

**Reforming the Federal Communications Commission
Comments of Henry Geller**

First, I fully agree with Phil Weiser's recommendations. They are urgently needed if there is to be genuine dialogue between the FCC and the public (and astonishingly between the Commissioners), instead of the Chairman's present ex parte decisional mode of proceeding. The proposals need no legislation and could be adopted by new Chairman/FCC. The Sunshine Act is not working at the FCC and may require legislative consideration.

The Weiser suggestions are "low hanging fruit" and, I believe, are not controversial. What I will now put forth, however, are controversial, require legislation, and should therefore decidedly not be the initial reform thrust. But I strongly believe that more drastic reform is called for and thus should be brought to the attention so that at some future time when it is more appropriate, it can be pushed. At one point, Chairman Bill Kennard planned to urge its consideration in a speech but unfortunately that window of opportunity closed due to competing circumstances. Even if the speech were delivered, it must be remembered that it took decades to reform the ICC and CAB and the same thing would be true as to the FCC.

The reform in question rests on two crucial considerations: (1) The Commission is mistaken and simply wasting resources in dealing with the behavioral content regulation of commercial TV (the public trustee regime); and (2) if this defective policy were eliminated, thus enabling the replacement of the multi-member Commission with a single administrator like EPA, there would be much more effective focus on the critical areas like spectrum and telecom matters like broadband expansion, common carriage (net neutrality), wireless growth and competition, and outdated subsidy schemes.

As to (1), there has been an explosion of new media in the last few decades – cable TV, direct satellite TV, TiVO/Netflix, DVDs, the Internet and video streaming. Soundly, none of these new

services come within the public trustee, behavioral content scheme of regulation. Yet, one service, commercial TV, comes within a regulatory scheme adopted over 80 years ago, as if it were the one and very way of delivering video. Why, for example, should not commercial TV be treated like cable TV and come within the same regulatory and constitutional jurisprudence? Cf. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994). The public does not care at all about the manner of delivering video to the TV set – it is focused only on the content and the cost.

Further, and equally important, the public trustee regulatory scheme has been a failure. As Ronald Coase stated, “,,,the regulation of broadcasting by the Federal Communications Commission resembles a professional wrestling match, The grunts and groans resound through the land, but no permanent damage seems to result” (*The Economics of Broadcasting*, at 96). I have attached as Appendix A an excerpt from a recent paper I prepared for a conference on the Gore Report 10 years later (*Information Economy Report*, GWU). The excerpt illumines the failure of the public trustee behavioral content approach and the reasons therefore, and the very different scheme to be adopted that would result in provision of high quality public service programs. The so-called social contract, whereby the commercial broadcaster sacrifices profits in order to render public service, would be set aside, and in place of the public service obligation, there would be a fee of 5% of the advertising revenues which would go to a trust fund for public broadcasting. For the first time, the regulatory scheme would work for the achievement of high quality public service such as in children’s programming, in-depth informational fare, cultural programs, minority, etc. For example, public TV wants to present and publicize a channel for the pre-schooler, one for school aged, another for literacy, and another for teachers or parents.

Thus, broadcasting would be treated like its main rival, cable TV. First Amendment strains would be reduced, because the government would no longer be trying to make commercial broadcasters act against their driving economic interests in a milieu of fierce and increasing competition among video providers.

As to (2) above, with this sea change and other steps to eliminate politically sensitive areas from the FCC's ambit (see App. A at 12-13), there would be no need for a bipartisan, multi-member commission, and thus no impediment to employing the single administrator approach for the FCC – a Federal Telecommunications Administration (FTA) like the EPA. The single administrator approach has been urged many times over the years by people who have served on the multimember commissions.¹ The strongest advocate was the Ash Council², but it did not recommend this organizational form for the FCC because “it would be inadvisable to place in the hands of a single administrator the power to exercise control over industry members through licensing and programming decisions” (at 25). With the changes set out in App. A, the single administrator could not be called upon to handle sensitive or political matters like political broadcasting, indecency, ownership caps, or licensing involving public service content review. There are benefits from this organizational reform: greater efficiency, reduced costs, and, most important, heightened accountability for critical decisions in areas like spectrum and telecom competition. Particularly if the term were set at ten years as recommended by Landis³, the president would have to take much greater care in both the appointment and retention of the administrator, with much greater emphasis on competence and expertise rather than political

