-case basis to specific program and commercial content; the WHDH case; and by the regulatory establishment of licensee obligations to carry specific types of programming. This process has continued into the 1970's, which have been marked by a variety of proposals to force broadcasters to carry counter-advertising, to prescribe how children's programs should be improved, and to set mandatory percentages of various types of TV programming.

Of course, the FCC and the courts have not had this territory entirely to themselves. Executive Branch officials in this and past administrations have also expressed their concerns about broadcast program content. But the Executive Branch has no life and death control over broadcasters, as do the other branches of government, so broadcasters can pay the Executive Branch less heed. But, given the trend of increasing Government controls, it is easy to see why broadcasters might get edgy when any official makes a critical comment.

Whether attempts to influence broadcast programming have come from the FCC, the courts, or the Executive Branch, it is the existence of regulatory mechanisms of program control that gives rise to the potential for abuse, and it is the existence of these mechanisms that the Congress should deal with through enactment of legislation.

I submit that much of the current political turmoil over abuse of FCC processes makes it clear that there is a definite need for increasing the insulation of the broadcaster from governmental intrusions in his First Amendment rights. This could be achieved by enactment of license renewal legislation that contains the essential safeguards of S. 1589 which are missing from H.R. 12993.

S. 1589 is designed to strengthen the First Amendment freedoms of broadcasters. All four changes in our bill promote the cause of less -- rather than more -- Government regulation and substitute, as much as possible, the voluntary exercise of responsibility by broadcasters for the often heavy and arbitrary hand of Government. In short, both S. 1589 and H.R. 12993 turn the broadcaster back to his service area for guidance on his program service, but only S. 1589 achieves this fully by insulating the broadcaster from arbitrary or capricious Federal interference in his First Amendment rights.

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STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR
OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT

ON

S. 3825

PUBLIC BROADCASTING FINANCING ACT OF 1974

before the

SUBCOMMITTEE ON COMMUNICATIONS
HONORABLE JOHN O. PASTORE, CHAIRMAN
COMMITTEE ON COMMERCE
UNITED STATES SENATE

August 6, 1974

Mr. Chairman, members of the Sub-Committee, I welcome this opportunity to appear before you today to discuss S. 3825, the Administration's proposed long-term funding plan for public broadcasting.

It was four years ago that I appeared before you at the hearing regarding my confirmation as Director of the Office of Telecommunications Policy (OTP). At that time, you reminded me of this Administration's pledge to submit a long-range funding plan for the Corporation for Public Broadcasting (CPB) and the local educational stations it is intended to serve. I promised that we would do so. I never realized then what an arduous journey it would be before we could keep that promise.

Working closely and constructively with public broadcasters, we have now devised a financing mechanism that satisfies as fully as possible the many objectives and concerns surrounding such an important and sensitive subject.

Mr. Chairman, the bill is analyzed in detail in the material we submitted with the legislation, and I offer it for the record. Therefore, I would like, in my time here today, to

review briefly how we arrived at this financing approach and how this approach serves and enhances the fundamental principles first set out in the Public Broadcasting Act of 1967.

Those principles are, first, that there must be local station autonomy from centralized control within the public broadcast system and, second, that there must be insulation of programming from Government control arising out of the use of Federal funds.

We all agree that program choices must be left to the judgment of broadcasters, independent of the wishes of Government officials. But a medium of expression funded through the Federal appropriations process can never be totally independent of Government. It matters little that governmental control is not actually exerted over programming; the mere potential for such control and influence can chill--or charm--the exercise of independent judgments by educational broadcasters. For these reasons, the Carnegie Commission on Educational Television strongly recommended permanent, insulated financing for the Corporation--that is, financing completely free of the budgetary process of the Executive Branch and the appropriations process of the Congress.

OTP rejected this recommendation, just as the Johnson Administration and this Sub-Committee did in 1967, when legislation created the framework, but not the financing, for public broadcasting. The reason for the rejection is that the Congress has an inescapable responsibility for holding the recipients of tax dollars accountable for their use of public funds. This is a valid and necessary governmental responsibility even when the recipients of such funds operate a communications medium.

