

ORAL ARGUMENT SCHEDULED FOR MARCH 10, 2003

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*In the*  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
No. 02-1039  
\_\_\_\_\_

OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST,  
ALLIANCE FOR COMMUNITY MEDIA  
and  
CENTER FOR DIGITAL DEMOCRACY,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION,  
and  
UNITED STATES OF AMERICA  
*Respondents,*

ASSOCIATION OF PUBLIC TELEVISION STATIONS,  
*Intervenors.*

\_\_\_\_\_  
ON PETITION FOR REVIEW FROM AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

**INITIAL BRIEF FOR PETITIONERS**

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October 21, 2002

## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners hereby certify the following information to be true and correct, upon information and belief:

### **A. Parties**

Petitioners are the Office of Communication, Inc. of the United Church of Christ, the Alliance for Community Media, and the Center for Digital Democracy.

Respondents are the Federal Communications Commission and the United States.

Intervenor is the Association of Public Television Stations.

### **B. Rulings Under Review**

The order under review is *In re Ancillary and Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, Report and Order, 16 FCC Rcd 19042 (2001) (“Order”) (J.A. \_\_\_).

### **C. Related Cases**

To the best of Petitioners’ knowledge, there are no related cases before this or any other court.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners respectfully submit this Corporate Disclosure Statement:

The Office of Communication, Inc. of the United Church of Christ, the Alliance for Community Media, and the Center for Digital Democracy have not issued shares to the public, and have no parent companies, subsidiaries or affiliates that have issued shares to the public.

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## GLOSSARY

1951 TV Allotments	The FCC's 1951 Order creating the noncommercial educational reservation, <i>In re Amendment of Section 3.606, Regulations and Engineering Standards Concerning the Television Broadcast Service, Utilization of Frequencies in the Band 470 to 890 Mcs. For Television Broadcasting, Sixth Report and Order</i> , 41 FCC 148 (1951).
1967 Act	Public Broadcasting Act of 1967, Pub. L. 90-129
1967 House Report	House Report on the Public Broadcasting Act of 1967, H.R. 6736, H.R. Rep. 90-572, 1967 USSCAN 1799 (1967).
1967 Senate Report	Senate Report on the Public Broadcasting Act of 1967 S. 1160, S. Rep. 90-222, 1967 USSCAN 1772 (1967).
1981 Amendments	Public Broadcasting Amendments Act of 1981, passed as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §§1221-34.
1981 House Report	Public Broadcasting Amendments Act of 1981, H.R. 3238, H.R. Rep. No. 97-82 (1981).
1981 PTV Order	<i>In re Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations</i> , 86 FCC.2d 141 (1981).
1984 PTV STV Order	<i>In re Amendment of the Commission's Rules Concerning Subscription Television Authorization for Noncommercial Educational Television Station Licensees</i> , 97 FCC.2d 411 (1984).
AAPTS Petition	Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service, Docket No. MM 87-268 (filed June 13, 1997).
Carnegie Commission	The 1965 Commission Sponsored by the Carnegie Foundation to study the need for a public broadcasting service.
Carnegie Commission Report	<i>The Report of the Carnegie Commission on Educational Television</i> (1967).
NCE	Noncommercial Educational Broadcaster.
PTV DTV NRPM	<i>In re Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees</i> , 14 FCC Rcd 537 (1998).

	Subscription Television Order	<i>Subscription Video</i> , 2 FCC Rcd 1001 (1987).
TCAF	The Temporary Committee on Alternative Financing for Public Telecommunications, created as part of the 1981 Amendments.	
TCAF Final Report	<i>Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications</i> (1983).	
Teletext Order	<i>Amendment to the Commission's Rules To Authorize the Transmission of Teletext Service</i> 48 Fed. Reg. 27054 (1983).	
VBI Order	<i>Amendment of Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations</i> , 50 Fed. Reg. 4658 (1985).	
VBI	Vertical Blanking Interval.	

## **JURISDICTION**

1. The Federal Communications Commission has jurisdiction to issue the *Order* under review pursuant to Sections, 1, 2, 3, 4, 303, 336(a)(2), 399 B(2) and 405 of the Communications Act of 1934 as Amended (“the Act”), 47 U.S.C. §§151, 152, 153, 154, 303, 336(a)(2), 399(b)(2), and 405.
2. This Court has jurisdiction over the Commission’s order under Section 402 (b) of the Act, 47 U.S.C §402(a), and 28 U.S.C §2344.
3. The Commission adopted its *Order* on October 11, 2001. It released the *Order* on October 17, and it was published in the *Federal Register* on November 26, 2001. Under the Commission’s rules, 47 C.F.R. §1.4(b), rulemaking documents become final upon publication in the Federal Register. Petitioners filed their Petition for Review on January 25, 2002, in the United States Court of Appeals for the District of Columbia Circuit, *UCC, et al., v. FCC*. This appeal is therefore timely under 28 U.S.C. §2344.

## **QUESTIONS PRESENTED**

- (1) Did the FCC violate the plain language of 47 USC §399b when – despite the definition of “advertisement” in 47 USC §399b(1) as “any message or other programming material which is broadcast or otherwise transmitted” and the prohibition against noncommercial educational licensees (NCEs) “mak[ing] its facilities available to any person for the broadcasting of an advertisement” in 47 USC §399b(b)(2) – it authorized NCEs to offer advertiser-supported programming or lease their digital spectrum to commercial programmers for offering subscription television because subscription television services are not “broadcasting.”

- (2) In light of statutory policy and its history of forming and implementing that policy, did the FCC act arbitrarily and capriciously when it authorized NCEs to offer advertiser-supported programming or lease spectrum to commercial programmers, without regard to its prior rejection of similar proposals on two prior occasions.

## **STATUTES AND REGULATIONS**

Relevant provisions of the Communications Act of 1934 (“1934 Act”) appear in the Addendum to this Brief.

## **STATEMENT OF THE CASE**

Petitioners seek review of a final FCC *Report and Order*, adopted on October 11, 2001, and released on October 17, 2001. The *Report and Order* is published at 16 FCC Rcd 19042 (JA ) A summary of the Report and Order was published in the Federal Register on November 26, 2001. 66 Fed. Reg. 58973 (November 26, 2001). (JA )

The *Report and Order* terminated a rulemaking which was initiated by a *Notice of Proposed Rulemaking. Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 14 FCC Rcd 527 (1998). No *Petitions for Reconsideration* were filed with the agency.

Petitioners participated in the proceedings below by filing comments and reply comments, and by making certain permissible *ex parte* presentations. Intervenor Association of Public Television Stations similarly participated in the proceedings below.

Respondent Federal Communications Commission issued the *Report and Order* under review. The United States is named as a Respondent pursuant to 28 USC §2344.

## **STATEMENT OF FACTS**

From the inception of noncommercial educational television (“NCE”), the Federal Communications Commission (“FCC” or “Commission”) and Congress have recognized that for educational noncommercial television to achieve its full potential, noncommercial television stations must remain

commercial free. In the very first Commission *Order* setting aside station allotments for noncommercial television, the Commission rejected requests from would-be educational broadcasters to fund their programming through the sale of commercials or through leasing air time to commercial operators (“frequency sharing”). *In re Amendment of Section 3.606, Regulations and Engineering Standards Concerning the Television Broadcast Service, Utilization of Frequencies in the Band 470 to 890 Mcs. For Television Broadcasting, Sixth Report and Order*, 41 FCC 148, 165-66 (1951)(“1951 TV Allotments”). Then as now, educational institutions and would-be NCEs argued that without revenues from commercials or retransmission of popular commercial programming, NCEs could not afford to build out stations or develop high quality educational programming that would best serve the public interest. The Commission categorically rejected these arguments:

A grant of the requests...for partial commercial operation by educational institutions would tend to vitiate the differences between commercial operation and non-commercial educational operation. It is recognized that the type of operation proposed by these Universities may be accomplished by the licensing of educational institutions in the commercial television broadcast service. But in our view achievement of the objective for which special educational reservations have been established – *i.e.*, the establishment of a genuinely educational type of service – would not be furthered by permitting educational institutions to operate in substantially the same manner as commercial applicants though they may chose to call it limited commercial non-profit operation.

*Id.* at 166.

In the fifty years between the *1951 TV Allotments Order* and the Order under review, Congress and the Commission have uniformly rejected use of a noncommercial television license for even “limited commercial non-profit operation.” Congress and the Commission have unequivocally preserved the distinction between regular “commercial” licensees (which may be either commercial or noncommercial entities and may chose to operate in either a commercial or noncommercial manner, or even on a subscription basis, if they so desire) and NCEs (which do not compete with commercial entities for scarce TV allotments) by prohibiting those who take advantage of the allotments reserved

for noncommercial, educational broadcasters from broadcasting commercials or operating on a subscription basis.

