

TO: CPB Board of Directors

FROM: Paul E. Symczak

THROUGH: Donald Ledwig

DATE: March 12, 1990

SUBJECT: Supplemental Materials re: Regulatory Issues  
for March 1990 Board Meeting

### Executive Summary

It has been a long-standing practice of CPB Management, at the direction of the Board, to obtain Board authorization on policy positions before presenting those positions to a regulatory agency or court. Typically, those authorizations are broad enough to cover a variety of filings and proceedings. At times, however, new proceedings or changes in positions require Management to come to the Board for new policy positions or filing authority.

We have three such matters to discuss with the Board during its March 1990 meeting. We have provided the usual background information on these issues in the February 23, 1990 Regulatory Update ("Regulatory Update") found in your Board materials. At the meeting, we will be making a presentation to you based on the attached supplemental materials. Due to the number and complexity of these matters, we wanted to provide the Board with the attached materials for your consideration in advance of the meeting. After our discussion at the Board table, we will recommend adoption of the attached resolution.

The first matter, cable carriage of local public television signals ("must-carry"), is one in which CPB has played a considerable role over the years. Recently, CPB has determined that the issue is primarily local in nature and that public broadcasting's position should be led by the public television membership organizations. Nevertheless, CPB has continued to support the position that all local public television stations should be carried by local cable systems. NAPTS, taking the lead on the issue, has refined its prior position and now proposes that local cable systems should be required to carry each local, substantially unduplicated public television service. We want to discuss with the Board whether CPB also should refine its position in order to be consistent with the new position taken by NAPTS and to be able to endorse and support NAPTS' efforts in this regard. We recommend that CPB do so.

The next two matters grow out of NTIA's recent release of three notices of inquiry in three separate areas. In the first area, dealing with management of the electromagnetic spectrum, Management felt that it had sufficient standing Board authority to file comments defending the public service grounding for awarding of spectrum licenses and urging the preservation of the special considerations historically given to public broadcasting. (See Regulatory Update at pages 32-33.)

The second comprehensive area of inquiry deals with the role of tele-communications in the infrastructure of the United States, and how regulatory and other government policies can promote the development of a telecommunications infrastructure that can meet present and future national needs. The inquiry focuses primarily on nonbroadcast communications systems, particularly public switched telephone networks. However, we feel that it is important for public service telecommunications to be recognized and play an important role in the development of telecommunications infrastructure policy. We believe that the Public Broadcasting Act, as amended, authorizes CPB to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services, and we want to ensure that such services continue to have guaranteed access to the infrastructure. Our comments would address these and related issues, and we recommend the Board authorize Management to file in this and related inquiries.

The final area of NTIA inquiry deals with the "globalization" of media, particularly the global growth of mass media firms and its implications for United States communications policy. Most of this inquiry deals with issues not directly relevant to CPB or public broadcasting. However, in one of the media content questions, NTIA specifically seeks information regarding the political impact of mass media firm globalization on the availability of public or noncommercial programming in the United States. NTIA asks for comment on the extent to which public broadcasting has influenced and shaped development of United States television and radio, and whether its role should remain the same as domestic and international media firms become global in nature. The inquiry also asks about financing of public broadcasting. Management recommends that the Board authorize it to provide information and comment in this proceeding.

If there are any questions about this memo or the issues it addresses. I will be happy to discuss them at any time before or during the Board meeting presentation.

### A. Cable Must-Carry

On December 12, 1989, the FCC initiated a Notice of Inquiry on the cable television industry's operation under the Cable Communications Policy Act of 1984 as a step towards producing the report which the Act requires the FCC to submit to Congress by October 28, 1990. (See Regulatory Update at page 4.) Comments were requested on many topics, including the effects of the absence of must-carry rules, and the interplay between must-carry rules and cable's compulsory copyright license. On March 1, 1990, PBS filed Comments primarily dealing with the compulsory license issue and NAPTS filed Comments primarily dealing with the must-carry issue.

NAPTS' Comments assert NAPTS' new and refined position that local cable systems should be required, upon request, to carry each local, substantially unduplicated public television service. This proposal represents a departure from previous must-carry approaches, including the position adopted by CPB, NAPTS and PBS in a series of joint filings before the FCC, the D.C. Court of Appeals and the U.S. Supreme Court through 1988. In those filings, pursuant to the CPB Board's Resolution dated May 5, 1983, CPB joined NAPTS and PBS in urging the FCC to adopt a mandatory carriage rule requiring cable systems to carry on their basic tier all public television stations that provide Grade B service to the cable system's community. As described more fully below, NAPTS' current proposal focuses on mandatory carriage of distinctive public television services, rather than on the number of stations which must be carried.