Annual appropriations are just as unacceptable as permanent appropriations, because there is insufficient insulation between the budgetary and appropriations processes and sensitive programming judgments. A multi-year appropriation represents a reasonable balance between the conflicting objectives of insulated financing and Government fiscal responsibility.

We did not, however, urge multi-year appropriations prior to this time, since we felt an obligation to see that public broadcasting was developing in line with the goals of the 1967 Act--to do otherwise would be to set in concrete a system which worked at cross purposes to the intention of that legislation. The Administration's recognition of this responsibility was interpreted by some as an attempt to dismantle public broadcasting. But we were not quarrelling

with public broadcasting as envisioned in the 1967 Act. We did object to a fixed schedule, real-time public network controlled and programmed in Washington in a manner that made a sham of meaningful local participation.

Despite those problems, this Administration continued its support for the public broadcasting system, recognizing its contributions as well as its shortcomings. Our funding requests for CPB have increased from $5 million in 1969 to $60 million for 1975. But we rightly withheld support of a long-range, insulated funding plan, until the public broadcast system operated with checks and balances adequate to merit long-term funding without intervening Congressional review.

Over the years public broadcasting changed. The structure of the system and the policies of CPB and the Public Broadcasting Service now reflect the importance of a direct and real local station participation in programming decisions at the national level. We have reached the point where insulated funding of the system is not only appropriate, it is essential if public broadcasting is to continue its present course to excellence and diversity.

I would now like to turn to the provisions of the Administration's proposed bill. S. 3825 is more than an appropriation for public broadcasting. It completes the basic structure established in

the 1967 Public Broadcasting Act by providing for insulated funding, with Congressional oversight every five years, and fosters the goal of local autonomy by the "pass-through" of funds to local stations.

Under this financing plan, funds would be simultaneously authorized and appropriated on the basis of a matching formula. The Federal Government would match 40 percent of the entire public broadcasting system's non-Federal income for each fiscal year. This amounts to one Federal dollar for every $2.50 contributed to public broadcasting by non-Federal sources.

This matching fund formula insures strong Federal support for public broadcasting and, at the same time, creates an incentive to generate non-Federal contributions. As the Federal share will represent at most 28 percent of public broadcasting's total income, the matching principle also assures that Federal funds will not dominate the financing of the system.

It is clearly necessary for the Administration to propose and for Congress to set a maximum amount--or ceiling--for the Federal funds available in a given year. The annual ceilings

proposed in S. 3825 reflect the Administration's estimate of the needs of the system. The ceilings also take into account the other demands upon the Federal budget, as well as the over-riding need to economize in the face of current fiscal problems. I believe that the ceilings in our bill are adequate. Naturally, those in public broadcasting believe that higher ceilings are needed. However, this is the first venture into multi-year appropriations for public broadcasting and it is prudent to establish conservative limits at the outset.

The proposed legislation also serves the essential principle of localism by building into the system checks and balances against centralization of power over programs and operations. The Administration's support of localism often has been misconstrued to mean that we are against nationally produced and distributed programs and want only those that are produced and originated at local stations. Of course, there must be a balanced mix of nationally and locally originated programming, but this is not the main thrust of the localism principle. It is that local educational stations should have a substantial role to play and a voice in national programming decisions and a meaningful choice in deciding whether to broadcast those programs

to their local audiences. This concept goes back to the Congress' own intent in the 1967 Act. The system created by that legislation was based on the concept of localism not merely because local autonomy in and of itself was seen as a desirable social goal. It is also the best way to promote the more basic concept of diversity. Only when there is assurance of substantial diversity of ideas and information will a Government-funded medium of expression be compatible with our country's values; and it is only then that exercise of governmental budgetary responsibilities can be limited to five-year intervals.

To foster the principle of localism, S. 3825 requires that a substantial percent of the annual appropriation of the Corporation be passed on to the local stations for use at their discretion. In addition to insuring significant financial support for local stations, the bill requires the Corporation to consult with the stations in making decisions regarding the distribution of the Federal funds.