The one exception to the ban on advertisements occurred in 1981, when Congress authorized a of single, sharply delineated, closely monitored ten station “demonstration program” as part of a broad effort to find alternative non-federal funding sources for public television. *See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35 §1233*. After the experimental period terminated on June 30, 1983, the special body created to oversee the program concluded that any ultimate benefit of permitting advertising on public television remained questionable. *Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications* (1983) at 45-46 (“TCAF Final Report”).

*Congress never again questioned the NCE advertising ban, or authorized any further exception to the advertising ban.*

In the *Order* under review, the Commission has now authorized NCEs to broadcast commercials over “ancillary and supplementary” subscription services or to lease “excess” spectrum to commercial entities for commercial uses.

#### **A. Relevant Legislative History of Noncommercial Educational Television.**

1. The 1962 Education Television Act: Congress Provides Public Money to Build Out Noncommercial Educational Television Rather Than Permit Advertising Supported Services.

In 1951, the Commission began the practice of reserving broadcast allotments for noncommercial educational broadcasters. *1951 TV Allotments Order*, 41 FCC at 158-67. In setting aside channel allotments for this new service, the Commission recognized two important principles. First, noncommercial educational broadcasters could contribute valuable programming and innovative

services to the public, and that to achieve the goal of services genuinely different from commercial broadcasting, NCEs must not be permitted to carry advertisements or lease their spectrum to commercial broadcasters for the purpose.

From the outset, it was apparent that NCE stations would require public support if they were to be constructed and operated without advertiser-supported services. By 1962, Congress concluded that it would serve the nation better to provide public money for noncommercial educational television rather than to permit languishing NCEs to take advertising revenues. It therefore authorized a five year grant program to assist NCEs in building broadcasting facilities. *See Educational Television Facilities Act of 1962, Pub. L. 87-477.* Like the Commission, Congress recognized the importance of noncommercial educational television as a national asset, and the necessity that such stations operate on a genuinely noncommercial basis, *i.e.*, without resorting to commercial supported programming.

2. The Public Broadcasting Act of 1967: Congress Provides Public Funds To Create A Public Broadcasting System Independent of Advertising Revenue.

Interest in noncommercial educational television continued to grow. In 1965, the Carnegie Foundation assembled a distinguished committee of experts, which in 1967 issued an enormously influential report on the need for a publicly funded national public television service. *See “Public Television: A Program for Action,” The Report of the Carnegie Commission on Educational Television (1967) (“Carnegie Commission Report”).*<sup>1</sup> As the author E.B. White explained:

Noncommercial television should address itself to the ideal of excellence, not the idea of acceptability - which is what keeps commercial television from climbing the staircase. I think television should be the visual counterpart of the literary essay, should arouse our dreams, satisfy our hunger for beauty, take us on journeys, enable us to participate in events....It should be our Lyceum, our Chautauqua, our Minsky’s, and our Camelot. It should restate the social dilemma and the political pickle. Once in a while it does, and you get a glimpse of its potential.

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<sup>1</sup>The Carnegie Commission, with the backing of the Johnson White House, “laid the foundation for modern public broadcasting.” John Witherspoon and Roselle Kovits, *The History of Public Broadcasting*, Current (1989) at 13. *See* Senate Report on the Public Broadcasting Act of 1967, S. Rep. 90-222, 1967 USSCAN 1772, 1774 (1967) (citing Carnegie Commission as important influence); H.R. Rep. 90-572, 1967 USSCAN 1799, 1800 (same).

*Carnegie Commission Report* at 13.

In 1967, upon considering whether to reauthorize the Educational Facilities Act, Congress instead determined to follow the urgings of the *Carnegie Commission Report* and the Johnson administration to follow a much more expansive model. See Senate Report on the Public Broadcasting Act of 1967, S. Rep. 90-222, 1967 USSCAN 1772, 1774 (1967) (“1967 Senate Report”). It enacted the Public Broadcasting Act of 1967, Pub. L. 90-129 (“1967 Act”), which became the basis for the modern noncommercial educational broadcast system.

The 1967 Act addressed a growing concern that merely funding the construction of facilities would not prove sufficient for NCE broadcasting to achieve its full potential. Although commercial television – with its need to attract a mass audience and fear of antagonizing large advertisers – could not engage in innovative or controversial programming and, of necessity, neglected demographically unattractive niche markets, NCEs were unable to fill the gap without funding for program development. As CBS President Frank Stanton testified during extensive hearings on 1967 Act:

They will do special things that we don't do in quantity at the present time. I would expect that they will appeal at certain times of the day to very small parts of the total audience. Because we are organized as a mass medium, because we have to serve the greatest number of people in order to do our job, they will be able to do special interest kinds of programming that we can't do.

H.R. Rep. 90-572, 1967 USSCAN 1799, 1807 (1967) (“1967 House Report”).

In the 1967 Act, Congress sought to bring this vision of noncommercial television to life. In addition to esthetic and educational potentials, Congress foresaw the value of a noncommercial broadcast system to maintaining an informed citizenry essential to democracy. As the House Report stated:

[T]he rewards which are reasonably expected from this seed program cannot be measured in money alone. Who can estimate the value to a democracy of a citizenry that is kept full and fairly informed as to the important issues of our times and whose children have access to programs which make learning a pleasure? The town meeting may have disappeared, but nevertheless the success of our democratic institutions still

depends ultimately upon the informed judgments of the citizens of our cities, towns and local communities.

1967 House Report at 1800-01.

The 1967 Act contemplated that local stations should provide original programming serving the needs of their own communities. Although the drafters also sought to facilitate the development of high-quality national programming through formation of the Corporation for Public Broadcasting, 1967 House Report at 1808-09; 1967 Senate Report at 1780-81, they explicitly rejected the idea that local stations should become passive conduits that merely retransmitted programming developed by others. Both the Senate and House Reports were at great pains to stress the importance of local stations developing original programming. 1967 House Report at 1808-09; 1967 Senate Report at 1786.

Finally, Congress intended that NCE broadcasting should continue to evolve technologically. 1967 Senate Report at 1780-81. Congress specifically contemplated the transition of program distribution technology from terrestrial lines to satellite. But it also envisioned that public television should become a leader in developing and adopting new technologies that commercial broadcasters might not adopt for fear of impacting their ‘bottom lines.’ 1967 Senate Report at 1785-86.

Thus, while Congress recognized the critical importance of providing funding for both technological upgrades and program development, it also recognized that to achieve the potential of NCE broadcasting, it must remain noncommercial and advertisement free. As a ‘temporary’ expedient, at the request of the Johnson administration, Congress authorized direct federal funding on an annual basis without creating a permanent source of financial support. *Id.* at 1795-96. While allowing public television to move forward as a vital part of our nation’s broadcast infrastructure, this decision left public television dependent upon the largess of the federal government.<sup>2</sup>

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<sup>2</sup>Congress declined to adopt recommendations to create a permanent endowment funded by a television excise tax. 1967 Senate Report at 1795.

3. The 1981 Amendments and Section 399B: Congress Explores Alternative Funding for Public Television But Explicitly Prohibits Any Form of Advertising In the Broadest Possible Terms.

In 1981, beset by deficit spending and political pressure to reduce federal spending, Congress sought to provide public television with new sources of revenue. *See* Public Broadcasting Amendments Act of 1981, passed as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, §§1221-34 (“1981 Amendments”). Section 1230, codified as 47 USC §399a, permitted public broadcast stations to expand underwriting announcements to some degree. Section 1231, codified at 47 USC §399b(b)(1), authorized public broadcasters to “engage in the offering of services, facilities or products in exchange for remuneration.”

Even as it relaxed certain policies to help generate revenues from other sources, Congress remained committed to the foundational principle embraced by the Commission in 1951, and reaffirmed in the 1967 Act: for NCE broadcasting to achieve its full potential, serve the public good, and justify its privileged status *vis-a-vis* commercial broadcasting, NCE television must remain commercial free. It went no further than establishing the limited 10 station experiment described above. 1981 Amendments at §1233.

In addition, Congress set sharp limits on NCE licensees to insure that they would not abuse their additional latitude to sell advertising. Using unusually sweeping and broad language, Congress specified that “expanded underwriting” would not be “advertising.” defined in this context as “any message or other programming material which is *broadcast or otherwise transmitted* for any remuneration.” 47 USC §399b(a). Finally, Congress also adopted an unequivocal provision barring public television stations not merely from broadcasting advertisements, but even even making their “facilities available to any person” for the purpose of broadcasting advertisements. 47 USC §399b(b)(2).

4. Business Logograms: Congress Restricts an FCC Decision on Sponsorship Identification To Reduce Similarity To Advertising.