¹ E.g., Letter from Newton N. Minow to the President, May 31, 1963, N. Minow, *Equal Time*, Atheneum, 1964, 277-289; Philip Elman, *A Modest Proposal for Radical Reform*, 36 *American Bar Association Journal* 1045 (1970); L.J. Hector, *Problems of the CAB and the Independent Regulatory Agencies*, 69 *Yale L.J.* 931 (1960).

² Report of the President's Advisory Council on Executive Organization 1971, finding that differences among the members “.. prevent the commission from responding effectively to changes in industry structure, technology, economic trends and public needs” (at 4); that “it is difficult to induce highly qualified persons to serve as co-equals on collegial commissions”(ibid.); and that the commissions “...are not sufficiently accountable for their actions to either the Congress or the President...” (at 5).

³ James M. Landis, *Report on the Regulatory Agencies to the President=Elect* (1960), at 59.

reward. This point is of the greatest importance: “Good men can make poor laws workable; poor men will wreck havoc with good laws” (Landis, at 6).

Finally, as a further example of promoting effective policy making, administration of the all important spectrum area would come under a single focal point, instead of the present split between government and non-government.

APPENDIX A

Excerpt from Geller paper on Gore Report 10 years later submitted to Information Economy
Project, GWU, October, 2008

The main goal of the public trustee scheme is to have the commercial broadcaster provide a reasonable amount of public service programming in three areas – local outlet (the TV allocation plan uses an inordinately large amount of spectrum to secure this local service), informational programs so that broadcasting will contribute to an informed electorate, and to the education of children who spend so much time with television. Since such programming is not as popular as the regular entertainment fare, it garners much less advertising support and the broadcaster foregoes profit. Further, commercial broadcasters face ever increasing fierce competition for the advertising dollar from the cable and satellite video systems and the internet and other new electronic delivery means. The crucial bottom line is that the regulatory scheme is striving to have the commercial broadcaster act against its driving financial interest in an increasingly difficult competitive market.

If public service programming is thus the goal, naturally what is most desirable in that respect is programming of a high quality nature. But in the United States, for very sound reasons, regulators are not allowed to judge the quality of programs. That is too subjective, and clearly would constitute censorship in violation of the First Amendment. So all the regulatory regime can do is to delineate the areas of public service and at most, specify specific amounts of such programming during specified time periods (e.g., 6 a.m. to midnight).

With one exception to be focused on later (implementation of the 1990 Children’s Television Act (CTA), the Commission never adopted a numerical standard for renewal. Twenty six years after its 1934 creation, the Landis Report to President Kennedy found that the Commission need not have “drifted” so long, and criticized its inaction, its “capture” by industry (especially the broadcasters), and its subservience to Congress.⁴ Thirteen years later, FCC Chairman Dean Burch told a broadcast industry group: “If I were to pose the question, what are the FCC’s renewal policies, and what are the controlling guidelines, everyone in the room would be on equal footing. You couldn’t tell me. I couldn’t tell you -- and no one else at the Commission could do any better (least of all the long-suffering renewal staff)”.⁵

Again with the single exception of CTA, the above statement holds true for every year since the passage of the 1934 Act and the creation of the FCC. Ironically, in 1984 the Commission adopted a deregulatory policy. The broadcaster sends only a postcard at renewal (hence postcard renewal). It is required to present community issue-oriented programming (really just non-entertainment programs) and to maintain at the station a public file setting out illustrative examples of such programming in sufficient amount to permit the public to file a petition to deny at renewal based on the showing.⁶ This is deregulatory because as would be expected, the public rarely examined the station’s public file or filed a protest at renewal.⁷

⁴ Subcommittee on Administrative Practice and Procedure of the Senate Comm. On the Judiciary, 86th Cong., Report on Regulatory Agencies to the President Elect (Comm. Print 1960), James M. Landis (herein Landis Report), at 53-54.

