

# PUBLIC BROADCASTING AND THE CRISIS OF CORPORATE GOVERNANCE

MONROE E. PRICE\*

## I. INTRODUCTION

Throughout the world, the future of public service broadcasting is in doubt. Partly this is a crisis of technology and its challenges to the prior order. Partly this is a crisis of definition and role. And partly, this is a crisis of economic organization: the capacity of a sector, because of its culture or its tradition of management, to respond to the needs and opportunities of the moment.<sup>1</sup> There is widely available literature on the relationship between responsiveness and the structure of for-profit corporations,<sup>2</sup> but precious little on the application of governance arguments to the public and non-profit foundation sector.<sup>3</sup> The argument of this Essay, however, is that for *public broadcasting* to flourish, for new technologies to provide opportunities for substantial growth in impact, it may be necessary to transform *public broadcasters*. Institutions and entities of the industry have to change in ways that do not seem likely to occur without substantial outside impetus. Indeed, the entire structure of public broadcasting, its history and relationship to government, renders it relatively impervious to change. In antitrust policy, laws or decisions are often criticized because they protect competitors not competition. Something similar is being argued here: the machinery and system in place, as we know it, is designed to protect the existing players rather than the function that is to be performed in American society. This Essay seeks to

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\* Visiting Professor, Cornell Law School, Spring 1999; Communications Fellow, the Markle Foundation; Danciger Professor of Law & Director, Howard M. Squadron Program of Law, Media and Society, Benjamin N. Cardozo School of Law, Yeshiva University; Founder & Co-Director, Oxford Programme in Comparative Media Law and Policy, Wolfson College, Oxford University. His book, *Television, The Public Sphere, and National Identity*, was published by Oxford University Press.

<sup>1</sup> See RICHARD COLLINGS, *FROM SATELLITE TO SINGLE MARKET: NEW COMMUNICATION TECHNOLOGY AND EUROPEAN PUBLIC SERVICE TELEVISION* (1999).

<sup>2</sup> See generally Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 (1992); Albert Caruana et. al., *The Effect of Centralization and Formalization on Entrepreneurship in Export Firms*, 36 J. SMALL BUS. MGMT. 16 (1998); Susan J. Fox-Wolfgram, et. al., *Organizational Adaptation to Institutional Change: A Comparative Study of First Order Change in Prospector and Defender Banks*, 43 ADMIN SCI. Q. 87 (1998).

<sup>3</sup> See Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631 (1998); Robert Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries*, 23 J. CORP. L. 655 (1998).

explain this and to recommend a dramatic way to alter the nature of the debate over public broadcasting's future.

## II. THE PROBLEM AND ASPIRATION

For much of the history of public television in the United States, the aspiration, indeed, the longing, for many has been for an entity that would look more like its European counterparts, especially the British Broadcasting Corporation ("BBC"). The hope was for public television to become more of a force in society, to have a larger audience, and to be capable of making a greater difference in terms of the specific goals that it has always articulated for itself. Instead, the reality of American public television has been turbulent and beset by structural problems, instability and insufficient funding. Its birthright, in fact, was a second-class technology. Now, however, technology has appeared as a possible lever for the accomplishment of submerged and all-but-forgotten goals.<sup>4</sup> For the reasons discussed in this Essay it is doubtful whether any of these opportunities for leverage will be used effectively to force those changes necessary to make public broadcasting more capable of using new technologies. Public broadcasters, like their commercial counterparts, want to preserve their present competitive position in the name of substantial change. They want to preserve most elements of the current structure but gain secure funding and more spectrum. It is like taking an old bungalow and pouring millions of dollars into it so that there is a more permanent, fixed, and high-tech dwelling. The alternatives facing decision-makers are to maintain the current mode of public broadcasting (with little or no change) or to create, or allow to be created, greater conditions for internal readjustment. A third alternative, actively ending public broadcasting, has had some adherents, but is not considered an option here.<sup>5</sup>

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<sup>4</sup> See generally ROSELLE KOVITZ & JOHN WITHERSPOON, *THE HISTORY OF PUBLIC BROADCASTING* (1987); JAMES DAY, *THE VANISHING VISIONS: THE INSIDE STORY OF PUBLIC TELEVISION* (1998); MICHAEL TRACEY, *THE DECLINE AND FALL OF PUBLIC SERVICE BROADCASTING* (1998).

<sup>5</sup> For some of the work identified with one of the harshest critics of the institutions of public broadcasting, see LAURENCE JARVIK, *PBS: BEHIND THE SCREEN* (1998); Laurence Jarvik, *Making Public Television Public*, HERITAGE FOUND. BACKGROUNDER, Jan. 18, 1992, at 1. Jarvik is both a critic, however, and an identifier of PBS strengths. He recognizes that PBS, though "warped by a series of tawdry political struggles," accomplishes three things which are "beyond the grasp of commercial television as we know it today." These are better children's programming, an articulate, balanced one hour news broadcasts, and occasional programming that is "of such scope, ambition, and achievement it probably could not find a home anywhere else on the screen."

### A. *Alternatives*

Maintaining the current mode is, with its modest changes, the most likely outcome even in the face of new technology. In this category of the status quo belong the continuing debates over broadening or narrowing public broadcasting's ambit, activation of proposals to increase advertising, continued siphoning of major productions to new satellite-delivered channels, continued fights over federal funding, and the prospects for an endowment or guaranteed funding. Changes at the margin, by definition, mean preserving the existing institutions of public broadcasting, but they slowly diminish its extended potential for contribution to the American public sphere.

The second alternative is creating or encouraging greater conditions for internal readjustment. Technology is already forcing this to some extent,<sup>6</sup> but more is required for the rapid overhauling of institutional arrangements to assure that agreed-upon (if that is possible) public broadcasting can be achieved. In large part, this means providing the legal and financial openness that would allow bidding and reward for further development of the assets of public broadcasting. Even here there is a problem because it is hard, given the structure of public broadcasting, to appropriately assess and value those assets. But cumulatively, they include the existing terrestrial distribution system including, in some markets, duplicative terrestrial distribution, existing contracts for satellite distribution, and potential spectrum rights. They certainly include some value for branding and some, though surprisingly little, in terms of library rights. The premise is that these assets are incapable of being reoriented, tapped for much of their value (even as non-profit assets) because the kind of change necessary to maximize or even strengthen their value in light of new technologies cannot take place without major structural modification.<sup>7</sup>

### B. *Leverage*

For the very reason of the architecture of public broadcasting itself, there is insufficient incentive for radical, internally driven

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<sup>6</sup> See Federal Communications Commission's Fourth Notice of Proposed Rule Making and Third Notice of Inquiry on Advanced Television Services, 60 Fed. Reg. 42,130, 42,131 (1995) (codified at 47 C.F.R. pt. 73).

<sup>7</sup> The idea of modest reorientation with the selling off of some frequencies lies at the heart of the TWENTIETH CENTURY FUND TASK FORCE ON PUBLIC TELEVISION, *QUALITY TIME?: THE REPORT OF THE TWENTIETH CENTURY FUND TASK ON PUBLIC TELEVISION* (1993) [hereinafter TWENTIETH CENTURY TASK FORCE].

change. That is the definition of the problem. The question, then, is what source for leverage exists. One lever for change is the often-expressed, though probably only lukewarmly felt, desire of Congress to get out of the business of annual funding, and perhaps get out of the business of funding public broadcasting at all.<sup>8</sup> Further, there has been the leverage, of the extraordinary need of public broadcasting for capital for transition to digital, of almost \$800 million in federal funds and \$1.7 billion overall.<sup>9</sup> There is the leverage at the FCC and in Congress finally, to determine the rules that will govern access to and use of digital spectrum. In addition, issues such as the way in which direct satellite broadcasters can satisfy the legislative requirement—that they set aside a portion of their channel offerings for informational and noncommercial programming—can be used as leverage for change.<sup>10</sup> Without the careful marshaling of this leverage and more, the mere existence of new technology will not lead to the kinds of changes necessary to substantially increase the role of public television in the United States. It would be a separate study to demonstrate that, in broadcasting (and other industries), modes of adaptation to technology are a function, in large part, of industry structure.<sup>11</sup> Aside from the initial flash of genius and the intuition of the founder, technological progress, so the hypothesis goes, is related to the risk-taking, decision-making capacity of a company.<sup>12</sup> The capacity to take advantage of opportunities, to deploy capital, to innovate, all these are related to structure.<sup>13</sup> A more modest hypothesis—and perhaps a sufficient one in the case of public broadcasting—is that certain forms of organization and internal decision-making are costly barriers to innovation. An organization that is conflicted between innovation and the protection of entities that are justifiable

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<sup>8</sup> See JARVIK, *supra*, note 5. In fact, since the heyday of Newt Gingrich's Contract with America, this alternative has not been so frequently mentioned. Now the issue—and this is present in proposals by Representative Billy Tauzin—is for a more regular and less political pattern of funding. For the history of the politicization of funding, see DAVID M. STONE, *NIXON AND THE POLITICS OF PUBLIC BROADCASTING* (1985).