The 1981 Amendments included a provision rolling back, in part FCC liberalization of corporate “underwriting” messages. *In re Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 86 FCC.2d 141 (1981) (“1981 PTV Order”).<sup>3</sup> In April 1981, the FCC had concluded a proceeding to provide public broadcasters with greater flexibility in identifying sponsors and portraying products and events. While the Commission reaffirmed the need to differentiate between commercial and noncommercial services and keep NCEs insulated from the demands of the market, *Id.* at 142, the FCC also recognized the need for public broadcasters to expand their funding base. *Id.*<sup>4</sup>

In response to requests from public broadcasters, the FCC modified its rules to allow visual representations of sponsors and removed restrictions on the number of such announcements and the timing of such announcements. *Id.* at 155-56. These the Commission left to the discretion of the NCE licensees, although the Commission warned NCEs that they must not abuse the privilege. *Id.* at 160.

Congress reacted swiftly to the Commission’s relaxation of the rules. The drafting Committee understood the Commission’s order as allowing NCEs to “fully and clearly identify contributors without promoting them,” and generally “endorse[d] this effort.” However, the Committee felt that the bill went “too far in a single step” and therefore reported a bill “more limiting than the Commission policy.” Public Broadcasting Amendments Act of 1981, H.R. Rep. No. 97-82 (1981) at 23 (“1981 House Report”).

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<sup>3</sup>This *Order* is discussed in greater detail in B.1 *infra*.

<sup>4</sup>Prior to the FCC’s decisions, NCEs could only identify sponsors by name, without any reference to place or product. *Id.* at 154-55. The FCC prohibited showing any visual representation of the sponsor such as a trademark or a product. The Commission also restricted the times NCEs could broadcast such acknowledgments, limiting them to the beginning or end of a sponsored program. *Id.* at 156.

The Committee therefore took steps to make the use of logograms ‘less commercial.’ The statute prohibited interrupting programs for such announcements and the Committee stressed that it intended logograms to “be value neutral, and solely for the purpose of generic identification.” *Id.* at 24. The Committee also “re-emphasize[d] the clear distinction made by the Commission between in its decision, that [logograms] will be allowed only to the they help identify a contributor without promoting him. No comparisons are allowed. No qualitative adjectives are allowed.”

This intent found expression in the statute. Congress defined a “logogram” in Section 399A as a visual or aural “symbol or sign, which is used for the *exclusive* purpose of identifying any corporation . . . *and which is not used for the purpose of promoting products, services, or facilities* of such corporation . . . .” 47 USC §399a(a). The logogram provision also provided that any broadcast of a logogram “may not interrupt regular programming.” 47 USC §399a(b).

5. The “Demonstration Program”: Congress Rejects Advertising As A Revenue Source for Public Television.

As part of the 1981 Amendments, Congress decided to embark on an extremely limited experiment with advertising. The legislative history reveals that a minority of the drafters favored permitting “limited, dignified” advertising on public television. 1981 Amendments House Report at 39-40. This minority expressed confidence that permitting limited advertising by NCEs would not compromise the nature of the service and would alleviate the need for federal funding. *Id.*

This view, however, was soundly rejected by the majority. The majority expressed concern over the already “growing commercialization of public television.” 1981 Amendments House Report at 9. They feared that the increased role of corporate underwriters and the need to attract larger audiences to attract these underwriters were already blighting the promise of noncommercial educational television and causing it to more and more resemble commercial broadcasting. *Id.* Accordingly, the House Report made clear that the drafters intended the 1981 Amendments to

guarantee the “insulation of program control and content from the influence of special interests – be they commercial, political or religious.” *Id.* at 16.

As a concession to the minority view, Congress agreed to authorize an extremely limited “demonstration program” on the practicality of permitting advertising on public television. *Id.* at 42. The 1981 Amendments created a “Temporary Commission on Alternative Financing for Public Telecommunications (“TCAF”). 1981 Public Broadcasting Amendments §1232. The Act permitted the TCAF, at its discretion, to conduct a demonstration program “for the purpose of determining the feasibility of permitting public television station licensees and public radio station licensees to broadcast advertising announcements.”

Congress imposed tight conditions on this demonstration program. First, Section 1232 permitted, rather than required, TCAF to conduct the demonstration program. §1232(j)(2). Congress set a mandatory termination date of June 30, 1983 or 18 months, whichever was shorter. §1233(b)(1)(B). Finally, Congress limited participation to ten public television broadcasters and ten public radio broadcasters. §1233(b)(2)(A).

Pursuant to this statute, the TCAF conducted the demonstration project and issued a final report to Congress in October of 1983. *Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications* (1983) (“TCAF Final Report”). It concluded that while advertising would confer a revenue stream to public television, the associated increase in costs associated with running a “commercial” broadcast and possible antagonism from non-federal funders, such as the states, made any ultimate benefit from permitting NCEs to advertise questionable. TCAF Final Report at 45-46. Accordingly, TCAF recommended that Congress take no action unless it could (a) conclusively conclude that benefits would exceed costs, and (b) ensure that stations declining to carry advertising did not suffer the negative consequences of higher rates and alienated sponsors. *Id.*

Apparently satisfied with the TCAF report, Congress took no further action. With the termination of the demonstration project authorized by Section 1233 of the 1981 Amendments, all exceptions to the absolute prohibition on advertising ceased.

**B. Relevant History of Public Television at the Commission.**

In 1951, as part of its formulation of the initial table of allotments of television stations, the Commission determined to set aside a number of allotments exclusively for noncommercial educational broadcasters. In authorizing this set aside, the Commission explained:

In general, the need for non-commercial educational television stations was based upon the important contributions which non-commercial educational television stations can make in educating the people both in school – at all levels – and also in the adult public. The need for such stations was justified upon the high quality type of programming which would be available on such stations – programming entirely different from that available on most commercial stations.

*1951 TV Allotments Order*, 41 FCC 165-66.

1. The 1981 Public Broadcasting Order: The FCC Reaffirms the Noncommercial Nature of Public Television and Rejects Proposals to Allow Advertising.

In the late 1970s, the Commission began a process of evaluating the noncommercial educational broadcasting service. This culminated in 1981 with a new Commission policy statement on the nature of public broadcasting. *In re Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 86 FCC.2d 141 (1981)(“1981 PTV Order”).

The Commission broadly reaffirmed the goals and policies of the *1951 TV Allotments Order*, *Id.* at 142-43, reiterating the need to maintain a clear distinction between the commercial broadcast service and the noncommercial educational service operating on frequencies specially reserved for noncommercial educational purposes. *Id.* Specifically, the FCC stated that it was “continuing to maintain the noncommercial nature of public broadcasting by not allowing a broadcaster to promote the goods or services of an entity or person in return for consideration.” *Id.* at 143.

Most significantly, the Commission again rejected petitions from NCEs to permit limited advertising on NCE-reserved frequencies or to sell broadcast time to support educational programming. In doing so, the Commission quoted the *1951 TV Allotments* at length, and concluded that it would “adhere to our policy that the outright sale of time to commercial entities for commercial purposes is inappropriate for public broadcasting licensees.” *Id.* at 159.

Although the Commission prohibited both advertisements and leasing time to commercial programmers, it did relax the restrictions on public broadcasting in other ways. The Commission observed that it was generally engaged in a process of eliminating rules controlling content and format on broadcasters that the Commission now considered overly restrictive. *Id.* at 142 n.3. The Commission while observing that comparison to commercial and noncommercial was not entirely comparable because noncommercial broadcasters were deliberately insulated from market forces, nevertheless found it appropriate to extend greater flexibility to NCEs. *Id.* The Commission therefore concluded that:

The Commission’s interest in creating a “noncommercial” service has been to remove the programming decisions of broadcasters from the normal kinds of commercial pressures under which broadcasters in the unreserved spectrum usually operate. The policy underlying the *Report and Order* is designed to serve that end and to eliminate rules which are not required for that goal.

*Id.* at 142.

In addition, the Commission recognized the need for public broadcasters to attract corporate sponsorship in a way that did not violate the advertising ban. *Id.* As a result, the Commission relaxed the rules on sponsorship identification. *See* Part A.4 *supra*. In relaxing these rules, however, the Commission was at great pains to prohibit promotion of goods or services. *1981 PTV Order* at 155.

The Commission admonished NCEs that it would monitor their conduct closely to ensure that no abuses of this new discretion occurred. *Id.* at 160.<sup>5</sup>

2. The 1984 STV Order: The FCC Rejects Granting NCEs Blanket Authority to Offer Subscription Television Services.

In the wake of the 1981 Amendments and the TCAF Report, the Commission considered a number of other steps to provide NCEs with opportunities for new revenue streams. In 1984, it considered – and rejected – a TCAF recommendation that it permit public television stations to engage in subscription television services. *In re Amendment of the Commission’s Rules Concerning Subscription Television Authorization for Noncommercial Educational Television Station Licensees*, 97 FCC.2d 411, 412 (1984) (“1984 PTV STV Order”). The Commission concluded, however, that a general rule permitting subscription services would violate 47 USC §399b. Instead, it adopted a policy that would permit waivers on a case by case basis. *Id.* at 413.