I recognize that, controversial as it has been in the past, the notion of pass-through funds to enhance local station autonomy in a structure of checks and balances is not particularly controversial now. As is apparent from the enactment of the

Budget Reform Act of 1974, however a multi-year appropriation is an extraordinary request to make of both the Executive and Legislative branches. But public broadcasting, and the viewers and listeners it serves, should ask for or accept no less from those of us in Government.

The financing of public broadcasting presents rare and unique circumstances in which the Executive and Legislative branches should give up some of the control they wield over federally funded programs by virtue of the annual authorization and appropriation process. This unusual funding mechanism is essential, if the public broadcasting system as conceived by the 1967 Act is to succeed. It is that simple. For that reason the Administration has put aside its own reservations and has proposed this bill. For the same reason Congress should loosen its control of public broadcasting's pursestrings and pass this legislation.

The past seven years have brought us all to a point at which we simply must trust the people who run the stations and the national public broadcast organizations and trust the American people who would be the true beneficiaries of this funding approach. I am not asking the Congress to have blind faith in public broad-

casting; just as I did not ask that of the President in urging him to send this legislation to the Congress. But we have created the system; it is a reality. We must now give it a chance to succeed according to the original vision for a truly independent and financially insulated system of public broadcasting. To do so, I have discovered, you must be willing to respect both reality and idealism. This bill is our best effort to combine the two. I commend it to you and your colleagues.

STATEMENT BY

CLAY T. WHITEHEAD, DIRECTOR

OFFICE OF TELECOMMUNICATIONS POLICY

before the

Subcommittee on Constitutional Rights
The Honorable Sam J. Ervin, Chairman
Committee on the Judiciary
United States Senate

February 2, 1972

I am pleased to have this opportunity to appear before you today, to discuss some aspects of the First Amendment which it is an important concern of my Office to protect. I wish to address my remarks specifically to the First Amendment implications of the two most significant innovations in our mass communications system during the past decade.

The first of these is cable television. Coaxial cable and related technologies enable large numbers of electronic signals--television signals included--to be carried directly into the home by wire rather than being broadcast over the air. There is no particular limitation on the number of signals which can be provided; systems now being constructed typically have the capacity to carry about 20 television channels, and can be readily expanded to 40.

The original use for this technology was "CATV," or Community Antenna Television. As its name implies, that involved no more than the use of cable to carry broadcast signals picked up by a high master antenna into homes in areas where reception was difficult. In recent years, however, use of the technology has progressed far beyond that. Many cable systems now use microwave relay systems to import television signals from far distant cities. Some originate programming of their own, and make unused channels available to private individuals, organizations, schools, and municipal agencies. Looking into the future, cable technology has the potential to bring into the home communications services other than television--for example, accounting and library services,

remote medical diagnoses, access to computers, and perhaps even instantaneous facsimile reproduction of news and other printed material. But I wish to focus upon the immediate consequences of cable, and in particular its impact upon mass communications.

I do not have to belabor the point that the provision of 20 to 40 television channels where once there were only four or five drastically alters the character of the medium. It converts a medium of scarcity into a medium of abundance. As this Subcommittee is aware from earlier testimony, one of the most severe problems which must be faced by broadcasters today is the allocation of limited broadcasting time--allocation among various types of programming, and allocation among the many groups and individuals who demand time for their point of view. Cable, if it becomes widespread, may well change that by making the capacity of television, like that of the print media, indefinitely expandable, subject only to the economics of supply and demand.

Of course the new medium also brings its own problems, several of which are immediately related to First Amendment concerns. Economic realities make it very unlikely that any particular community will have more than a single cable system. Unless some structural safeguard or regulatory prohibition is established, we may find a single individual or corporation sitting astride the major means of mass communication in many areas.

The second aspect of this new technology which bears on the First Amendment is, to my mind, the more profound and fundamental, because it forces us to question not only where we are going in the future, but also where we have been in the past. That aspect consists of this: the basic premises which we have used to reconcile broadcasting regulation with the First Amendment do not apply to cable.