<sup>9</sup> See Paige Albiniak, *PBS Switch to DTV May Get Pushed Back*, 128 *BROADCASTING & CABLE* 6 (1998).

<sup>10</sup> For one of the recent orders of the FCC in this proceeding, see "In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations," Report and Order, MM Docket 93-25, November 19, 1998; *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996); *FCC Rulemaking on DBS Noncommercial Set-Aside Delayed Again*, *PUB. BROADCASTING REP.*, Jan. 9, 1998, available in 1998 WL 8608662.

<sup>11</sup> See Prescott C. Ensign, *Interdependence, Coordination, and Structure in Complex Organizations: Implications for Organization Design*, 34 *MID-ATLANTIC J. BUS.* 5 (1998).

<sup>12</sup> See generally ICHAK ADIZES, *CORPORATE LIFESTYLES: HOW AND WHY CORPORATIONS GROW AND DIE AND WHAT TO DO ABOUT IT* (1988).

<sup>13</sup> See Caruana, *supra* note 2.

largely because of a particular status quo would be an example of a counter-technology environment. That does not mean that technology would not be implemented, but the pace and pattern of implementation would be unavoidably skewed.

The structure of U.S. public television retards, substantially, the likelihood that it can take advantage of technological opportunities.<sup>14</sup> As in the past with respect to other technologies, PBS and public broadcasting stations will take steps induced by technological opportunities, and that will lead to some systemic improvement, and perhaps that is all that can be anticipated. But the needs for change are so great and the opportunities presented so substantial that, more attention must be paid to bringing vision and possibilities into harmony.

### III. TECHNOLOGY, VISION, AND STRUCTURE

Technology, of course, is a key determinant of the moments and modes of transition. After all, public television, as it now exists in the United States, was, in its infancy, itself a social response to the availability of the new technology of television.<sup>15</sup> Indeed, the history of public television could be written, in part, as the intersection of new media technology and government response. Upon the development of a Table of Allocations—the designation of spectrum for certain television users or licensees—the federal government reserved a portion (in some ways an orphan-like grab bag) of frequency opportunities for instructional and educational purposes. At that point, in the early 1950s, the essence of the reservation was the desire—at some point—to encourage entities which would adapt the then-new and potent technology of television to a specialized version of the public weal.<sup>16</sup> The choice of colleges and universities, for the most part, as recipients of these licenses, established and embedded a particular view of how public service television in the United States should proceed.<sup>17</sup> From the very start, public policy involved a combination of engineering and organizational structure; and from the very beginning, this organizational

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<sup>14</sup> See Richard Somerset-Ward, *American Public Television: Programs—Now, and in the Future*, in PUBLIC TELEVISION IN AMERICA 95, 106-11 (Eli M. Noam & Jens Waltermann eds. 1998) [hereinafter PUBLIC TELEVISION IN AMERICA]; Willard D. Rowland, Jr., *The Institution of U. S. Public Broadcasting*, in PUBLIC TELEVISION IN AMERICA, *id.*, 11, 29-33.

<sup>15</sup> See ELLEN CONDLIFFE LAGEMANN, *THE POLITICS OF KNOWLEDGE: THE CARNEGIE CORPORATION, PHILANTHROPY AND PUBLIC POLICY* (1989).

<sup>16</sup> See Howard A. White, *Fine Tuning the Federal Government's Role in Public Broadcasting*, 46 FED. COMM. L.J. 491, 496-98 (1994).

<sup>17</sup> See ROBERT J. BLAKELY, *THE PEOPLE'S INSTRUMENT: A PHILOSOPHY OF PROGRAMMING FOR PUBLIC TELEVISION* (1971).

structure had a substantial impact on the way in which the technology could be used. Public service broadcasting would mirror, with a vengeance, the localism of its commercial counterpart.<sup>18</sup>

Vision or purpose is inextricably tied to structure since all rational structures begin and end with the question of role and direction. For the emerging instructional sector, it would be another ten to fifteen years before the energy of major foundations, linked with high-level governmental concern, would lead to the Carnegie Commission report and a purposeful and comprehensive approach to the use of technology.<sup>19</sup> The resulting system—the Corporation for Public Broadcasting (“CPB”), the Public Broadcasting Service (“PBS”), and the ubiquitous local stations—have, since the mid-1960s, adjusted or sought to adjust to additional new technologies. These adjustments have included the shift to color television, the mandate for improved reception of UHF signals, the use of the vertical blanking interval for closed captioning, the adjustment to cable television and the use of the satellite as a networking tool. Now, a complex, more comprehensive, and more overwhelming set of technologies appear: the Internet, High Definition Television (“HDTV”), advanced television services, direct broadcasting services. Under federal legislation, all commercial and noncommercial stations will get a channel on which to broadcast digital television (“DTV”), consisting of either one HDTV program (and some datacasting) or multiple streams of standard definition programs and datacasting or other services. As was true in each earlier instance of engineering opportunity, the question is how the existing system adapts or alters as a result of a new technology, and whether the system is organized so as best to use these new technologies.

Despite all the love and effort that went into its creation, from before the days of the first Carnegie Commission and up until the present day, the public broadcasting sector has been pressed into conflicting directions in terms of its mission, and this is reflected in its structure.<sup>20</sup> It is true that PBS and its member stations, and newer players like the American Programming Service, distribute a rich variety of educational programming to the public and to educational institutions using several means of distribution. It is true

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<sup>18</sup> See Rowland, *supra* note 14, at 15-25; James Ledbetter, *Funding and Economics of American Public Television*, in PUBLIC TELEVISION IN AMERICA, *supra* note 14, 73, 80-92.

<sup>19</sup> See CARNEGIE COMMISSION ON EDUCATION TELEVISION: A PROGRAM FOR ACTION (1967); Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified as amended at 47 U.S.C. §§ 390-399(b)).

<sup>20</sup> See TWENTIETH CENTURY TASK FORCE, *supra* note 7.

that PBS's National Program Service was gloriously a pioneer in distributing by satellite its programming for broadcast by PBS member stations, and that it has been in the forefront in sending signals directly, by direct broadcast satellite ("DBS") services, to areas unserved by local broadcast stations. The National Program Service is the jewel in the crown" of PBS. Supplementing these are such offerings as PBS's Ready to Learn Service, an educational service offered in day care centers across the country that helps prepare preschoolers to enter kindergarten.<sup>21</sup>

#### A. *Structural Obstacles*

Yet, despite this overall positive face, there are deep problems, both horizontally and vertically.<sup>22</sup> Horizontally, the confusion has been whether the system is driven by a social need for education and instruction—a need fired by the great demands of a huge, overburdened collection of elementary and high schools throughout the country—or whether it is an instrument for cultural programming, to bring the riches of the metropolis to the entire nation and to bring the diverse cultures of the American people to each other. There has been, at times, a division over whether public service broadcasting is an instrument primarily for the broad center and the major cultural institutions that serve it or, in addition, one specifically designed to redress lacunae by programming for the cultural needs of underserved groups in society.<sup>23</sup> Finally, in recent years (and reflecting a debate in public service broadcasting systems globally) an additional question has arisen: whether competitive entertainment programming ought to be part of a diet that makes cultural offerings more palatable, thus improving overall ratings? Of course, public broadcasting can be all of these: opera and symphonies, foreign language programming, programming that helps the diverse groups in society better understand their own needs, and programming that informs and enriches all by increasing knowledge generally. But including all of these varied types of programming is costly in terms of resources and in terms of fashioning strategy.