We still maintain that it is more appropriate for the station membership organizations to take the lead on the must-carry issue, as NAPTS is continuing to do, since this is fundamentally a local station/cable company issue. However, NAPTS' new position describes a public policy position that has national implications for all of public telecommunications. Therefore, pursuant to CPB's role as an advocate of the public interest on national regulatory issues affecting public telecommunications, it seems appropriate for CPB to reexamine its must-carry position in light of the NAPTS' public policy posture. Accordingly, we are recommending that the Board take this opportunity to reconsider the original focus on stations, as contrasted with NAPTS' current focus on services.

This reexamination of CPB policy is especially important at this time when the must-carry issue is surfacing on several fronts. The FCC is reconsidering the issue in the context of its cable reregulation Notice of Inquiry. Bills are also pending in both the Senate and the House as part of the current push for cable reregulation. In addition, although negotiations recently have stalled, some are still looking for an industry compromise. (See Regulatory Update at pages 2-5.)

As we explained in the Regulatory Update (page 4), in addition to filing its Comments with the FCC on March 1, 1990, NAPTS also has prepared and has been distributing (mostly at the FCC and on Capitol Hill) a comprehensive information package establishing and explaining the must-carry position which NAPTS recently developed for public television. Specifically, NAPTS recommends that any new carriage regulations or legislation include the following requirements:

1. Upon request by a local public television station, a cable system must carry, on its basic service tier, every qualified public television service which:
  - (a) Is within 50 miles of the cable system's principal headend, or broadcasts a predicted Grade B contour over the principal headend, and
  - (b) Provides a program service that is not substantially duplicated by another qualified public television station also requesting carriage. The "substantial duplication" criterion would be defined and enforced by the Commission.
2. A public television service is "qualified" for carriage if provided by a licensee that (1) is operating under a noncommercial educational license, and (2) meets the eligibility criteria established by CPB under the authority cited in section 396(k)(6)(B) of the Communications Act for receipt of a community service grant.
3. If no qualified public television service is provided through transmission facilities located within 50 miles of the cable system's headend or broadcasts a predicted Grade B contour over the headend, the cable system must carry the closest in-State qualified public television service.
4. Cable systems with a capacity of 12 or fewer channels must carry only one public television service -- the one considered "most local".
5. Public television services must be provided with sufficient bandwidth and technical capacity to reach their audiences with the same quality audio and video signals as commercial services receiving carriage.
6. Cable systems must carry the audio and video signals of public television services in their entirety, including the vertical blanking interval (VBI) and aural subcarriers.

We have consulted with NAPTS and studied carefully the distinctions between focusing on the number of stations carried and focusing on the number of services carried. As discussed below, we have concluded that it is in the best interest of public broadcasting and its viewers for CPB to support legislation and regulations which call for mandatory carriage of all substantially unduplicated local public television services. As a practical matter, our earlier orientation toward the number of stations carried simply was not leading to a satisfactory result for public television.

Apparently, our earlier approach of requesting mandatory carriage of all public television stations was undermined by the all too common misperception that carriage of more than one public television station constitutes carriage of nothing more than duplicative programming. It is well established that local communities often support more than one public television service, each of which serves the market in an important and different way. Unfortunately, however, neither the FCC's nor the industry's previous approaches to must-carry recognized or adequately protected these distinctive services. For example, the FCC rules established in the 1986 Report and Order ("Interim Rules") required that small cable systems (fewer than 54 usable activated channels) carry one noncommercial educational station or translator, and that larger systems (54 or more usable activated channels) carry two such stations or translators. In addition, it is our understanding that the industry compromise reportedly reached in July 1989 would have provided for carriage of only one public television station per market, which is even more limiting than the Interim Rules. (See Regulatory Update at pages 2-3.) These examples suffer from the same flaw -- they are based on a purely quantitative approach instead of a qualitative approach and therefore ignore the important fact that unique and distinct services may be provided by two or more public television stations in the same market. Perhaps by changing the focus from stations to services, the ultimate legislation and regulations are more likely to ensure that all local citizens will have access to all of the distinct public telecommunications services that they choose to support through their tax dollars and private contributions.