⁵ Dean Burch, address to the International Radio and Television Society, Sept. 14, 1973 (FCC Memo 06608, at 3).

⁶ Deregulation of Television, 96 FCC2d 1076 (1984); 104 FCC2d 358 (1986).

⁷ See Report and Order on Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, FCC 07-205, Jan. 24, 2008, pars. 10-12, 39,

In the Telecommunications Act of 1996, the Congress continued the deregulatory mode. While it reaffirmed the public interest obligation of broadcasters, it extended the license period from three to eight years, and eliminated the opportunity for a comparative renewal hearing.⁸

The Gore Report did have one positive impact: The FCC's January 24th Report on Standardized and Enhanced Disclosure Requirements (see n.4, below). Citing the Gore Report, the Commission adopted a standard form requiring broadcasters to delineate the public service programming broadcast on the primary channel (the one with entertainment, sports, etc), and to make the form available on the station's website or, alternatively, on the website of the state broadcasters association. This might promote more public service programming through a process aptly termed "lifted eyebrow" – that is, the station might be reluctant to have zero or very little programming in category after category.⁹

However, it is important that the FCC stressed in this regard that it was not making any substantive change. Thus, the Commission was not requiring any minimum amount of programming in any category or combination of categories; the licensee was left with great discretion as to the programming and amount in any category and also the judgment to be made in categorizing a program.

Clearly the Commission has made it much easier for public groups to examine the licensee's public service efforts. Whether the public will take advantage of this new opportunity or whether it will continue to be indifferent, is a question that can be settled only by experience. Even if the public does turn to internet examination, it will face difficulty in deciding whether to challenge renewal, assuming that the station has some programming in some of the various categories like news or civic affairs programming, because of the absence or any minimal requirements.

It might be argued that this could be remedied by having the FCC conclude a proceeding that does impose numerical requirements, either in all the categories or more likely, in some combinations of the standard categories (or with some specification of the amount of locally originated programs in these categories). But here the experience with the CTA becomes instructive.

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

In March, 1993, the FCC found that there had been no increase in the hours of E/I programming, with many licensees relying on PSAs and vignettes to meet the CTA obligation. Other licensees proffered animated programs like "The Flintstones" and "GI Joe" as E/I, asserting that the programs include a variety of generalized pro-social themes. The time slots for educational

⁸ See Part II, Sec.201 (Sec. 336(d)); sec. 204 (broadcast license renewal procedures).

⁹ This might be the reason for the NAB's appeal of the FCC's action. NAB v. FCC, C.A.D.C.

programming were often before 7 a.m., when the child audience is minimal.¹⁰The reason for these deficiencies is that the Commission, from 1991 through 1992, was being administered by a Commission hostile to the notion of requiring public service in specific categories like children's educational fare. As a result, there was no enforcement of the CTA, and the above woeful picture emerged.

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

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

(i)The object is not just quantity but high quality educational programming. The non-commercial system is motivated to present such programming, even though it is more expensive, and has a long track record of doing so. The commercial system has no such incentive or history. The commercial system, with its profit incentive, cannot be expected to develop and revise a "Sesame Street"; in the multichannel digital era, to present on its 19.4 Mbs. a program for pre-schoolers, one for school aged (6-11), another for teen-agers, a literacy program, and one for teacher training or parents. Adequately funded, PBS could implement such an ambitious educational plan.