This horizontal problem is compounded by the competitive environment in which public broadcasting finds itself. What was formerly a niche, which PBS held exclusively, is now chipped away by competing cable programming services, and this may be far

<sup>21</sup> See *PBR Notes*, PUB. BROADCASTING REP., July 1, 1994, available in 1994 WL 11432924.

<sup>22</sup> See WILLIAM F. BAKER & GEORGE DESSART, *DOWN THE TUBE* 242-57 (1998); see also Ledbetter, *supra* note 18, at 80-82.

<sup>23</sup> See Rowland, *supra* note 14, at 24-25.

more the case in a digital future. Cultural channels, however imperfect at the moment, dilute an audience for classical music and adventurous films. Internet providers and competing cable educational services challenge PBS' dominance in classroom instruction. And, as PBS changes programming to capture and retain an audience, it becomes slightly more like the commercial channels from which it seeks to differentiate itself. Finally, new technologies, multicast channels resulting from expanded spectrum availability and digital compression, abundant channels promised by cable and telephone competitors, and even the Internet, present competition for that most valuable of commodities—viewer time.

Vertically, the American system is also structurally riven. There is, most famously, the ancient division over whether the system is national, with local nodes, or local, with national coordination.<sup>24</sup> Here the structural flaws have the greatest consequences. Nationally, there is the complexity created by the existence of both the CPB and PBS. Within PBS, there are conflicts between the large and powerful stations and others, over who should control decisions and how to use new technologies. *Quality Time* argued that structural flaws meant that scarce funds that are expended on maintaining a complex system of local stations and station managements could be better spent on a national programming service with greater production and more elaborate marketing.<sup>25</sup> Intersector competition intensifies the problems inherent in structure. A divided PBS, with conflicts between center and stations, must compete with cable programming services, commercial networks, and international providers (like the BBC) that are highly integrated. These fault lines have been widening, and with debilitating consequences, for three decades.

### B. *Technological Possibilities*

New technology becomes an occasion, in most healthy organizations, to rethink opportunities, and the same has been the case for public broadcasting. Take, for example, the expansion of spectrum made available to commercial broadcasters by the 1996 Telecommunications Act.<sup>26</sup> In an October, 1997, ceremony, Vice President Gore announced the formation of the Advisory Committee on Public Interest Obligations for Digital TV.<sup>27</sup> He discussed

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<sup>24</sup> See *id.* at 15-25.

<sup>25</sup> See TWENTIETH CENTURY TASK FORCE, *supra* note 7.

<sup>26</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15 U.S.C. & 47 U.S.C.).

<sup>27</sup> See *Remarks by Vice President Al Gore on Presidential Advisory Committee on Public Interest*



the renewed possibility of using technology to benefit public broadcasters. Speaking of the commercial television system that controls the bulk of the audience, he said that “[the] tradition of trusteeship must continue, even as television goes through the greatest transformation in its history, one that is truly bigger than the shift from black and white to color—the move from analog to digital broadcasting.”<sup>28</sup> But a subtext was that “public interest” obligations could be satisfied in part by payment to public broadcasters from their commercial counterparts.<sup>29</sup> Gore continued:

We also know that digital broadcasting will be more dynamic and more flexible; more competitive and more interactive—and potentially much more responsive to the needs and interests of the American people, if we prepare for it in the right way . . . . [T]he fact that [the new technology] is so limitless—the fact that so many of our present rules and expectations will not apply—makes digital broadcasting the wild west of the television age. If we don’t map out some of that terrain for public purposes—if we don’t carve out meaningful public space on our newest public airwaves—we could lose the opportunity for good.<sup>30</sup>

Here the tones of the past are reiterated: the notion of reservations, the idea that a portion of spectrum should be set aside and provided to those who have been the guardians of public broadcasting in the past. This too, seems to be a hallmark of the existing U.S. approach. Advanced television service should, and will, be brought to us by those who brought its analogue predecessors. Gore employed a theme that suggests the relationship between technology, structure, and opportunity:

At the same time, the digital spectrum is a valuable asset, one that will bring an explosion of opportunities for broadcasters. What we have asked for in return—what we must get in return—is a significant commitment to the public interest. We all know what the critical needs are: the need to educate and inform our children; the need to give parents the tools to protect their children from what they consider to be harmful influences; the need for free and open political debate, driven not by dollars and soundbites, but by issues and ideas. The challenge we now face is meeting those needs, protecting our oldest values, in the

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*Obligations for Digital TV* (visited Oct. 22, 1997) <<http://www.pub.whitehouse.gov/whit...arks-on-digital-tv-commission-text>>.

<sup>28</sup> *Id.*

<sup>29</sup> *See id.*

<sup>30</sup> *Id.*

face of new and changing technology . . . .<sup>31</sup>

This statement involves a special opportunity—related to structure—in American broadcasting. The question, embedded in Gore's political rhetoric, is whether commercial broadcasters, provided with extremely valuable spectrum, can be required to disgorge some of the benefits which they will gain, and (this being the part relating to the structure of public broadcasting) whether this dividend—if it comes to pass—will be assigned to, or seized by, the public television system. The issue is not only the internal capacity of public television to develop a strategy, but also the relationship of structure to politics, and the capacity of PBS and the lobbying arm of the local stations to make their power felt.

In terms of vision or official understanding of purpose, the FCC, in its Fifth Report on Advanced Television Services, discussed in the following way the role that public broadcasting plays and the regulatory steps necessary, in a time of new technology, to allow it to expand its role:

[W]e note our commitment to noncommercial educational television service and our recognition of the high quality programming service noncommercial stations have provided to American viewers over the years. We also acknowledge the financial difficulties faced by noncommercial stations and reiterate our view that noncommercial stations will need and warrant special relief measures to assist them in the transition to DTV. Accordingly, we intend to grant such special treatment to noncommercial broadcasters to afford them every opportunity to participate in the transition to digital television, and we will deal with them in a lenient manner. . . . [W]e wish to note that public broadcasting service was the first to establish a digital satellite transmission system and that public broadcasting licensees are in the forefront of experimenting with digital television.<sup>32</sup>

The indications are that public television will be in the forefront in terms of using additional capacity to experiment with HDTV, perhaps being more experimental and more in advance than the commercial stations. But this could mean that public broadcasting will be the undercompensated stalking horse for com-

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<sup>31</sup> *Id.* For the final report, see ADVISORY COMMITTEE ON THE PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS, CHARTING THE DIGITAL BROADCASTING FUTURE: FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS (1998) (visited May 10, 1999) <<http://www.benton.org/PIAC/report.html>>.

<sup>32</sup> Federal Communication Commission's Fifth Report on Advanced Television Systems, 62 Fed. Reg. 26,966, 26981-26982 (1997) (to be codified at 47 C.F.R. pt. 73).

mercial television. Public television could provide, through HDTV, an inducement for the purchase of advanced sets, at a time when it is not economic to do so for the commercial stations, but not receive any substantial benefit for its pioneering role.

### C. *Redefinition of Functions*

One anticipation is that technology will aid in resolving the problem of what PBS is, what functions it best serves. To be sure, some redefinition will occur. Technology requires it because of the way adaptation to technology means taking structures apart and putting them back again. But technology does not obviate choice. The new technology has the appearance of abundance, but it will certainly be the case that public television cannot do all things or perform best by trying to continue to intensify all of its prior goals. Indeed, it is because, dreams aside, not everything can be done, that it is necessary to look at the variety of possible definitions for public television, and then make choices. Among these definitions are the following:

*Lifeline.* Under this definition, public service television takes on the residue of public interest obligations from commercial broadcasting, whatever they are. Under some proposals, and under the Children's Television Act of 1990<sup>33</sup> can serve as a model, commercial broadcasters, in the new technology future, could shed public interest responsibilities if they were willing to pay noncommercial broadcasters to assume them in their stead.