Nevertheless, we must recognize the realities of achieving carriage of all substantially unduplicated public television services. We believe that using a qualitative approach to cable carriage should make more evident the lack of duplication between the public television stations in most markets. However, depending on how "substantial duplication" is ultimately defined, certain public television stations may fail the "substantial nonduplication" test and be disqualified from carriage by the local cable system. While we would prefer that no public station ever be disqualified from carriage, this result is completely consistent with CPB policy -- specifically, CPB's long standing policy of facilitating the provision of

new and diverse public television services to communities throughout the United States rather than just adding new stations and duplicative services to those communities.

In sum, we recommend that CPB support the development of legislation and regulations which mandate that each substantially unduplicated local public television service be carried, on request, on the lowest priced basic service tier by all cable systems with a headend within fifty miles of the licensed noncommercial educational transmitter, or the translator broadcasting the service, or within its signal's Grade B contour, whichever is greater. If the Board accepts this recommendation, then we are prepared to file reply comments on April 2, 1990 in the FCC cable reregulation proceeding endorsing the proposal NAPTS presented in its March 1, 1990 Comments.

There are two caveats, however, to our endorsement and support of NAPTS' must-carry proposal. First, NAPTS' proposal does not define "substantial duplication", but rather states that it would be defined and enforced by the FCC in order to resolve carriage-related disputes which may arise in markets in which more than one local public television service requests carriage. We would recommend that NAPTS develop a definite definition of "substantial duplication" rather than leave the proposal open ended and thus vulnerable to unacceptable interpretations of duplicative services. It must be made clear that different public television services can air some of the same programs, yet not provide duplicative services.

The second caveat concerns the extent to which we intend to support NAPTS' efforts. As we discussed above, we believe that it is appropriate for CPB to take a position on the national public television policy issues implicated in NAPTS' proposal. However, under NAPTS' proposal, the FCC may ultimately be required to adjudicate carriage and duplication questions in specific markets. Regardless of CPB's must-carry position, CPB should not become involved with any such local debates.

Finally, please note that, as we explained in the Regulatory Update, there are several other elements in the ongoing must-carry debate (e.g., channel-positioning (pages 2-3)) and the "if-carry, must-pay" proposal (pages 4-5)). Such specific issues are generally local in character and thus more naturally the concern of the station membership organizations. Accordingly, we do not believe that it is necessary for CPB to take any public position on such subjects.

## **B. Telecommunications Infrastructure**

On January 9, 1990, the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) issued a Notice of Inquiry beginning a comprehensive study of the current state and future evolution of the domestic telecommunications infrastructure. The objectives of NTIA's inquiry are to: (1) examine the significance of telecommunications as an element of national infrastructure; (2) consider the technological and marketplace trends that are determining the characteristics and capabilities of telecommunications in the United States and elsewhere; (3) evaluate the ways in which telecommunications services and capabilities affect both the international competitiveness of U.S. business and the quality of life of American citizens; and (4) assess the role of regulatory and other government policies in promoting the development of a telecommunications infrastructure that meets present and future national needs. Through this inquiry, NTIA intends to develop a broad, coherent vision of the role of telecommunications in U.S. economic and social life, and of the ways to best promote its usefulness to the American public.

NTIA focuses on a number of economic, regulatory, and technical questions related to the operation, use, and development of nonbroadcast communications systems, particularly public switched telephone networks. Of central importance, NTIA asks whether "plain old telephone service" remains adequate for the majority of U.S. citizens, what capabilities the telephone network must or should possess, what services it should provide and at what cost, and whether the traditional policy goal of "universal service" should be redefined. NTIA also examines the policies which might guide the evolution of the broad-band, fiber-optic, digital network of the future. In this regard, we are concerned with the probable migration of video and audio services to wireline, and the role which public broadcasters and the producers of public telecommunications services might play in that new scenario.

NTIA examines the importance of telecommunications as a factor of production in the national economy, and raises for discussion the links between telecommunications and economic development in both urban and rural areas. NTIA also explores the role that telecommunications can play in the improvement of the quality of life and the delivery of critical public services such as education, health care, and public safety. We believe that CPB should file comments on the quality of life and educational services issues as they relate to the use of the telecommunications infrastructure for noncommercial educational and cultural purposes. We also would emphasize the essential role of a well-educated workforce in economic development.