Shortly thereafter, the Commission conducted a proceeding to authorize new “teletext” technology which allows the transmission of data as part of a television broadcast.<sup>6</sup> There, the Commission permitted NCEs to have yet another potential revenue stream by authorizing them to provide teletext services for remuneration. *Amendment to the Commission’s Rules To Authorize the Transmission of Teletext Service* 48 Fed. Reg. 27054 ¶¶50-52 (1983). *See also Amendment of Commission’s Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, 50 Fed. Reg. 4658 ¶22 (1985) (“VBI Order”). In so doing, the Commission did not explicitly consider the question of the advertising ban, but did find that NCEs

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<sup>5</sup>The Commission essentially reaffirmed its order on reconsideration. 90 FCC.2d 895 (1982). The one exception was its conclusion that Congress in 399B had gone further in permitting NCEs discretion to carry announcements for remuneration for nonprofits. *Id.* at 899-900. It found that the advertising ban applied to for profit entities, where the material was nonpromotional in nature. *Id.*

<sup>6</sup>This resembles the technology used today for closed captioning.

must operate any teletext service consistent with 399B.<sup>7</sup> *Teletext Order* at ¶¶50-52. As, for example, if NCEs carried programming material for other non-profit educational institutions or transmitted program material which did not urge a particular course of action in exchange for remuneration (*i.e.*, an advertisement under Section 399B(b)(1)-(3)).<sup>8</sup>

### C. The Current Proceeding

In 1996, Congress passed the Telecommunications Act of 1996. Pub. L. 104-104. One provision of the that law directed the Commission on proper procedures for the transition from traditional analog broadcasting to digital broadcasting (“DTV”). 47 USC §336.

1. Section 336: Congress Authorizes DTV Licensees to Offer “Ancillary and Supplementary” Services.

The transition from analog to DTV represents a tremendous leap in capacity for licensees. Where licensees now operate on one analog channel, digital compression technologies allow licensees to employ the same bandwidth (“one channel” in analog terms) to transmit 5 or more program feeds (“channels” in a new sense of the word) simultaneously. *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order*, 12 FCC Rcd 12809, 12817 (1997) (“*Fifth Report and Order*”) In addition, the digital technology permits transmissions of other kinds, such as data or voice transmissions. A licensee can therefore chose to offer a mix of free television, pay-per-view or other subscription television, and data or voice transmission, all at the same time. *Id.* As part of the 1996 Act, Congress directed the Commission to permit licensees

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<sup>7</sup>No one challenged this failure to consider the advertising ban. Of significance, the Commission found in the context of the political access rules that teletext was a “common carrier” or “hybrid point-to-point” service rather than a true broadcast service, because of the “unique characteristic as a print medium.” *Id.* at 53 n.21.

<sup>8</sup>For example, the Commission *Order* on the use of the Vertical Blanking Interval (VBI) recounted that “public television stations are considering services ranging from distribution of computer software to individual schools to delivery of business data as possible uses of their VBI facilities.” *VBI Order* at ¶6 n.6. Neither of these examples implicates the advertising prohibition of Section 399B since they do not “promote any service, facility or product,” 47 USC §399b(a)(1), “express views of any person with regard to matters of public importance,” §399b(a)(2), or “support or oppose any political candidate.” §399b(a)(3).

to offer “ancillary and supplementary services,” provided the Commission recovers revenues from the use of such spectrum to compensate the public and provided the provision of ancillary and supplementary services is consistent with the public interest. 47 USC §§336(a)(2), 336(e).

In accordance with this Congressional directive, the Commission conducted a rulemaking proceeding in which it set forth rules for the transition to DTV. *Fifth Report and Order*, 12 FCCRcd 12809 (1997). The Commission adopted rules for all licensees, without distinguishing between commercial broadcasters and NCEs, that permitted licensees to offer ancillary and supplementary services provided they maintained at least one free over-the-air video programming service. *Id.* at 12820-23.

2. The AAPTS Petition: NCEs Want Unprecedented Commercial Authority to Offer Advertising Services While Demanding Special Treatment as “Noncommercial Educational” Service.

In response, Intervenor AAPTS and the Public Broadcasting Service (PBS) filed a Petition for Reconsideration requesting the Commission clarify whether public television broadcasters may offer ancillary and supplementary services and on what terms. Petition for Reconsideration and Clarification of Association of America’s Public Television Stations and Public Broadcasting Service, Docket No. MM 87-268 (filed June 13, 1997) (AAPTS Petition) (J.A. at \_\_) Specifically, the AAPTS Petition argued that public television broadcasters should have unfettered discretion to offer any services without constraint, including subscription television broadcasting with advertisements, provided public television broadcasters maintained one, free over-the-air educational channel. *Id.* at 26-28 (J.A. \_\_\_\_). AAPTS reasoned that because Section 336 did not distinguish between commercial licensees and public broadcasters, but simply referred to “licensees,” that Congress intended for all licensees to enjoy the same unfettered discretion to offer ancillary services despite the language of Section 339B. *Id.*

At the same time, AAPTS claimed an exemption from the fees Congress instructed the Commission to collect from licensees that chose to offer ancillary and supplementary services. *Id.* at 28 n.29 (JA \_\_) AAPTS argued that Congress had instructed the Commission to create a fee structure which would “recover for the public a portion of the value of public spectrum resource made available for such commercial use” and “recover for the public an amount that, to the extent feasible, equals but does not exceed...the amount that would have been recovered had such services been licensed pursuant to the provisions of Section 309(j) [which requires the Commission to auction spectrum].” 47 USC §336(e)(2)(A)-(B). AAPTS maintained that because Congress has exempted public broadcasters from the auction system, *see* 47 USC §309(j)(2)(C), no amount would have been recovered at auction from a public broadcaster and therefore no fee should be recovered.

Thus AAPTS argued that while Congress’ silence as to public broadcasters in Section 336 should be interpreted as impliedly repealing the restrictions of Section 399B and an intent to treat all licensees equally, the silence on auctions should be construed as Congress’ wish to continue to privilege public broadcasters by exempting them from auction.

Petitioners and others opposed the AAPTS petition, arguing that the canons of statutory interpretation required reading Section 339B and Section 336 in harmony. *Opposition to Petitions For Reconsideration of MAP, et. al.*, Docket No. MM 87-268 (filed July 18, 1997) at 8-9 (JA\_\_). Accordingly, while Section 336 would permit public broadcasters to offer ancillary and supplementary services, they may only offer them in a manner consistent with Section 399B. *i.e.*, public broadcasters may offer services for remuneration such as ancillary and supplementary services provided that (a) such services do not interfere with the provision educational television or other educational services, and (b) the NCE observes the absolute prohibition on advertising. *Id.* Petitioners also observed that nothing in Section 336 indicated a Congressional intent to provide a windfall to noncommercial

applicants. Accordingly, they argued, where public broadcasters acted in the same manner as commercial licensees, the Commission should collect similar fees. *Id.*

3. The Commission Commences a New Proceeding: The Commission Proposes a Radical Change in Policy Without Adequate Explanation and in Violation of 399B.

Faced with this opposition, the Commission severed the issues raised in the AAPTS Petition from the general DTV Docket and issued an entirely new Notice of Proposed Rulemaking solely to deal with the issues raised in the AAPTS Petition. *In re Ancillary or Supplementary Use of Digital Television Capacity by Noncommercial Licensees*, 14 FCC Rcd 537 (1998) (JA \_\_\_) (“*DTV NPRM*”). The Commission observed that it had previously rejected a proposal to amend its rules generally to permit public broadcasters to offer subscription television services, although it retained the authority to offer them on a case by case basis. *Id.* at 547 (JA \_\_\_) The Commission noted however, that it had rejected STV only in the analog environment and that “the [AAPTS Petition] concerns *digital* television, which offers significant new challenges and opportunities to NCE stations.” *Id.* at 548 (emphasis in original) (JA\_\_\_) Without any further elaboration of how DTV differs from analog in a manner relevant to the Commission’s decision to reject the request for blanket permission to offer STV in its *1984 PTV STV Order*, the Commission stated it was “inclined to permit NCE stations to take advantage of these opportunities.” *Id.*

The *DTV NPRM* also invited comment on the proper application of Section 399B, particularly the ban on advertising. The FCC tentatively concluded that “this section would appear to prohibit advertisements on any service that would constitute ‘broadcasting,’ while permitting a public DTV station to air advertisements on any ‘nonbroadcast’ service.” *Id.* at 549 (JA at \_\_\_) Relying on the *1987 Subscription Television Order* which redefined subscription television as a “nonbroadcast”

service,<sup>9</sup> the FCC tentatively found that the advertising prohibition would not apply to subscription television services. *Id.* at 549-50 (JA \_\_\_\_)

The Commission also invited comment on an alternate argument in the AAPTS Petition – that Section 336 provided independent authority for the Commission to override Section 399B and authorize advertising if it found that authorizing NCEs to broadcast advertisements served the public interest. *Id.* It also invited comment on the AAPTS Petition’s argument for a fee exemption. *Id.*

4. Petitioners Oppose The Commission’s Change In Policy: Petitioners Argue That the Record Does Not Support A Change in Policy and that the Proposed Change Violates Section 399B.