*National Treasure, National Identity.* This definition is a reminder of the BBC and European public television in its origins, in which the institution is, in terms of a cultural role, overarching, like the monarchy, a secular version of the Church of England, bearer and reflector of identity and charged with a conscious strategic role in changing culture. This social role is, more than merely the attainment of viewers, enough to justify a license fee. This model is rarely the one that is used to express public television in the United States, and public broadcasting has not evolved a sufficient audience share to perform this role.

*Minority Satisfaction or Empowerment model.* The best example of this, outside Channel 4 in the United Kingdom, is SBS in Australia. In Australia, the network is dedicated to Vietnamese, Indian, and other minority culture films and similar, conscious counter-programming with the intent that diverse groups deem themselves

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<sup>33</sup> Children's Television Act of 1990, Pub. L. No. 105-220, 104 Stat. 996 (codified at 47 U.S.C. §§ 303(a)-(b), 394) (1990)).

more meaningfully included in the Australian whole. The U.S. public broadcasting service performs this function to some extent, but when it does it in too notorious a way, it becomes charged with ignoring its mainstream acculturating or reinforcing responsibility.

*Public Sphere.* Another way of looking at purpose is to say that the public service broadcasting is an instrument of civil society, part of the creation of a public sphere. It increasingly takes on this function as the commercial entities in American television abandon that role more and more. Perhaps it will have a ceded monopoly on certain public events—like political conventions and presidential, regional, and local television debates.

*The Collection of Activities Called Public Broadcasting.* A reasonable alternative is not to wax philosophical, but to recognize that there is an existing structure with existing practices and existing institutional neuroses and goals. What that existing structure is, and how it marginally extends itself, is what constitutes public broadcasting in the United States.

#### IV. NEW TECHNOLOGIES AND THEIR RELATIONSHIP TO STRUCTURE

The principal new technology, the technology that is forcing decisions, involves providing additional spectrum for advanced television services. This technology alone is causing important planning shifts within PBS. Other new technologies and PBS' attitude towards them include the Internet and the new modes for global distribution of television signals. The approach to new technologies and the steps being taken, or under consideration, are evaluated in terms of the existing problems of structure. PBS and local stations are doing much to adjust to new technologies, in terms of using online services, developing revenue streams from the sale of videocassettes, aggressively entering the world of HDTV, and planning multiple channels made possible through digitalization and compression of signals. These wholly laudable emblems of an emboldened PBS must be put in context.

##### A. *New Technology as a Solution*

New technology can be perceived—and this is sometimes a great danger—as a providential way out of an entity's historic conceptual difficulties. This is a particular danger for PBS. New technologies are thought to be a way of solving old horizontal and vertical problems. Take the horizontal problems discussed above. Digitalization and compression mean that newly available spectrum can be used for multicasting. Because of newly abundant capacity,

it is thought, the system can transcend its functional ambivalences by encompassing everything. It can be both a great cultural broadcaster and a targeted provider of educational and instructional programming. It can be a channel for the mainstream and for the edges. It can be politically centrist and politically daring. That is the dream. Technology relieves scarcity, and scarcity, not the complexity of defining purpose, can be deemed the source for prior dilemmas.

A similar approach is possible with respect to the "vertical" problems. Because of the technology of national direct broadcasting, the tortured structural past can have a happy "both/and" solution as well. Here, technology forces, or is thought to force, a solution, though it is technology linked, as always, with legislation or regulation. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") requires direct broadcast services to set aside four to seven percent of their capacity for programming, akin to that of public television.<sup>34</sup> If PBS and the local stations want to gain this opportunity, they have to fashion a national feed that is unmediated by local and regional outlets, and it appears that this will occur.

Both of these hopes—solutions to the vertical and horizontal problems, the problems of vision and purpose, and the internal crippling issues of structure—are not, however, automatically resolved by the existence of technology. Both solutions, as this is their weakness, are linked to funding. This is true especially of the horizontal questions of niche programming versus comprehensive appeal. But it is true of the second, as well, since legislative provisions that have structural implications come bound in budget packages. How funds are obtained, both in amount or in process, will determine what impact technology has on public television.

### B. *New Technology and Finance*

This is, of course, the well-rehearsed problem of scope of funding and reliability of funding. Multicasting means a great call on production. Transition to advanced television services, including HDTV, requires new equipment. PBS has just emerged from conflict in federal funding, and problems in subscriber and underwriter support.<sup>35</sup> The result is that new technology is being invoked to resolve this third and encompassing problem of the

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<sup>34</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1460 (1992)(codified at 47 U.S.C. §§ 534-535).

<sup>35</sup> See Rowland, *supra* note 14, at 40-59.

system: the political pull of annual funding as opposed to the relative comfort of a sustained source of revenue, either through a license fee or endowment or predetermined annual payment.

Increasingly, new technology is positioned as a lever to solve this problem. Income streams rising from digital spectrum might be tapped for public broadcasting or assets might be sold to create an endowment. The important thing is that, here too, unresolved issues, deeply and historically divisive, can be overcome by the arrival of expanded technical capabilities. Thus, the most important part of a tentative, sketchy but powerful suggestion of Vice-President Gore is that funds from commercial broadcasters, possibly relieved of other public interest obligations, might be made available for public service broadcasters. This is also a direction urged by Representative Billy Tauzin, chair of the Congressional committee most concerned with these issues.<sup>36</sup>

### C. *New Technology and Instruction*

Before these structural issues are discussed further, it is useful to indicate how new technologies could be used conventionally to assist in the performance of the system's function. Public broadcasting is, of course, the nation's primary source of classroom programming, reaching thirty million students in kindergarten through twelfth grade, and two million teachers in 70,000 schools.<sup>37</sup> It claims to be the world's leader in college telecourses because over 2.6 million adults have earned college credit through the PBS Adult Learning Service.<sup>38</sup> PBS claims a distance learning program in which several technologies are used: broadcast, cable, satellite and videocassette and disc, and through the PBS ONLINE Website.<sup>39</sup> PBS is proud of its history of being the first, in the United States, to use technology to develop closed captioning for the hearing impaired, descriptive video services for the visually impaired, and stereo television services; and to transmit television programming by satellite.<sup>40</sup> As indicated above, technology, particularly the technology of multicasting, is to be used to increase greatly the ser-

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<sup>36</sup> See *Tauzin Says New Commission Could Help Create Public Broadcasting Trust Fund*, PUB. BROADCASTING REP., Aug. 8, 1997, available in 1997 WL 8586029.

<sup>37</sup> See *CPB Backs Demonstration Projects in Distance Learning Report to Congress* PUB. BROADCASTING REP., March 12, 1993, available in 1993 WL 2879615.

<sup>38</sup> See Marilyn K. Melia, *Go the Distance Getting a Degree Without Setting Foot on Campus*, CHI. TRIB., Sept. 28, 1998, at 1.

<sup>39</sup> See *Commercial Without Commercials: Duggan Reinvents PBS with a Goal of Self Sufficiency for the Service*, BROADCASTING & CABLE, Oct. 27, 1997, available in 1997 WL 11792674.

<sup>40</sup> See Ann Hodges, *PBS Sees Grounds for Hope in Fight over Federal Funds*, HOUS. CHRON., July 29, 1995, at 8.

vice's commitment to instruction and education. The president of PBS, Ervin Duggan, has promised that a return to education and instruction seems a clearly important part of a multicasting future, as well as a politically acceptable use of some significant aspect of the abundance made possible through new technology.<sup>41</sup>

#### D. *New Technology and National Signal Distribution*

A key element of the "both/and" solution is the enhancement of a PBS-controlled national broadcasting service. A direct to home service that would bypass intermediate stations seems to be a significant symbolic part of such a solution. After its fall 1997 annual meeting, PBS announced it would provide a direct feed to DBS operators for transmission to all DBS subscribers, not only those unserved by a local PBS signal.<sup>42</sup> This was a major step by PBS since the signal would be national in origin and distribution. Furthermore, the announcement was significant in indicating some progress in terms of internal structure. The membership, composed of local stations, voted to proceed with this approach despite reluctance, and in contrast to blocking efforts by stations in previous years.<sup>43</sup> The possibility of such a national signal meant that PBS simultaneously sought a Congressional amendment to the Satellite Home Viewer Act of 1988<sup>44</sup> to facilitate the automatic clearance of copyright restrictions to be delivered through a national signal.