In earlier sessions of these hearings, this Subcommittee has heard three principal justifications for Government intrusion into the programming of broadcast communications: The first is the fact of Government licensing, justified by the need to prevent interference between broadcast signals. But with cable, there is nothing broadcast over the air, no possibility of interference, and hence no unavoidable need for Federal licensing. The second is "the public's ownership of the air waves" which the broadcaster uses. But cable does not use the air waves. The third is the physical limitation upon the number of channels which can be broadcast in any area--meaning that there is oligopoly control over the electronic mass media, in effect conferred by Federal license. But the number of feasible cable channels far exceeds the anticipated demand for use, and there are various ways of dispersing any monopoly control over what is programmed on cable channels.

In other words, cable television is now confronting our society with the embarrassing question: Are the reasons we have given in the past forty-odd years for denying to the

broadcast media the same First Amendment freedom enjoyed by the print media really reasons--or only rationalizations. Why is it that we now require (as we in effect do) that each radio and television station present certain types of programming--news, religion, minority interest, agriculture, public affairs? Why is it that our courts repeatedly intervene to decide, or require the FCC to decide, what issues are controversial, how many sides of those controversies exist, and what "balance" should be required in their presentation? Is it really because the detailed governmental imposition of such requirements is made unavoidable by oligopoly control of media content or by the need to decide who is a responsible licensee? Or is it rather that we have, as a society, made the determination that such requirements are good and therefore should be imposed by the Government whenever it has a pretext to do so? And if it is the latter, is this remotely in accord with the principle of the First Amendment, which (within the limitation of laws against obscenity, libel, deception, and criminal incitement) forbids the Government from determining what it is "good" and "not good" to say?

This stark question is inescapably posed by cable technology. The manner in which we choose to regulate cable systems and the content of cable programming will place us squarely on one or the other side of this issue. Perhaps the First Amendment was ill conceived. Or perhaps it was designed for a simpler society in which the power of mass media was not as immense as it is today. Or perhaps the

First Amendment remains sound and means the same thing now as it did then. The answer to how we as a nation feel on these points will be framed as we establish the structure within which cable television will grow.

Because the President realizes that such fundamental issues are involved, he has determined that the desirable regulatory structure for the new technology deserves the closest and most conscientious consideration of the public and the executive and legislative branches of Government. For this reason, he established last June a Cabinet-level committee to examine the entire question and to develop various options for his consideration. Not surprisingly, in view of the magnitude and importance of the subject, the work of the committee is not yet completed. I assure you, however, that First Amendment concerns such as those I have been discussing are prominent in our deliberations--as I hope they will be prominent in yours when the Congress ultimately considers this issue.

I now wish to turn to what I consider the second major innovation in our mass communications system during the past decade--the establishment of a Corporation for Public Broadcasting, supported by Federal funds. The ideals sought by this enterprise are best expressed in the following excerpt from the Report of the Carnegie Commission on Educational Television.

> "If we were to sum up our proposal with all the brevity at our command, we would say that what we recommend is freedom. We seek freedom from the constraints, however necessary in their context, of commercial television. We seek for educational television freedom from the pressures of inadequate funds. We seek for the artist, the technician, the journalist, the scholar, and the public servant freedom to create, freedom to innovate, freedom to be heard in this most far-reaching medium. We seek for the citizen freedom to view, to see programs that the present system, by its incompleteness, denies him."

In addition to this promise, public television also holds some dangers, as was well recognized when it was established. I think most Americans would agree that it would be dangerous for the Government itself to get into the business of running a broadcasting network. One might almost say that the free-speech clause of the First Amendment has an implicit "non-establishment" provision similar to the express "nonestablishment" restriction in the free-exercise-of-religion clause. Just as free exercise of religion is rendered more difficult when there is a state church, so also the full fruits of free speech cannot be harvested when the Government establishes its own mass communications network. Obvious considerations such as these caused Federal support of public broadcasting to be fashioned in such a way as to insulate the system as far as possible from Government interference.