Petitioners and others argued that Congress used unusually broad and sweeping language both to define advertisements and to prohibit them on public television. *Comments of UCC, et al.*, Docket No. MM 98-203 (filed February 16, 1999) at 5-6 (JA \_\_\_\_). Petitioners argued that the Commission’s reading of the statute would render the language “broadcast or otherwise transmitted” a nullity. *Id.* at 8 (JA \_\_\_\_). Their comments claimed that contrary to the Commission’s initial suggestion in the *NPRM*, the plain language of the statute prohibited any transmission of an advertisement as defined by the statute. *Id.* at 5-8 (JA \_\_\_\_). They argued that the legislative history of the 1981 Amendments and the refusal of Congress to authorize any exception to the advertising prohibition after the conclusion of the TCAF demonstration project and TCAF Final Report further reinforced this conclusion. *Id.* at 5-8, 9-13 (JA \_\_\_\_).

In particular, Petitioners maintained that the Commission could not rely on the distinction drawn between “broadcasting” and “nonbroadcasting” services that the Commission had introduced in its 1987 *Subscription Television Order* to conclude that Congress intended to prohibit advertisements only on broadcast services, but to permit them on subscription services. *Id.* at 5-7

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<sup>8</sup>*Subscription Video*, 2 FCCRcd 1001 (1987), *aff’d sub. nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988).

(JA\_\_). They argued that because the Commission issued the *Subscription Television Order* six years after Congress enacted the 1981 Amendments, and Congress could not reasonably anticipate that the Commission could make such a distinction. *Id.*

Petitioners further argued that even if the plain language permitted a different reading, Congress could not have intended to permit advertising on subscription television services offered by NCEs because in 1981 (and, Petitioners observed, at the time of the proceeding at issue) the Commission's rules prohibited NCEs from offering subscription television services except on a case-by-case basis. *Id.* at 7 (JA \_\_) As Petitioners' comments explained, this further reenforced the view that Congress could not have intended to permit advertising on subscription services despite the use of the word "broadcast" in Section 399B(b)(2). *Id.* at 7-8. (JA\_\_)

Petitioners further argued that the Commission had previously determined that "stations that do not have to concern themselves with the whims of advertisers and the marketplace are able more freely to provide the kind of high quality public affairs, arts, cultural and educational programming not often seen on commercial television." Comments of UCC, *et al.*, at 9-10 (citing *1951 TV AllotmentsOrder*) (J.A. at \_\_) Accordingly, Petitioners argued, that the Commission and Congress had always recognized that "the very defining characteristic of [NCEs] is that they are noncommercial – that is, both nonprofit and free of advertisements." *Id.* The Commission, they said, offered no explanation for why it no longer considers it necessary for NCEs to remain free of advertisements to produce "programming of an entirely different character from that available on most commercial stations." *Id.* (citing *1951 TV AllotmentsOrder*). *See also Reply Comments of UCC, et al.*, Docket No. MM 98-203 (filed March 16, 1999) at 4 (JA\_\_) (no basis in record to assume that advertising ban sought to preserve only one video programming channel rather than noncommercial nature of service as a whole).

In comments, reply comments, and *ex parte* comments submitted into the record, Petitioners reminded the Commission that the TCAF Final Report had found that permitting even limited advertising would jeopardize the other funding sources for public television. Petitioners argued that corporate sponsors and individual contributors would be alienated by the “commercialization” of public television, and that such hostility could jeopardize state and federal funding as well. *Id.* at 13-14 (JA\_\_); *Notice of Oral Ex Parte Presentation of Andrew Jay Schwartzman, Counsel for UCC, et al., to Susan Eid, Legal Adviser to Chairman Powell*, October 2, 2001 (JA \_\_). Petitioners maintained that Congress’ refusal to act in the wake of the TCAF Report showed that Congress had found no answer to these concerns – and neither had the Commission. *Comments of UCC, et. al.* at 9-13 (JA \_\_).

Petitioners also argued that, as the Commission itself had observed in the NPRM, the Commission had declined to extend blanket authority to offer subscription television service and that nothing in the record supported changing that position. *Id.* at 7.

Finally, Petitioners stated that Section 336 did not provide any separate authority for the Commission to authorize advertising on public television in violation of Section 399B. *Id.* at 8-9. (JA\_\_) As to AAPTS’ request for an exemption from fees, Petitioners argued that the plain language of the statute directed Congress to charge fees for ancillary and supplementary uses of the public spectrum for “commercial *use*” of digital spectrum regardless of the nature of the licensee. *Id.* at 14-5. (JA\_\_) This position was reenforced by the statutory directive to prevent “unjust enrichment” of licensees. This reading of the statute mandated charging NCEs fees for any non-educational commercial uses of the spectrum (as opposed to noncommercial educational uses of the spectrum, for which public broadcasters would continue to pay no fee). *Id.*

5. The Commission Releases the PTV DTV Order: The FCC Authorizes Advertising on Subscription Services In Violation of 399B and Without Explaining Why It Departs From Its Prior Decisions Prohibiting Advertising, Prohibiting Frequency Sharing With

Commercial Broadcasters, and Refusing to Authorize NCEs to Offer Subscription Television.

On October 17, 2001, the Commission released the *Report and Order* at issue here. 16 FCCRcd 19042 (2001)(JA\_\_\_)(“*PTV DTV Order*”). The Commission decided to amend its rules to provide blanket authority to NCEs to offer subscription television services over their digital channels. *Id.* at 19049. (JA\_\_\_) The Commission did not reference its *1984 PTV STV Order*. Instead, it declared that grant of such authority was “consistent with the 1996 Act, as well as with our *Fifth Report and Order*.” *Id.*

The Commission next addressed Petitioners’ argument in the comments that the plain language of Section 399B prohibited any advertising by NCEs – whether on a subscription basis or otherwise. The Commission reviewed Petitioners’ argument that the language of Section 399B(a) that defines an advertisement as “any message or other programming material which is broadcast or otherwise transmitted” in Section 399B(a), and that Congress could not have been aware in 1981 of the Commission’s distinction between broadcast and subscription services because that order would not issue for another six years. *Id.* at 19051-2. (JA\_\_\_)

The Commission acknowledged that Petitioners’ “argument is one way to read the statute,” *id.* at 19053, (JA \_\_\_) it found this reading “problematic” because Section 399B(b)(2) “refers to the ‘broadcasting of any advertisement’ whereas the definition in (a)(1) treats broadcasting as only one means of transmitting advertising.” *Id.* The Commission therefore decided that the prohibition against advertising did not apply to advertisements broadcast through subscription services. *Id.*

Having determined that Section 399B did not prohibit advertising on subscription services, the Commission decided to grant NCEs the authority to offer advertiser supported video programming as a subscription service. *Id.* at 19053-54. (JA\_\_\_) The Commission also decided to permit NCE

licensees to lease their spectrum to others who could retransmit commercial programming on NCE spectrum on a subscription basis. *Id.* at 19054. (JA\_\_)

The Commission did not address any of Petitioners' policy arguments. The Commission did not refer either to the *1951 TV Allotments* or the *1981 PTV Order*, in which it rejected permitting advertising or the leasing of NCE reserved frequencies for advertising supported programming transmitted by a third party. The Commission did not address the policy issue raised by Petitioners that permitting any advertising would later the noncommercial nature of the service. Nor did it address Petitioners arguments that allowing any advertising – even on subscription services – would alienate other federal and state funders, corporate underwriters, and individual donors.

The Commission rejected the argument of AAPTS and others that Section 336(a)(2) provided a separate source of authority for the Commission to authorize advertising if prohibited by Section 399B(b)(2). 16 FCCRcd at 19055. (JA\_\_) The Commission also rejected AAPTS' argument that Congress intended to exempt NCEs from fees when offering commercial services over their DTV spectrum. *Id.* at 19058-60. (JA\_\_).

6. The Copps Dissent: Commissioners Copps Finds the Decision Contrary to Law and Threatening the Noncommercial Nature of Public Broadcasting.