#### E. *New Technology and the Cultural Function*

One of the most significant challenges to PBS is how to maintain its franchise as cultural consciousness, or at least the television custodian of that consciousness. Ever since CBS sought—unsuccessfully and too early—to develop a high cultural alternative to PBS, this aspect of the programming strategy has been at risk. Now, with planned pay channels like Horizon, with the History Channel and Arts & Entertainment ("A&E"), and with Bravo on the arts cinema front, the unrealized threat of CBS may be partly accomplished.<sup>45</sup> It is possible that competition has increased the viewership of such programming, but not significantly, especially

<sup>41</sup> See generally Duggan hits *Commercial Stations' Ambivalence on DTV*, PUB. BROADCASTING REP., April 9, 1999, available in 1997 WL 14869563.

<sup>42</sup> *PBS Launching Multiple DBS Feeds by Year-End*, PUB. BROADCASTING REP., October 31, 1997, available in 1997 WL 14869563.

<sup>43</sup> See *id.*

<sup>44</sup> Pub. L. No. 100-667, tit. II, 102 Stat. 3949 (1988).

<sup>45</sup> See Somerset-Ward, *supra* note 14, at 104 (citing Robert Ottenhoff, Chief Operating Officer, PBS, in *Television Industry Scan* (Feb. 1, 1997)) (an internal PBS document at 12).

given data that viewership in general has remained static despite the jump in the number of choices.

PBS is trying to address this in part through multicasting and the new technology.<sup>46</sup> It would repackage its cultural programming, possibly seeking to do more to differentiate itself from the competition.<sup>47</sup> Under its announced plan for a digital future, PBS would show many of the network's prime time shows, such as *Nova*, *Great Performances*, and *Masterpiece Theater*, in wide screen and high definition with accompanying six-channel enhanced digital sound.<sup>48</sup> During other day-parts, PBS stations would divide their digital channel, splitting it into four channels, offering, as an example, children's programming on one channel, an adult-education show on another, a nature show on a third, and elementary-school course work on the fourth. Using the multichannel option, PBS stations would have the ability to offer children's programming and adult cultural programming simultaneously.<sup>49</sup>

In a digital multi-channel future, PBS is considering that viewers might first negotiate a menu screen with small windows—one for each available channel—so they could then select which to watch. In addition, the expanded technology would mean that a portion of the spectrum would be used to send data to viewers, such as teacher guides for teachers.<sup>50</sup>

#### F. *Technology and Facilities*

Already, small steps are being taken toward the digital and multicasting future. In October, 1997, the Public Broadcasting Service dedicated its new all-digital technical operations center.<sup>51</sup> It had been the decision of Ervin Duggan, president of PBS, to demonstrate the Service's dedication to technology by being on the "bleeding edge" of transition to digital broadcasting.<sup>52</sup> PBS had begun digital transmissions on a limited basis in 1994, providing dual analog and digital feed for months, and switched to all-digital path to air in the fall of 1996. At the ceremony establishing the center, Duggan and other PBS officials said that the switch to

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<sup>46</sup> *Stations Ready to Spend for DTV; but Study Says Investment Will Fail to Reverse Viewers to Cable*, BROADCASTING & CABLE, Nov. 17, 1997, available in 1997 WL 11792958.

<sup>47</sup> *See generally PBS' Ottenhoff Wants PBS in Every Medium*, PUB. BROADCASTING REP., June 5, 1998, available in 1998 WL 10720836.

<sup>48</sup> *See Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm.*, 105th Cong. (April 23, 1998) (statement of Ervin S. Duggan, President & C.E.O., Public Broadcasting Service), available in 1998 WL 11517109.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *See PBS Goes Digital*, TVDIGEST, Oct. 21, 1996, available in 1996 WL 7065496.

<sup>52</sup> *See id.*



digital “positions [PBS] for the next step” to HDTV and that it helped PBS “double or triple the number of our feeds, [the signals provided to local stations] probably at lower cost than 5 years ago.”<sup>53</sup> The early switch was consistent with PBS’s history “of getting there first” and “our desire to be on the cutting edge.”<sup>54</sup> Duggan said PBS was able to add new technology quicker than commercial broadcasters because “we are not so driven by commercial imperatives” and because manufacturers were willing to provide discounts to get their equipment placed in a high-profile public service operation.<sup>55</sup>

## V. FEDERAL POLICY

### A. *New Technology and Funding*

As mentioned, given the existing structure (and even without it), a vital element of any solution is more reliable, less politicized federal funding. Without such funding, technology alternatives do not provide the possibility of break-through solutions. The technology of abundance without a strategy to program for it, without annual politically sensitive funding efforts, is but a chimera. Representative Tauzin has been advancing a plan, announced in September, 1997, in which commercial broadcasters might establish a fund or provide annual payments for public television uses in exchange for burden-free licenses to develop high-definition television.<sup>56</sup> This solution, often bruted about in the past, would provide a benefit even over license fee models. The plan has many advocates, but it is so ambitious, and it so removes from Congress the blood sport of punching at PBS annually, that its chances for success are only fair.

Under the plan, the argument could be made—and has been by Representative Tauzin—that “taxpayers would no longer have to help pay their [public television’s] bills.”<sup>57</sup> The Congressman has also stated plans to form a commission—paralleling one established by the White House—that would study other new ways to fund public broadcasting.<sup>58</sup> Under the plan, commercial broadcasters would have the option to subsidize public television rather than air required children’s programming or offer free political air

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See Doug Abrahms, *Case Made for Using HDTV to Fund PBS*, WASH. TIMES, Sept. 20, 1997, at A11.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.*

time, mirroring options included in the 1990 children's television legislation.<sup>59</sup>

A forerunner of the Tauzin proposal, sponsored by former Senator Larry Pressler, sought in 1995 to establish a trust endowment for public broadcasting that would have been funded in part by auctioning off HDTV airwaves.<sup>60</sup> The bill died after Congress decided to give broadcasters the HDTV spectrum for free.<sup>61</sup>

### B. *New Technology and Flexibility of Use*

For public broadcasting—as for its commercial counterpart—one of the most pressing immediate strategic questions is how the new spectrum resource will be used. While HDTV was the promise that induced much Congressional interest in providing spectrum to existing broadcasters, incumbents, both public and private, want flexibility so that they can maximize the benefit of what is obtained.

The FCC has, however, begun to constrain, slightly, those available alternatives. In the Fourth Further Notice/Third Inquiry on Advanced Television Services, the FCC outlined its policy both for noncommercial and commercial television.<sup>62</sup> They included: (1) preserving a free, universal broadcasting service; (2) fostering an expeditious and orderly transition to digital technology that will allow the public to receive the benefits of DTV while taking account of consumer investment in NTSC television sets; (3) managing the spectrum to permit the recovery of contiguous blocks of spectrum, so as to promote spectrum efficiency and to allow the public the full benefit of its spectrum; and (4) ensuring that the spectrum—both Advanced TV (“ATV”) channels and recovered channels—will be used in a manner that best serves the public interest.<sup>63</sup> Put more simply, the FCC has as a primary goal the promotion and preservation of a free, universally available, local broadcast television in a digital world. Just as it used the “must-

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<sup>59</sup> *See Id.*

<sup>60</sup> *See id.*

<sup>61</sup> In early October, 1997, CPB forwarded an implementation proposal to the White House which underscored the importance of a financing plan. At issue was the question of how much it would cost public television stations to make the transition to advance services, digitalization, and HDTV. CPB requested \$771 million in federal funds—over and above the usual operating budget—to help pay for the change. This \$771 million, and \$1 billion more that would be raised by local stations, would be in addition to the endowment for operations that would be the subject of the Tauzin fund.