(ii)Annual studies by the Annenberg Washington Program have questioned the educational value of a substantial amount of the core programming being offered by commercial broadcasters. In one such review, for example, it was found that one quarter of these programs had no educational value and that overall there was a heavy emphasis on social rather than cognitive educational values.¹¹

In May, 2007 the FCC sought comments on the status of /children's television programming.¹² The Children's Media Policy Coalition¹³ assessed the E/I performance for affiliated stations in six of the top 10 Designated Market Areas (DMA). It found that nearly all E/I programming is relegated to weekends, even though weekdays comprise a significant portion of children's viewing times, and that preemption for sports continues to be a problem. The Coalition also analyzed the core programs offered by broadcasters in the Los Angeles DMA, as representative of programming offered in most markets. It found that the "vast majority of broadcasters air programs with social/emotional lessons, but offer few academic or informational shows". It pointed out that "the Commission and Congress have recognized that children can benefit greatly from viewing E/I programs that provide academic and informational lessons, yet it does not appear that children are receiving those benefits." The Coalition also found that "some programs reported as E/I contain little or no educational content. Indeed, some programs

¹⁰ FCC Notice of Inquiry, 8 FCC Rcd 1841, 1842 (par.6).

¹¹ Annenberg Washington Program's annual survey are available at <http://www.annenberg.nwu.edu>.

¹² 73 Fed. Reg.24308 (May 2, 2007).

¹³ This group consist of the following organizations: Children Now, American Academy of Pediatrics, Benton Foundation, National PTA, and Office of Communication of the United Church of Christ (herein UCC).

provide weak or generic social lessons, still others appear to be merely entertainment programs masquerading as educational.” See Coalition Comments, in MB Docket No. 000167, at ii-iii, (iii) There are First Amendment strains in the CTA approach because there will always be difficult questions at the margins. To attract the young child, the program must have a strong entertainment quotient, and the FCC has wisely determined that there is no way to draw a line as to the amount of such entertainment fare. When this consideration is combined with a program that purportedly seeks to teach children a lesson as to some social goal, the FCC can end up reviewing content in a most sensitive area. Chairman Hundt asserted that NBC’s program, “NBA Inside Stuff” could not be regarded as E/I but NBC, relying on two educational psychologists, claimed that the program is designed to teach “life lessons”, not just promote basketball, and Hundt backed away¹⁴. Significantly, the FCC has not acted on a UCC petition filed in September 2004, seeking to deny renewal for two stations in the Washington DMA on the ground that the programs claimed to be E/I lacked education as a substantial purpose.

(iv) There is the problem of lax enforcement and its consequences when a majority of the FCC commissioners is hostile to implementation of the CTA. As noted, that was the case in 1991-1992, and may be the case today in the light of the four year delay in ruling on the above UCC petition.

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

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

Public television would thus be enabled to fully implement its expansive and much needed educational plans in the digital era (preparation, production, distribution, and publicizing). As noted, in the multichannel digital era, it is greatly desirable to have a pre-school (ready to learn) program, one for the school aged child (6-11), another for the teen-ager, another for literacy,

¹⁴ New York Times, “Networks Comply, but Barely on Children’s Shows”, Dec. 11, 1997, C1.

and one for training, especially for teachers in the use of high technology, Thus, it would benefit the national interest by making mandatory the voluntary policy of Section 303b(b)2) of the 1990 CTA.¹⁵

The trust fund would be used to finance adequately the various other missions of public television – e.g., culture, arts, the humanities, drama, in-depth informational programming, thus solving its perennial funding problems. See again Gore Report, xiii: “Congress should create a trust fund to ensure enhanced and permanent funding for public broadcasting to help it fulfill its potential in the digital television environment and remove it from the vicissitudes of the political process.” Public television wants to deliver high quality public service; that is its sole reason for existing. So for the first time, government policy would be in accord with the driving considerations of the field.

Public television does need governance reform, and a new governing board could be established in a way insuring prestigious members with high integrity and interest in public service areas.¹⁶ This board could act like the Board of Governors of BBC, and could assure compliance with Congressional directives as to matters like fair and balanced journalism and elimination of the inappropriate commercial practices that are so pervasive today as a result of the financially starved condition of public TV.