Commissioner Copps dissented. The Commissioner observed that everyone supported public television and wished to see it transition into a leader in digital programming. 16 FCCRcd at 19107. (JA\_\_) However, the Commission's determination was "contrary to law." *Id.* In particular, he said, the Commission's reading of Section 399B to allow advertising on subscription television "contravenes the clear language of the statute." *Id.*

It was of great importance to Commissioner Copps that the Commission's determination threatened the distinct identity of public broadcasting and that "[w]hen it begins to lose this different identity, it begins to lose its soul." *Id.* The Commissioner observed that the Commission's decision

“is certainly inconsistent with the heritage, indeed the integrity, of public television.” *Id.* at 19102. (JA\_\_)

Commissioner Copps noted further that public television broadcasters could offer a number of remunerative ancillary and supplementary services consistent public televisions’ mission – such as distance learning or the transmission of educational materials. *Id.* Finally, echoing the concerns of the TCAF Final Report, Commissioner Copps worried that permitting advertising in any form would antagonize other sources of funding – such as state governments, corporate underwriters, and individual contributors. *Id.* at 19073. (JA\_\_)

#### **D. Nature of Petitioners**

The Office of Communication of the United Church of Christ, Inc. (“UCC”) is a non-profit corporation, charged by the Church's Executive Council to conduct a ministry in media advocacy to ensure that historically marginalized communities (women, people of color, low income groups, and linguistic minorities) have access to the public airwaves. The United Church of Christ has 1.4 million members and nearly 6,000 congregations. It has congregations in every state and in Puerto Rico.

Alliance for Community Media (ACM), a nonprofit, national membership organization founded in 1976, represents over 1,500 Public, Educational and Governmental (PEG) access organizations and community media centers throughout the country.

The Center for Digital Democracy (CDD), is committed to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming. CDD is an offshoot of the Center for Media Education (CME), which participated in the proceedings below.

### **SUMMARY OF ARGUMENT**

This is a “*Chevron I*” case. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Commission’s interpretation flies in the face of the plain

language of the statute and clear congressional intent. While the Commission has broad powers under the Communications Act, it is constrained by the Act's plain language. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994) Nor can the Commission's interpretation create a statutory ambiguity where none exists. *id.* at 226-29.

Here, Congress used broad, sweeping language to prevent NCEs from broadcasting any advertisements or from allowing others to broadcast advertisements through any NCE facility. Its decision to allow a limited demonstration project followed by its refusal to either reauthorize the demonstration project or modify the advertising ban, and the sharp limits placed on the display of "corporate logograms" to identify corporate underwriters, all reenforce the plain language of the statute prohibiting any form of advertising.

Even if it were somehow possible to discern ambiguity in the statute, the Commission's *Order* would still merit reversal, because is in any event an arbitrary and capricious misreading of the strong policy against commercializing public television. The Commission failed to explain why it departed from more than fifty years of its own decisions – independent of Congressional action – prohibiting NCEs from engaging in advertising either independently or in conjunction with commercial broadcasters. Nor did the Commission identify, much less adequately justify the fact that its action reversed its 1984 *Order* declining to grant NCEs blanket authority to offer subscription TV services.

## **ARGUMENT**

The Commission's *PTVDTV Order* fails in two fundamental respects. First, the *Order* violates the plain language of Section 399B, which prohibits NCEs from offering advertiser supported services. Second, it departs from previous long-standing Commission policy without providing a reasoned explanation for this departure.

### **I. THE COMMISSION'S ORDER VIOLATES THE PLAIN LANGUAGE OF SECTION 399B.**

This case turns on the plain language of the relevant statute. Section 399B of the Communications Act of 1934, in pertinent part, states as follows:

- (a) For purposes of this section, the term “advertisement” means any message or other programming material which is broadcast *or otherwise transmitted* in exchange for any remuneration and which is intended –
  - (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
  - (2) to express the views of any person with respect to any matter of public importance or interest; or
  - (3) to support or oppose any candidate for political office.
- (b) Offering of services, facilities, or products permitted; advertisements prohibited
  - (1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for remuneration.
  - (2) No public broadcast station *may make its facilities available to any person* for the broadcasting of any advertisement.

(Emphasis added)

This is a *Chevron I* case, which is governed by the familiar precedent that, “if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In determining the intent of Congress, the Courts will look to the plain language at issue in the context of the specific statute before it. *National Public Radio, Inc. v. FCC*, 254 F.3d 226, 229 (D.C. Cir 2002). Where, as here, the plain language contradicts the agency’s construction, this Court must reverse. *Id.* at 230.

**A. The FCC’s Interpretation of Section 399B Violates the Plain Language of the Statute.**

The language Congress employed is extraordinarily broad and clearly designed to encompass all possible forms of advertising. NCEs may not even make their facilities “available” for the purpose of any advertisement. The term “advertisement” is also given an expansive meaning so as to cover material meeting the criterion of Section 399B(a) which is either broadcast “or otherwise transmitted.” This definition is clearly incorporated in the prohibition of 399B(b)(2).

The Commission nonetheless construed Section 399 as permitting certain kinds of advertising. It concluded that the broad language of 399B(a) “was arguably acknowledging that noncommercial stations were capable of transmitting advertisements on a broadcast or nonbroadcast basis” but that “[w]hen Congress set out the prohibition in Section 399B(2), however, it expressly limited it to those advertisements provided on a *broadcast* basis.” *PTV DTV Order*, 16 FCC Rcd at 19053 (emphasis in original) (JA\_\_).

This reading strains credulity. The Commission’s would require one to believe that Congress went to the trouble of creating a special definition of the term “advertisement” so that it could subtly, implicitly and ambiguously signal that it would be OK to permit “nonbroadcast” advertising. This belief must also withstand the fact that, to all appearances, Congress used the broadest language at its disposal to prohibit any form of advertising whatsoever, even leasing or otherwise “mak[ing] available its facilities to any person” seeking to engage in advertising.

**B. The FCC’s 1987 *Subscription Video Order* Did Not Inform Congress’ 1981 Use of the Word “Broadcasting” in Section 399B(2).**

The Commission justifies its decision by stating that:

The term “broadcasting” is defined in the Communications Act as “the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.” In 1986, we addressed this definition in our *Subscription Video* proceeding [*Subscription Video*, 2 FCC Rcd 1001 (1987), *aff’d sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988)]. In that decision we determined that the term “broadcasting” as defined by the Communications Act “refers only to those signals which the sender intends to be received by the indeterminate public.” We therefore found that “a necessary condition for the classification of a service as broadcasting is that the licensee’s programming is available to all members of the public, without any special arrangements or equipment.” Based on these criteria, we ruled that subscription television does not constitute broadcasting. Applying these same criteria to the digital spectrum, we find that subscription television provided by NCE licensees on their excess digital spectrum does not constitute “broadcasting.” We conclude therefore that NCE licensees may include advertising in their subscription television offerings, as the Section 399B ban on advertising applies only to broadcast streams. We also conclude that these same criteria continue to apply to any DTV capacity that NCE licensee might lease to other parties.

*Order*, 16 FCC Rcd at 19053-54 [JA ] (footnotes omitted)

Neither the plain language of the statute, nor any other traditional tools of statutory construction support the Commission's reading. Thus, it is impossible for the Commission to demonstrate that, when Congress chose to use the word "broadcasting" in 399B(2), it was using the word in anything other than its contemporaneous legal meaning, *i.e.*, that "broadcasting" did not include the provision of subscription services. Congress therefore had no cause to make specific reference to subscription television or other "nonbroadcast" services in its prohibition.

While the Commission has certain latitude to reinterpret ambiguous statutes, it cannot create ambiguity where none exists by ignoring extrinsic evidence as to the meaning of the words in the relevant time frame. *See NAB v. FCC*, 740 F.2d 1190, 1201 (D.C. Cir. 1984) ("the [FCC's] *DBS Order* must rise or fall upon the FCC's articulated policies at the time of the order.") In particular, the Commission's construction of Section 399B falters on its failure to account for an important time sequence. The critical flaw is that, at the time Congress enacted Section 399B(2) in 1981, the statutory term "broadcasting" did **not** have, and **never** had, the definition on which the Commission now relies.

Until 1987, the term "broadcasting" was not applied to subscription television services. Thus, STV operators were required to provide time for political candidates, identify sponsors and adhere to other public interest obligations. *NABB v FCC*, 849 F.2d at 680 (Wald, J., dissenting); *see also, Monroe Communications Corp. v. FCC*, 900 F.2d 351 (D.C. Cir. 1990) (applying pre-1987 criteria). When the FCC did change its application of the term in its 1987 *Subscription Television* decision, the Commission expressly acknowledged that it was redefining a statutory construction,<sup>10</sup> it recognized

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<sup>10</sup>*Id.*, 2 FCC Rcd at 1001. ("With this background, the Commission adopted the Notice in this proceeding, proposing to re-examine the broadcast classification of STV. After a careful review of the comments and reply comments, it appears that the re-classification of STV as a non-broadcast service would be both legally permissible and more appropriate as a matter of regulatory policy.")

that it was required to re-examine its prior precedents,<sup>11</sup> and it presented a detailed legal analysis based upon precedent of this Court that clearly afforded it latitude to reinterpret the term prospectively.<sup>12</sup>

Rather than deal head on with this question, the Commission attempts to duck it in a footnote:

We recognize that Section 399B was enacted before *Subscription Video*. Congress gave no indication in Section 399B, however, that it intended to lock in the Commission's prior interpretation of the statutory definition of the term "broadcasting." See *Lukhard v. Reed*, 481 U.S. 368, 379 (1987) ("It is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place.").