<sup>62</sup> *See* Federal Communications Commission's Fourth Notice of Proposed Rule Making and Third Notice of Inquiry on Advanced Television Services, 60 Fed. Reg. 42,130, 42,131 (1995) (codified at 47 C.F.R. pt. 73).

<sup>63</sup> *See id.*

carry” rule to strengthen broadcasting at a time of severe competition from cable, it now seeks to ensure a smooth transition by providing existing licensees with additional spectrum and imposing certain simulcasting requirements. Simultaneously, by setting limits for the transition, or providing, in other ways, some idea of transition, the FCC was seeking “to promote spectrum efficiency and rapid recovery of spectrum.”<sup>64</sup>

### C. *Ancillary Use*

Public broadcasters might have taken the position—consistent with FCC—that all new spectrum they obtained would be used for educational, cultural, and informational uses and that such uses would be free to viewers. Instead, the primary associations of public broadcasters told the FCC that they favor something that gives them the opportunity to raise funds from this new spectrum. They would be free to provide ancillary broadcast and nonbroadcast use of the DTV channel, supporting the FCC’s position that “flexible use will serve the public interest by helping to spur development of new technologies and to provide greater opportunities for non-commercial stations to enhance their public service to their respective communities.”<sup>65</sup>

Under the public television position, these services could serve noncommercial and revenue producing purposes. Obviously, “a noncommercial station could . . . utilize digital transmission to distribute program-related course materials, textbooks, student and teacher guides, computer software and content areas of the World Wide Web as part of the station’s instructional programming.”<sup>66</sup> But it would also be true that “noncommercial stations could use ancillary and supplementary services, without regard to the educational content, as a revenue source to support nonprofit services and operations and the transition to DTV.”<sup>67</sup> Public stations could launch a pay service or otherwise use some portion of their new capacity to raise revenues for the remainder of their efforts. PBS and the Association of America’s Public Television Stations (“AAPTS”), the licensees lobbying group, also opposed a requirement of a minimum time or capacity commitment to HDTV, rather leaving that determination to the marketplace. AAPTS and PBS, in joint comments, opposed a minimum HDTV requirement, noting

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<sup>64</sup> Federal Communication Commission’s Fifth Report on Advanced Television Systems, 62 Fed. Reg. 26,966, 26,967 (1997) (to be codified at 47 C.F.R. pt. 73).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

that the FCC “can rely on broadcasters and public television’s commitment to HDTV.”<sup>68</sup> They argued that if the Commission adopts an HDTV requirement, it should be “liberally waived” for non-commercial stations (particularly those analog stations that may share a DTV channel in the transition).<sup>69</sup>

## VI. STRUCTURAL OBSTACLES TO CHANGE

These responses and adaptations to the availability of spectrum for advanced television services are examples of how public television, like every other institution in American society, is affected profoundly by the existence of new technologies. The central idea here, however, is that new technologies are a relatively small variable in terms of the future of public television in the United States. Of course, public television will change—and will have to change. But technological change will not, and certainly not alone, materially alter the market share or impact our global status of the American service. It will alter public television no doubt, but it cannot provide the miraculous cure that seems to be anticipated as the PBS system looks to new technology to help resolve the problem of definition of function, to resolve long-standing disputes about the national versus local nature of the system and, as well, to open the door to more secure funding. Let me examine each of these in turn.

### A. *Barriers to Structural Change*

The remainder of this Essay will focus on what was above called the second alternative: creating the conditions for change, adaptation and major shifts in institutional structures to permit better use of new technologies. In the absence of such change, there is slow decay and death as PBS program niches get picked away. Or, there is marketplace adaptation by which PBS becomes more like another cable programming service with a respectable narrowcasting share.

To look at structural obstacles to change, we must look at elements of the status quo and their effect on innovation. For example, PBS has obtained, through the must-carry rule, a Congressional guarantee of shelf space on cable (and, to a much shakier extent, on DBS), shielding it from certain of the competitive pressures of that new technology.<sup>70</sup> While other services, like

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<sup>68</sup> *Id.* at 26,972.

<sup>69</sup> *Id.*

<sup>70</sup> See Monroe E. Price & Donald W. Hawthorne, *Saving Public Television: The Remand of*

Discovery and Bravo, were pressured to determine their role in a multi-channel environment, public broadcasting could maintain the status quo. Thus, cable guaranteed it an expanded market, for a time, rather than merely creating a multichannel environment in which it would do worse. Even the initiation of C-Span by the cable industry had its soporific effect on public broadcasting.<sup>71</sup> While this entity can be viewed as a competitor to public broadcasting, it can also be perceived as an entity that relieved PBS of some public sphere obligations.

In short, public broadcasting has been protected from market pressures felt elsewhere that might have forced greater internal structural changes and led to greater transformation of its programming strategy. It has not had to change to keep its cable channel position and to convince cable operators to carry the signal. By the same token, the protection of existing broadcast stations meant that the system did not, at an early stage, build a cable programming channel, as ABC and NBC did.<sup>72</sup>

Similarly, in a period of intense jockeying for position in a global market, the existing clumsy internal organizational structure, coupled with the history of public broadcasting, has meant that U.S. public broadcasting will not be a major player, as a national entity, in transnational services. This does not mean that local public television stations WNET or WGBH will not make deals and money. Here the focus is whether there is a market for an internationalized American public television as an entity. Technology makes such a market possible, but not for the U.S. system. The major commercial competitors in the global marketplace are American, but U.S. public broadcasting has no significant role. It is the BBC that is trying to stake out a global identity or increase its global trademark for the Anglophone market.<sup>73</sup>

There are several reasons for this: public broadcasting in the United States was never strong in news, and competition in news seems to be one of the most important areas for global competition. The BBC effort, which at first was a mixture of news and entertainment, seems now to be wholly news and information. One

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*Turner Broadcasting and the Future of Cable Regulation*, 17 HASTINGS COMM. & ENT. L.J. 65, 68-80 (1994).

<sup>71</sup> For a history of C-Span, see STEPHEN FRANTZICH & JOHN SULLIVAN, *THE C-SPAN REVOLUTION* (1996).

<sup>72</sup> See Rowland, *supra* note 14, at 20-25.

<sup>73</sup> See Andrew Walker, *A SKYFUL OF FREEDOM: 60 YEARS OF THE BBC WORLD SERVICE* (1992); ASA BRIGGS, *THE BBC: THE FIRST FIFTY YEARS* (1985); see also Lawrie Mifflin, *A BBC Cable Channel is on the Way to the U.S.*, N.Y. TIMES, Dec. 9, 1997, at E1; *BBC Seeks Guarantees from Discovery*, CABLE EUROPE, Apr. 16, 1997, available in 1997 WL 11239306.

can ask, as well, whether the internal and public pressure on PBS, particularly in news and public affairs, has been toward the local and, therefore, the parochially domestic, while the BBC has always had a product which was more transnational or global. Second, PBS never really developed an international consumer brand name recognition that could compete with the BBC. The internal organization of PBS means that it is not nearly so equipped to have an external strategy as is the BBC. Besides, within the great tent of the BBC, an external voice was always a vital and distinguished part. In the United States, the Voice of America was always kept away from public broadcasting. The British way was not necessarily preferable, but it was far more natural for the BBC to have an international agenda—and to know the territory—than it was for PBS, despite PBS's international marketing and co-production deals.

It is possible, as one model for the future, that there will be a global public service (or one Anglophone, one Francophone) with national affiliates. The question is whether there is a global alliance to make this happen and whether the national or local entities are so public-sphere driven that such a model would be hard to create. Related is the idea that there could be a kind of global arts and cultural television production alliance, with a national focus on public sphere activities. One interesting aspect has been the development of a strategic arrangement between the BBC and the Discovery Channel for certain global programming (and domestic production) rather than extending a more exclusive relationship with the U.S. public broadcasting system.