It may be argued that with this reform, viewers, especially those not on cable or DBS, might lose public service programming in the absence of the public trustee content regulation of the FCC. But with this disappearance of regulation, there would be little, if any, effects in areas such as news, news-type programs, etc., which are broadcast because of the station’s bottom line, not regulation. There could be a small loss in the CTA area, but it would be greatly outweighed by the provision of strong support for high quality educational fare over PBS, which reaches over 96% of the nation’s TV households. The Internet will be increasingly making its contribution. In the circumstances, there is little downside, and if the test is one balancing, it must be struck heavily in favor of reform.¹⁷

There are three other politically sensitive areas that should be briefly treated. First, as to indecency, the FCC should not be involved in enforcing the criminal statute (18 U.S.C. 1464). It should be left to the Department of Justice and the courts. Further, it makes no sense to have vigorous indecency enforcement as to broadcasting and no enforcement, for sound constitutional reasons, as to cable, satellite and the internet. Even as to broadcasting, 86% receive such service over a subscription operation, with blocking of unwanted material

¹⁵ This subsection provides that broadcasters who enable another broadcaster to present E/I programming are to be given credit for this action at the time of filing their renewal applications. The provision has been very little used.

¹⁶ For example, the following recommendation made as to Corporation for Public Broadcasting could be used for the new governing board: “...the Task Force recommends that in the future the president appoint a distinguished commission from the fields of broadcasting, education, the sciences, the arts, and the humanities to recommend five outstanding candidates for each vacancy...The president would make his choice from the list... This method of appointment would guarantee a high level of leadership in public broadcasting and would help to insulate public broadcasting more effectively from political influence without in any way lessening its accountability...” “Quality Time?”, the Report of the Twentieth Century Fund Task Force on Public Television, 1993, N.Y., at 36. The writer was a Task Force member.

¹⁷ The “must carry” rules were sustained not on any public service content considerations but rather on competitive grounds, stemming from cable’s monopoly “gatekeeper” position. See *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994),

available, and all sets now sold have a V-chip and can be programmed to hide channels. In these circumstances, the only sound way to proceed is to eliminate the entire indecency regime as unnecessary and unconstitutional.¹⁸

On multiple ownership and related rules, the FCC and Congress, especially in the 1996 Telecommunications Act, have undermined the important diversification principle – to diversify the sources of information coming to the American people. Enforcement in this area could and should be placed with the FTC, an independent agency with bipartisan composition, with explicit direction to act not only on economic facts but also on diversification considerations. In light of the past record of the FCC, it would be constructive to have a new agency, the FTC, with a new explicit diversification mandate.

Similarly, the sensitive political broadcast activities of the FCC could be transferred to the FTC. The expert staff would continue to follow the rules and precedents that have been formulated over the years.

With the above changes and the elimination of the public trustee content regulatory scheme, for the first time it would be appropriate to replace the five-member FCC with a single administrator within the Executive Branch (similar to EPA). The administrator would not be called upon to handle sensitive or political matters like ownership caps, political broadcasting, indecency or licensing involving public service content review. There are benefits with such reform: greater efficiency, reduced costs, and, most significantly, heightened accountability for important decisions in areas like spectrum and telecom competition. With this reform, the president would have to take much greater care both in the appointment and retention of the administrator, with much greater emphasis on competence and expertise. As a further example of promoting effective policy making, administration of the all-important spectrum area would come under a single focal point, instead of the present split between Government and non-Government. To gauge the difference between a collegial body and a single administrator, examine the effectiveness of OFTEL in the United Kingdom as against the FCC.¹⁹

¹⁸ Clarification in this regard may come in *FCC v. Fox Television Stations, et. al.*, 07-582, in the next Supreme Court term. The writer is participating as amicus in the case.

¹⁹ For a full discussion of the above reform, see Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 Fed. Comm. L. J. 637 (1998).