*PTV DTV Order*, 16 FCC Rcd at 9053 n.60.

However, this is a *Chevron II* solution to a *Chevron I* problem. When, as here, the plain language has a clear meaning, one looks at Congressional intent for affirmative meaning. Finding "no indication" that the statutory term might be reconstrued in the future amounts to authorizing the FCC to amend the statute. Put another way, what matters is that there is "no indication" that Congress expected the FCC to give the term a different meaning, much less that it expected the FCC to do so.

As this court has found, Congress did not intend, in 1927, to foreclose the FCC from defining "broadcast" for purposes of Section 153(o). *National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir 1988). In 1981, however, when Congress wrote Section 399B, it clearly intended to apply the FCC's then-current definition of broadcasting. See *Brown v. Gardner*, 513 U.S. 515, 520-22 (1994); See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. Frickey, "Statutory

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<sup>11</sup>*Id.*, 2 FCC Rcd at 1003 ("We do not propose to "re-write" the statute, but, recognizing that the Act's definition is based on the intent of the licensee, we do propose to decide whether previously utilized criteria for determining that intent remain the best practicable indicia for these classification decisions. As a result of our review of the comments and replies in this docket, we conclude that the proposal outlined in the Notice is the correct approach to these decisions. Previously utilized indicia of intent, based in large part on the general appeal of program content, seem to have been ill advised. More accurate and appropriate indicia are available, and, in future classification decisions, we intend to use them.")

<sup>12</sup>*Id.*, 2 FCC Rcd at 1003 ("The court's decision in *NAB v. FCC* does not foreclose the Commission's authority to revisit previous classification decisions. The court concluded that the Commission could not depart, without reasoned explanation, from its previous classification of STV as a broadcast service. 740 F.2d at 1201.")

Interpretation as Practical Reasoning,” 42 Stanford L. Rev. 321 (1990) (arguing that Congressional silence in the face of administrative action should not be construed as adoption of the new administrative interpretation).

**C. Traditional Tools of Statutory Construction Support Petitioners’ Reading of the Statute.**

Any remaining question of the “clear intent of Congress” is resolved by examination of the accompanying provisions of the 1981 Amendments and the legislative history. *See, e.g., Meredith v. Federal Mine Safety and Health Review Commission*, 177 F.3d 1042, 1053 (D.C. Cir. 1999) (the court must use “traditional tools of statutory construction”-- such as legislative history – when conducting *Chevron I* analysis).

The 1981 legislation had several coordinate elements. One part was the decision to embark on an extremely limited advertising experiment. *See pp. 11-13 supra*. The legislative history in the House, where the bill originated, reveals that a minority of the drafters favored permitting “limited, dignified” advertising on public television, 1981 Amendments House Report at 39-40, but the majority soundly rejected this view. Instead, the majority expressed concern over the already “growing commercialization of public television,” 1981 Amendments House Report at 9, and declared that 1981 Amendments must guarantee the “insulation of program control and content from the influence of special interests – be they commercial, political or religious.” *Id.* at 16.

As a concession to the minority view, however, Congress ultimately agreed to authorize the advertising “demonstration program” and created the TCAF to monitor it. The conditions imposed upon the demonstration program demonstrate Congress’ suspicion of and hostility to anything

After considering the TCAF report, Congress took no action to reauthorize the demonstration program or permit advertising in any other way, shape or form by NCEs. With the statutory expiration of the demonstration program, any statutory permission for NCE advertising conclusively ended.

Another indication demonstrating Congress' "clear intent" to prohibit all forms of advertisement on public television, whether on subscription television or free over-the-air service, is seen in the contemporaneously adopted restrictions action on "corporate logograms." 1981 House Report at 23-25; 47 USC §399a.

As discussed at 9-11 *supra*, Congress reacted swiftly to what it perceived as the FCC's too rapid deregulation of corporate sponsorship announcements. While the drafting committee recognized that the FCC had not deviated from its previous policy of prohibiting any advertising by NCEs, and while generally endorsing the FCC's desire to give NCEs more latitude, it *still* expressed concern that the Commission's actions would move too quickly toward commercialization. House Report at 23-25. Accordingly, the final statute rolled back some of the discretion the Commission had allowed NCEs, satisfying Congress that sponsorship announcements would not become too much like commercials.

The examination of contemporaneous statutory provisions and the legislative history thus support Petitioners' construction of the plain meaning. Congress painted with the broadest possible brush to prohibit NCE advertising.

By contrast, nothing in the legislative history, or of the 1981 amendments read as a whole, supports the Commission's view. To impute to Congress a Nostradums-like prescience enabling it to "arguably" foresee what that the Commission would do six years later goes far beyond canons of construction. Further, if Congress intended to make such a distinction, one would expect to find somewhere in the legislative history an explanation as to *why* Congress would permit NCEs to offer advertiser supported services – particularly in the face of the concern expressed by the majority that public broadcasting was already becoming "too commercial" in nature.

## **II. THE *ORDER* DEVIATES FROM PRIOR COMMISSION POLICY WITHOUT ADEQUATE EXPLANATION.**

An administrative agency has the authority to alter policy and reverse previous decisions when circumstances warrant; it may not, however, do so in an arbitrary and capricious manner. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 48-49 (1983); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044-45 (2002). The agency must provide a reasoned explanation for the change. *Id.*; *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971) (agency must indicate that “prior policies and standards are being deliberately changed, not casually ignored”). In particular, where an agency policy is of long standing, the agency must explain why it has chosen to reverse itself. *International Ladies Garment Union v. Donovan*, 723 F.2d 795, 813 (D.C. Cir. 1983).

The *Order* at issue here reverses two longstanding Commission policies – yet provides no reasoned explanation for the departure. The Commission reverses its policy of 50 years to prohibit NCEs from offering any form of advertiser supported programming or sharing NCE-dedicated frequencies with commercial broadcasters, and of declining to grant general authority to NCEs to offer subscription television services. In neither case has the Commission offered a sufficient explanation for these changes.

**A. The *PTVDTV Order* Departs From the Commission’s Strict Policy of Prohibiting Any Advertiser-Supported Programing on NCE Reserved Frequencies Without Explanation.**

In 1951, when the Commission established its first table allotting television licenses to communities around the country, it determined it would reserve at least one license per market for noncommercial educational broadcasters. *1951 TV Allotments Order*, 41 FCC 148, 158-67 (1951). The Commission justified what was then an extraordinary reservation of scarce allocations on the grounds that “based on the important contributions such stations can make in the education of the in-school and adult public, there is a need for non-commercial educational stations.” *Id.* at 159-60.

The Commission recognized that the cost of building television stations and developing programming would be enormously expensive and particularly difficult for the noncommercial educational and noncommercial public institutions that would receive NCE licenses. *Id.* at 162-63. The Commission expressed considerable concern that the service succeed and looked for innovative ways to assist NCEs to meet the challenge, such as holding open the reserved allotments and extending the usual construction deadlines so that NCEs could secure funding from either the state or federal government or perhaps private donors. *Id.*

The Commission, however, drew the line at permitting advertising by NCEs or permitting NCEs to share their NCE reserved allotment with commercial broadcasters. The Commission recognized such arrangements would provide much needed funds for construction of stations and development of programming. Nevertheless the Commission rejected the requests from two potential NCEs to engage in such “limited commercial non-profit operation.” *Id.* at 165-66.

In rejecting these requests, the Commission found that allowing even limited advertisements or frequency sharing with commercial broadcasters would “vitate the difference between commercial operation and noncommercial educational operation.” *Id.* At 166. Accordingly, the Commission found that “achievement of the objective for which special educational reservations have been established—*i.e.*, the establishment of a genuinely educational type of service—would not be furthered” by permitting advertising or frequency sharing. *Id.*

Since that 1951 Order, the Commission has never questioned this conclusion – that permitting NCEs to offer advertising would vitiate the difference between commercial and noncommercial licensees and thus defeat the entire purpose of the noncommercial reservation.

To the contrary, it reaffirmed that conclusion just prior to the passage of the 1981 Amendments. *1981 PTV Order*. Explicitly relying on the policy set forth in the *1951 TV Allotments Order*, the Commission rejected a request from NCEs to support noncommercial educational

programming with advertising revenue, finding again that permitting advertiser supported programming of any kind would compromise the NCE service. *1981 PTV Order*, 86 FCC.2d at 158-59.

Inexplicably, the Commission completely ignored this long-standing policy in its *PTV DTV Order*. Having determined – erroneously– that Congress did not prohibit advertising or frequency sharing with commercial broadcasters, the Commission proceeded to authorize it without any explanation as to why it would no longer “vitiating the difference between commercial operation and noncommercial educational operation” and defeat the purpose of the noncommercial reservation.