These, then, are two big areas where technology affects public broadcasting: the impact of cable television and DBS in terms of fashioning the domestic market, and the role of satellites in developing a global market. PBS' own history provides impediments to vital change. There is no library to speak of since the independent producers retain library rights, no effective international alliance, no dominating history that public broadcasting has a central role in national identity building, no tradition of a license, and a creaky structure which protects itself from innovation by buffering itself against job loss and extinction.

Some of the changes necessary to alter the capacity of the public system to take advantage of new technologies have been implemented, and new technologies have been used to produce these changes. A New Technologies Working Group ("NTWG") has

been established and converted to a PBS Board committee.<sup>74</sup> PBS President Duggan told his board that the effort was to ensure that the NTWG formed under his direction in 1994 would be “more secure” as it pursued its mission on DBS and other issues, such as digital TV.<sup>75</sup> It was precisely such governance reforms which seemed to make technology-positive decisions easier to adopt. For example, the vote on direct feeds occurred after PBS’s first-ever membership meeting, a result of February, 1997, reforms.<sup>76</sup> The vote arose on the resolution of a coalition of stations urging that PBS be “position[ed] . . . to take advantage of the [DBS] channels set-aside,”<sup>77</sup> referring to the proposed four to seven percent set-aside for noncommercial educational programming on DBS services in the 1992 Cable Act.<sup>78</sup>

Prior to this vote, and the governance reforms, PBS stations consistently voiced concern that a national feed would in fact compete against them.<sup>79</sup> They argued that a national feed DBS channel would have unfair advantages over local stations.<sup>80</sup> The national feed might have a superior picture to that of the local station. By making DBS more acceptable, by contributing to its appeal to subscribers, PBS would be enhancing a system where switch-back to terrestrial uses might be hindered and local stations impaired. As an example of this station-based reluctance, one member station sought to have the future DBS feed be “distinct” from National Program Service programming.<sup>81</sup> Assurances had to be given that the feed would be differentiated and, as a consequence, harm to local stations would be minimized. Furthermore, if there were fundraising on the national feed, the proceeds would be returned to stations in the donor’s zip code.<sup>82</sup>

At the same time, in a development perhaps linked to issues of technology, the chair of PBS, Gerald Baliles, publicly stated that PBS’s governance structure needed to be changed “to outfit our-

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<sup>74</sup> See *PBS Board Debates Risk to Stations from DBS National Feed*, PUB. BROADCASTING REP., April 4, 1997, available in 1997 WL 8585699.

<sup>75</sup> See *PBS Seeks to Launch National DBS Feed by Year End*, SATELLITE WK., Oct. 27, 1997, available in 1997 WL 15605724.

<sup>76</sup> See *PBS Urges Members to Waive Barrier to National DBS Feed*, PUB. BROADCASTING REP., Sept. 25, 1998, available in 1998 WL 10720907.

<sup>77</sup> *PBS Launching National DBS Feed by Year-End*, COMM. DAILY, Oct. 24, 1997, available in 1997 WL 13780100.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> *PBS Launching Multiple DBS Feeds by Year-End*, PUB. BROADCASTING REP., Oct. 31, 1997, available in 1997 WL 14869563.

<sup>82</sup> See *id.*

selves for that new future.”<sup>83</sup> He said “we don’t have time to waste,”<sup>84</sup> and since the launch of the governance review process last fall, PBS has heard from “many” within the system who are pro-change.<sup>85</sup> He recognized that those favoring a stronger, more efficient PBS consistently complained that the existing board structure and complicated decision-making process made it impossible.<sup>86</sup> Even those who favored a tighter arrangement had expressed doubt about whether PBS was the entity that ought to be the carrier of renewed leadership.<sup>87</sup> Reflecting the ambivalence toward the issue, Baliles was later quoted as saying to a closed governance panel that structural change might not be necessary, and suggesting a go-slow approach.<sup>88</sup>

#### VII. CHANGING STRUCTURE AND MAXIMIZING BENEFITS FROM TECHNOLOGY

Looking at all of this from another angle, one can ask what impact the new technologies have had on existing broadcasting entities and how they have positioned themselves to exploit these opportunities. That would provide some suggestion of whether public television is properly organized (on the assumption that other, more commercial entities have behaved in a rational manner). New technologies have, of course, facilitated the creation of a completely different environment world-wide. Quite obviously—and this became true with cable and satellite, and now with digital spectrum—the transformation has been from few channels to an abundance. It has moreover meant a substantial shift from a television system that was all free (advertising supported or public) to one in which payments by the viewer to a distributor (or direct to a programmer) has become prevalent. From this, a new industry organization of gatekeepers and distribution patterns has emerged. New technologies have meant the possibility, and then the inevitability, of cheaper cross-border distribution and, therefore, the possibility of global markets.<sup>89</sup> This, too, has meant redefinitions of strategies by programmers and by distributors of programming. And the final new technology, the Internet and World Wide Web,

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<sup>83</sup> *Duggan: PBS Exists to Serve Stations, Has No Plans for Independence*, COMM. DAILY, June 25, 1996, available in 1996 WL 2368820.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See ADAM FINN ET AL., GLOBAL TELEVISION AND FILM: AN INTRODUCTION TO THE ECONOMICS OF THE BUSINESS* (1997).



has altered—and continues to alter—the amount, method, and form of information coming from broadcaster to consumer.

The creation of a greater number of channels and the fundamental change in the distribution systems in the United States has had a sharply differentiated impact on commercial and noncommercial television in the United States. For much of commercial broadcasting, this technology-driven fact has led to strategies of consolidation and vertical integration, neither of which has characterized the public television sector. There is no PBS equivalent of the Disney acquisition of ABC or of the Time Warner merger with Turner. The multichannel opportunities of cable have meant that existing commercial players have developed new products, like CNBC, MSNBC, ESPN, and A&E. Public television has not developed similar products during the last twenty years. It has mainly maintained its niche in a time of economic, political and cultural assault. This is not a point of chastisement, just description. Given all the political turmoil that public television has faced, maintaining and slightly improving the status quo is more than could have been expected.

As to the altered global landscape, because of the never-ending need of the commercial networks to extend and expand markets, coupled with a library of programs to which they own rights and the desire to develop brand name recognition, large, relatively untapped, potentially consumer-oriented markets have been increasingly attractive. Not only NBC, but Rupert Murdoch, Sony, and others have been willing to take large risks to establish audiences using new satellite technology coupled with new multi-channel terrestrial distribution systems (or “DTH”). The BBC has been aggressive as well. Its strategy explicitly has been to become more secure at home and more competitive worldwide. Public television has not had the leisure, the resources, or the organization to engage such a dual strategy. In the current political environment, it had to focus on domestic issues and there was not the Congressional support for investment in PBS to take great overseas risks. For the BBC (and a few other state-supported public broadcasting services), government has seen it as in its interest to make investments that will either help the national policy cause abroad or pay off and mean less reliance on the domestic license fee.

#### VIII. A CAREFULLY CONSTRUCTED AUCTION

In this environment of great technological opportunity and dogged structural and political impediments, a number of more

radical approaches have been suggested. Lawrence Grossman has proposed a high-powered second public network, utilizing prime time in a portion of the week, to garner advertising support.<sup>90</sup> The enterprising PBS president, Ervin Duggan, has his own publicly stated agenda for progress in streamlining within the existing framework of public television.<sup>91</sup>

One more aggressive approach is for there to be an auction of the national service, along the lines of the British ITV auctions, where there is a described set of functions to be performed. Bidders offer to perform the required functions or bid up the functions to be performed. Bids would contain—depending on the nature of the functions described or the proposal of the contenders—either a payment to the government or the guarantee of the services promised for a contracted government contribution. The full design of such an auction—too ambitious for this Essay—can serve as a mental exercise in subjecting public television to carefully selected market pressures, not the accidental ones that now affect program policies adversely.

Public service television—or more likely some part of it—would be spun off into a private or semi-private corporation, much like the privatization of airports or highways, or the operation of prisons or schools. This technique is used as a means of forcing a definition of purpose and trying to obtain a more efficient way of accomplishing national goals. The technique is also used as a way of limiting or defining the government contribution to a public enterprise. Looking at the evolution of public television globally, no system has used exactly this approach. On the other hand, public television globally seems to be moving from state control to a more public-private partnership, or towards entities more capable of competing in a multi-channel and globally defined environment. In surprising ways, the former evolution of the state broadcasters in Central and Eastern Europe and in Russia, have hallmarks of such a redefinition.