The concern went, however, even further than this. Not only was there an intent to prevent the establishment of a Federal broadcasting system, but there was also a desire to avoid the creation of a large, centralized broadcasting system financed by Federal funds--that is, the Federal "establishment"

of a particular network. The Public Broadcasting Act of 1967, like the Carnegie Commission Report which gave it birth, envisioned a system founded upon the "bedrock of localism," the purpose of the national organization being to serve the needs of the individual local units. Thus it was that the national instrumentality created by the Act--the Corporation for Public Broadcasting--was specifically excluded from producing any programs or owning any interconnection (or network) facilities.

Noncommercial radio has been with us for over 50 years and noncommercial television for 20. They have made an important contribution to the broader use of communications technology for the benefit of all. The new Corporation for Public Broadcasting has, for the most part, made a good start in expanding the quantity and quality of programming available to local noncommercial broadcasting stations. There remain important questions about the most desirable allocation of the Corporation's funds among educational, instructional, artistic, entertainment, and public affairs programming. But most importantly, from the First Amendment standpoint, there remains a question as to how successful the Corporation has been in avoiding the pitfalls of centralization and thereby of Government "establishment." Now that we have a few years' experience under this new system, we see a strong tendency--understandable but nonetheless regrettable--towards a centralization of practical power and authority over all the programming developed and distributed with

Federal funds. Although the Corporation for Public Broadcasting owns no interconnection facilities, which the Act forbids, it funds entirely another organization which does so. Although it produces no programs itself, which the Act forbids, the vast majority of the funds it receives are disbursed in grants to a relatively few "production centers" for such programs as the Corporation itself deems desirable--which are then distributed over the Corporation's wholly funded network. We have in fact witnessed the development of precisely that which the Congress sought to avoid--a "Fourth Network" patterned after the BBC.

There is, moreover, an increasing tendency on the part of the Corporation to concentrate on precisely those areas of programming in which the objection to "establishment" is strongest, and in which the danger of provoking control through the political process is most clear. No citizen who feels strongly about one or another side of a matter of current public controversy enjoys watching the other side presented; but he enjoys it a good deal less when it is presented at his expense. His outrage--quite properly--is expressed to, and then through, his elected representatives who have voted his money for that purpose. And the result is an unfortunate, but nonetheless inevitable, politicization and distortion of an enterprise which should be above faction and controversy.

Many argue that centralization is necessary to achieve efficiency, but I think it is demonstrable that it does not make for efficiency in the attainment of the objectives for

which public broadcasting was established. For those objectives are variety and diversity--almost inherently antithetical to unified control. To choose for public broadcasting the goal of becoming the "Fourth Network" is to choose for it the means which have brought success to the first three--notably, showmanship and appeal to mass tastes. This is not to say that there should be no nationally produced programming for public television. Some types of programming not offered on commercial television require special talent, unique facilities, or extensive funds that can only be provided at the national level; it is the proper role of the Corporation to coordinate and help fund such programming. But both for reasons of efficiency and for the policy reasons I have discussed above, the focus of the system must remain upon the local stations, and its object must be to meet their needs and desires.

The First Amendment is not an isolated phenomenon within our social framework, but rather one facet of a more general concern which runs throughout. For want of a more descriptive term we might describe it as an openness to diversity. Another manifestation of the same fundamental principle within the Constitution itself is the very structure of the Nation which it established--not a monolithic whole, but a federation of separate states, each with the ability to adopt divergent laws governing the vast majority of its citizens' daily activities. This same ideal of variety and diversity has been apparent in some of the most enduring legislation enacted under the Federal

Constitution. Among the le was the Communications Act of 1934. Unlike the d broadcasting systems of other nations, such as Frangland, the heart of the American system was to be station, serving the needs and interests of its localy--and managed, not according to the uniform dictatentral bureaucracy, but according to the diverse of separate individuals and companies.

In 1967, when Congred the Public Broadcasting Act, it did not abandon thand discard the noble experiment of a broadcasting syd upon the local stations and ordinated towards diversi would indeed have been a contradictory course, for e purpose of public broadcasting was to increase, an diminish, variety. It is the hope and objective of inistration to recall us to the original purposes of t I think it no exaggeration to say that in doing so we lowing the spirit of the Constitution itself.