Certainly the Commission discussed the benefits that such arrangements would have for NCE licensees; it described the revenue generated from advertiser supported subscription services or from leasing spectrum to commercial entities to offer advertiser supported services and how this revenue would fund the purchase of DTV equipment necessary for the transition. The Commission also observed that the revenue would fund innovative digital programming and new, educational service taking advantage of the interactive potential of DTV.

These arguments, however, are identical in every respect to those it rejected in 1951. Indeed, one could simply remove the word “digital” from the Commission’s *Order* and find it perfectly applicable to the situation in 1951. Then, as now, NCEs argued that the expense of state of the art equipment created a nearly insuperable barrier to establishing precisely the service the Commission wished to see. Then, as now, NCEs argued that they desperately needed the revenues from advertiser supported services and that this “limited commercial operation” would not interfere with the educational mission, but would in fact enhance it with increased revenues and private sector partnerships.

The Commission offers no explanation as to why it comes to the opposite conclusion here that it did in 1951. The Commission proposes no new safeguards or explanations, merely an admonishment

to NCEs that they must serve their educational purpose and that the “primary” use of their spectrum must serve their educational purpose. *PTV DTV Order* 16 FCC Rcd at 19055-56 (JA\_\_\_).

But the issue in 1951 was not one of degree. In 1951, the Commission found that the very act of offering commercial services or partnering with commercial broadcasters would blur the line between commercial and noncommercial licensees and defeat the purpose of the noncommercial reservation. Or, to use the phrase of the Commissioner Copps, when that happens, public broadcasting begins to lose its soul. 16 FCC Rcd at 19071 (JA\_\_\_).

The Commission similarly fails to explain why it reversed its 1984 determination that a general grant of authority to NCEs to offer subscription services would interfere with the ability of NCEs to offer educational programming. The Commission’s sole justification is the single line in the *PTV DTV NPRM* that “digital is different.” *PTV DTV NPRM*, 14 FCC Rcd at 548 (JA \_\_\_). The Commission does not explain, however, how digital television differs from analog television *in any way relevant* to the decision to grant blanket authority to offer subscription services.

The Commission cannot satisfy the requirement that it justify its decision to reverse itself with a well reasoned explanation by simply announcing “digital is different.” The Commission must draw some logical connection between the differences between digital technology and analog technology and its previous decision that blanket authority would interfere with the ability of NCEs to offer noncommercial educational programming.

Because the Commission failed to offer any reasoned explanation for these departures, the court should vacate the rule and remand this proceeding to the Commission.

## CONCLUSION

WHEREFORE, the court should find the FCC's decision contrary to law and vacate the rule or, in the alternative, remand the matter to the FCC for further consideration.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this initial brief complies with the type-volume limitation. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 11,268 words. This certificate was prepared in reliance on the word-count function of the word-processing system (WordPerfect 9.0) used to prepare this brief.

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Harold Feld

Dated: October 21, 2002

**ADDENDUM**  
**RELEVANT SECTIONS OF THE**  
**COMMUNICATIONS ACT OF 1934, AS AMENDED**

**SEC. 336. [47 U.S.C. 336] BROADCAST SPECTRUM FLEXIBILITY.**

(a) COMMISSION ACTION.--If the Commission determines to issue additional licenses for advanced television services, the Commission--

(1) should limit the initial eligibility for such licenses to persons that, as of the date of such issuance, are licensed to operate a television broadcast station or hold a permit to construct such a station (or both); and

(2) shall adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.

(b) CONTENTS OF REGULATIONS.--In prescribing the regulations required by subsection (a), the Commission shall--

(1) only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services;

(2) limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies;

(3) apply to any other ancillary or supplementary service such of the Commission's regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplementary service shall have any rights to carriage under section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;

(4) adopt such technical and other requirements as may be necessary or appropriate to assure the quality of the signal used to provide advanced television services, and may adopt regulations that stipulate the minimum number of hours per day that such signal must be transmitted; and

(5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.

(c) RECOVERY OF LICENSE.--If the Commission grants a license for advanced television services to a person that, as of the date of such issuance, is licensed to operate a television broadcast station or holds a permit to construct such a station (or both), the Commission shall, as a condition of such license, require that either the additional license or the original license held by the licensee be surrendered to the Commission for reallocation or reassignment (or both) pursuant to Commission regulation.

(d) PUBLIC INTEREST REQUIREMENT.--Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest. Any violation of the Commission rules applicable to ancillary or supplementary services shall reflect upon the licensee's qualifications for renewal of its license.

(e) FEES.--

(1) SERVICES TO WHICH FEES APPLY.--If the regulations prescribed pursuant to subsection

(a) permit a licensee to offer ancillary or supplementary services on a designated frequency--

(A) for which the payment of a subscription fee is required in order to receive such services, or

(B) for which the licensee directly or indirectly receives compensation from a third party in return for transmitting material furnished by such third party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required),

the Commission shall establish a program to assess and collect from the licensee for such designated frequency an annual fee or other schedule or method of payment that promotes the objectives described in subparagraphs (A) and (B) of paragraph (2).

(2) COLLECTION OF FEES.--The program required by paragraph (1) shall--

(A) be designed (i) to recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment through the method employed to permit such uses of that resource;

(B) recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this Act and the Commission's regulations thereunder; and

(C) be adjusted by the Commission from time to time in order to continue to comply with the requirements of this paragraph.

(3) TREATMENT OF REVENUES.--

(A) GENERAL RULE.--Except as provided in subparagraph (B), all proceeds obtained pursuant to the regulations required by this subsection shall be deposited in the Treasury in accordance with chapter 33 of title 31, United States Code.

(B) RETENTION OF REVENUES.--Notwithstanding subparagraph (A), the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such proceeds for the costs of developing and implementing the program required by this section and regulating and supervising advanced television services. Such offsetting collections shall be available for obligation subject to the terms and conditions of the receiving appropriations account, and shall be deposited in such accounts on a quarterly basis.

(4) REPORT.--Within 5 years after the date of enactment of the Telecommunications Act of 1996, the Commission shall report to the Congress on the implementation of the program required by this subsection, and shall annually thereafter advise the Congress on the amounts collected pursuant to such program.

(f) EVALUATION.--Within 10 years after the date the Commission first issues additional licenses for advanced television services, the Commission shall conduct an evaluation of the advanced television services program. Such evaluation shall include--

(1) an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services;

(2) an assessment of alternative uses, including public safety use, of the frequencies used for such broadcasts; and

(3) the extent to which the Commission has been or will be able to reduce the amount of spectrum assigned to licensees.

(g) DEFINITIONS.--As used in this section:

(1) ADVANCED TELEVISION SERVICES.--The term "advanced television services" means television services provided using digital or other advanced technology as further defined in the

opinion, report, and order of the Commission entitled "Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service", MM Docket 87-268, adopted September 17, 1992, and successor proceedings.

(2) DESIGNATED FREQUENCIES.--The term "designated frequency" means each of the frequencies designated by the Commission for licenses for advanced television services.

(3) HIGH DEFINITION TELEVISION.--The term "high definition television" refers to systems that offer approximately twice the vertical and horizontal resolution of receivers generally available on the date of enactment of the Telecommunications Act of 1996, as further defined in the proceedings described in paragraph (1) of this subsection.

#### **SEC. 399A. [47 U.S.C. 399a] USE OF BUSINESS OR INSTITUTIONAL LOGOGRAMS.**

(a) For purposes of this section, the term "business or institutional logogram" means any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization.

(b) Each public television station and each public radio station shall be authorized to broadcast announcements which include the use of any business or institutional logogram and which include a reference to the location of the corporation, company, or other organization involved, except that such announcements may not interrupt regular programming.

(c) The provisions of this section shall not be construed to limit the authority of the Commission to prescribe regulations relating to the manner in which logograms may be used to identify corporations, companies, or other organizations.

#### **SEC. 399B. [47 U.S.C. 399b] OFFERING OF CERTAIN SERVICES, FACILITIES, OR PRODUCTS BY PUBLIC BROADCAST STATIONS.**

(a) For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended--

(1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;

(2) to express the views of any person with respect to any matter of public importance or interest; or

(3) to support or oppose any candidate for political office.

(b)(1) Except as provided in paragraph (2), each public broadcast station shall be authorized to engage in the offering of services, facilities, or products in exchange for remuneration.

(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

(c) Any public broadcast station which engages in any offering specified in subsection (b)(1) may not use any funds distributed by the Corporation under section 396(k) to defray any costs associated with such offering. Any such offering by a public broadcast station shall not interfere with the provision of public telecommunications services by such station.

(d) Each public broadcast station which engages in the activity specified in subsection (b)(1) shall, in consultation with the Corporation, develop an accounting system which is designed to identify any amounts received as remuneration for, or costs related to, such activities under this

section, and to account for such amounts separately from any other amounts received by such station from any source.