Specifically, we are concerned that: (1) the telecommunications infrastructure will be capable of providing the most advanced services at the highest possible technical quality (e.g., on-demand, fully interactive instructional programming); (2) the providers of public telecommunications services will have guaranteed access to that infrastructure; (3) public telecommunications services will be provided on both local and national levels in order to preserve localism, fulfill national programming objectives, and achieve economies of scale; and (4) the dual public policy goals of universal, affordable service to the public will be retained. Our comments would address these issues.

Through CPB's participation in this proceeding, we hope to ensure that the highest ideals of public broadcasting are reflected in whatever policies NTIA adopts or recommends. Public telecommunications must continue to play an important role in bettering the lives of our citizens through the provision of diverse, innovative, noncommercial educational and cultural programming of the highest quality, no matter which distribution technology becomes preeminent. While not abandoning the existing broadcasting infrastructure, public telecommunications service providers (today's public radio and television stations) must have the resources and/or the right to access the evolving nonbroadcast telecommunications infrastructure. That infrastructure, namely the advanced public switched telephone network, eventually could become the new "mass media." Therefore, that infrastructure must provide the means to educate, enhance, and improve our society as a whole and to continue the goals and objectives contained in the Public Broadcasting Act. It must further our democratic institutions and ideals by equitably distributing the benefits of the Information Age, by unifying rather than separating the public into the information rich and poor.

We believe that our participation in NTIA's inquiry is within CPB's statutory mandate. Since 1978, the Congress has found and declared that it is "in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services." 47 U.S.C. Sec. 396(a)(2). To this end, CPB is expressly authorized to "make grants or contracts for the use of nonbroadcast technologies for the dissemination to the public of public telecommunications services." 47 U.S.C. Sec. 396(g)(2)(H). CPB also is authorized to support and assist "public telecommunications entities," which includes both public broadcasting stations and entities which have "been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere." 47 U.S.C. Sections. 396(g), 397(7, 12). Given CPB's statutory role in the growth and development of

alternatives to broadcasting as a means of disseminating public telecommunications services more efficiently and effectively, we recommend that CPB participate in this inquiry. Accordingly, we request authorization from the Board, through the adoption of the attached resolution, to participate in this proceeding.

The deadline for the submission of comments originally was March 19, 1990. In order to permit consultation with the Board at a regularly scheduled meeting, we requested a three-week extension of the comment period. Comments are now due on April 9, 1990. Reply comments are due on May 24, 1990.

### **C. Globalization of Media**

On February 1, 1990, NTIA initiated a Notice of Inquiry concerning the current trend of "global growth" of mass media firms and its communications policy implications. The Notice addresses two aspects of the "globalization" phenomenon. First, NTIA asks commenters for factual information on the globalization trend, its origins, its effects on the media industry, and whether it is a short-term marketplace aberration or a long-term phenomenon. Second, NTIA seeks comment on a number of communications policy issues including media industry structure, media content, and the United States' competitiveness in the marketplace. Because public opinion on a worldwide basis is increasingly shaped by global media, another focus of the inquiry is the impact of global media on social, cultural and political developments worldwide.

In exploring media content questions, NTIA specifically seeks information regarding the potential impact of mass media firm globalization on the availability of public or noncommercial programming in the United States. In this regard, NTIA asks for comment on the extent to which public broadcasting influenced and shaped the development of United States television and radio, and whether its role should remain the same as domestic and international media firms become global in nature. NTIA notes the continuing debates concerning the appropriate structure and sources for the funding of public broadcasting and asks whether the subjects addressed in the Notice relate to the subject of continuing governmental funding for public broadcasting. Finally, the Notice requests comments as to whether the United States should look to the experience of other nations in assessing the role of public broadcasting in an era of globalization.

We believe that it is incumbent upon CPB to respond to these questions, however, Management has no specific authority to provide policy positions in this context. We believe that the information we would provide in responding to this Notice of Inquiry is consistent with other well-established CPB policy statements made in

other forums. Therefore, we recommend that the Board give Management specific authority to submit comments on behalf of CPB in this Inquiry.

As we noted in the Regulatory Update, we plan to discuss this matter with the Board at the March 20, 1990 Board meeting because comments are due on May 11, 1990, prior to the May 1990 Board meeting. The deadline for reply comments is June 22, 1990.

cc: Ted Coltman