To help understand this auction approach, one could ask who the bidders might be. Looking at counterpart commercial restructurings, candidates might include those who are central to the existing system or an entity with a library and production capability

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<sup>90</sup> See Lawrence K. Grossman, *Introducing PTV Weekend* (visited May 10, 1999) <<http://www.current.org/weekend/wklg597.html>>. See also *DIGITAL BROADCASTING AND THE PUBLIC INTEREST* (Charles Firestone & Amy Korzick Garmer eds., 1998). This document was highly influential to the Gore Commission in terms of setting forth alternatives for the financing of public television.

<sup>91</sup> See Duggan: *PBS Exists to Serve Stations, Isn't Planning for Independence*, PUB. BROADCASTING REP., June 28, 1996, available in 1996 WL 8312735.

that could use a public distribution system. An auction would increase the likelihood of vertical or horizontal integration in the various markets of which public television is a part. It is unclear who all the bidders might be, but some possibilities include the Children's Television Workshop or PBS itself, or a BBC-Discovery consortium, or an alliance of major PBS local stations, alone or with the BBC. A commercial network like CBS seeking to redefine itself, might participate in such an auction, as might Disney-ABC.

It is impossible, in this Essay, to indicate exactly how such an auction would be structured to render technological opportunities more productive in terms of the goals of a public service, but some indication is possible. One idea would be to establish a bidding process for prime-time public broadcasting—the National Programming Service—but leave the remainder to local affiliates. Extremely important would be whether the bidder would have some portion of the multicasting opportunities available as a result of spectrum expansion and digital compression, and under what conditions. For example, the bidder would be committed to providing an “as is or better” public broadcast system to nearly 100% of U.S. households, with some right to do limited advertising on PBS stations, and some obligation to provide a new public broadcasting channel on cable—something like the Australian SBS or British Channel 4 models. The bidder could also bid by providing funds for the use by affiliates during day parts. The bidder would provide a plan for the use of digital spectrum and local broadcasting stations would be required to clear prime time. The bid would be similar to the British system for the award of Channel 5 licenses and the award being for a period of years with a new bid at the end (as opposed to a license renewal process). Congress could still participate by creating additional program development funds, or by funding major cultural institutions to produce programming with the successor organization.

While a great temptation and likelihood would arise, it would be highly pragmatic for entities that might seek to enter into such an auction to help define its terms. This determination should be done through hearings before the FCC or before a Congressional subcommittee. An auction or similar transaction might, for example, mean that proceeds from a privatized national service, including use of digital spectrum during prime time, would finance local entities with a redefined function as well as production. Federal budgetary contributions might, in the future, be limited to support for educational or instructional offerings. One bidder might offer to provide a service like SBS in Australia which spoke specifically to

under-served language minorities in the United States. Funds from an auction could be used to support local production by local public broadcasting entities during those periods not reserved for those who prevail at auction. There could be an auction for a nationally-based but decentralized distance learning program (like Ready to Learn) in which the bidder proposed a model for utilizing available digital spectrum, reservations on DBS, and over terrestrial facilities. Such a bid might be contingent on funding, or promise some version of partial self-funding through tuition and other revenue-producing methods. The function of opening up possibilities—of allowing Microsoft or Disney, or the BBC or Children’s Television Workshop (or a combination of major PBS stations) to make a bid—would be to allow a reconceptualization to occur which did not depend, for its initial validity, on the protection of existing entities. The British Open University might participate in a bid for post-secondary instructional broadcasting, in conjunction with a consortium of American universities or with the Learning Channel.

The idea, here, is only to sketch the possibilities. It is an understatement to say that there are enormous, probably insurmountable, hurdles. These would include: coordinating a carved out role with the continuing existence of local station licensees; the constitutional questions involved in actually determining what a public broadcasting entity should do; the difficult question of who would judge among bidders and by what criteria. It is only because of some structural approach that might substantially reenergize—even more than is now occurring—and strengthen public broadcasting that such a complex suggestion is put forward.

#### IX. CONCLUSION

Ervin Duggan is a leader who uses formal opportunities to try to build consensus or the appearance of consensus. In a June, 1996, speech, Duggan gave an important view of the relationship between structure and technological development.<sup>92</sup> Instead of reflecting on fracture and dissent, an earlier theme, Duggan announced a “year of victory,” of “solidarity, unity and cohesion.”<sup>93</sup> He wished to dispel concerns of local stations that PBS wished to become independent of them, rather than tied to their continued maintenance. “Let there be no ambiguity,” Duggan exhorted, “we know why we are here. PBS is here to serve you. We cannot reach

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<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

our audience except through you.”<sup>94</sup> In the speech, Duggan specifically addressed PBS efforts in the area of new technologies. Duggan pointed to the PBS World Wide Web site and the formation of the NTWG originally charged with examining the prospects of HDTV, ATV, and DBS for programmers and stations.<sup>95</sup>

Many of these are important steps. They will yield improvements in the workings of the public broadcasting services. They do so, however, within a structure that remains hobbled. The emphasis on structure in this Essay is based on the assumption that exploitation of technology in the public interest depends on a complex of political and structural forces. In a world in which there is intense reorganization so as to maximize the potential gains from technology shifts, the greatest danger to public television could be an inability to react adequately to opportunities provided. It is in this context that a number of suggestions have been made for moderate and radical change as precursors for the benefits of engineering advancement. Of course, *ex ante*, it is difficult to know what changes in structure will lead to particular social benefits. It may well be that a highly decentralized and almost atomized system can be a greater goal for change than one that is more structured and controlled from above. The early results from the commercial sector are mixed. But it is clear that the investments, the flexibility and the speed necessary for change to take advantage of new technologies require structural change in public television. New technologies are, in a sense, like new playing cards dealt in a high-stakes game. They are opportunities to be sure, but they are deeply embedded in a pre-existing context and a complex competitive environment. Technologies create opportunities, but policy-makers, legislators, managers and citizens provide the environment and structures in which those technologies manifest themselves. Technological determinism has its place in the discourse of history, but in the corner of public broadcasting, at this moment in time, it is implementation, not the technology itself, that is most fateful.

In a time when huge commercial networks have been gobbled up, have transformed or virtually disintegrated, where relations between networks and affiliates have been in a state of constant flux, where the relationships among industry components—broadcasting and cable, for example—have gone from prohibited to intimate, public broadcasting should be subject to radical reexamination as well. Yet, the entities of public broadcasting are

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<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

holier cows than is their British counterpart. The pressure on the BBC to transform, to act competitively, and to alter substantially its structure so as to function in the next several decades, has been dramatic and effective. For all the clumsy and culture-laden debate about public broadcasting in the United States, for all the oaths and cataclysmic predictions from the public broadcasting community, or the harsh pledges of budget cuts by conservatives in Congress, there has not been anything like the coherent and effective refashioning that has taken place in the United Kingdom. To be sure, the British experience has had its critics. The new leadership of the BBC is often portrayed as abandoning the Reithian tradition and playing too facilely to the marketplace, and there are those who think that market forces are destroying the institution in order to save it. What is critical here, however, is that the structure for change, not for immunity, has been set in motion, and the consequence is that a far more entrepreneurial, far more globally ambitious, and more innovative BBC has emerged.

All this being said, technology and even the structural changes that will maximize the impact of new technologies, will not turn America's step-child of public television into a new and glorious BBC. If anything, the future of the world's public service entities will become more like the present of its American exemplar. The history of American public television—and the future of public service television around the world—is one of segmentation and narrowcasting, and technology may not change that simple fact. It is important to examine demography and market share. Oddly, because PBS always was a sculpted minority, its audience share has remained more stable than that of many other public service broadcasters around the world. The problems PBS and America's public television stations have traditionally faced will increasingly be found in its more protected equivalents around the world.