

Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 16 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review --)
)
Streamlining Mass Media Applications)
Rules, and Processes)
)
"Annual Report of Cable Television)
System," Form 325, filed pursuant to)
Section 76.403 of the Commission's Rules)

MM Docket No. 98-43

CS Docket No. 98-61

COMMENTS OF
INSTITUTE FOR PUBLIC REPRESENTATION
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
CENTER FOR MEDIA EDUCATION
CIVIL RIGHTS FORUM
OMB WATCH

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June 16, 1998

No. of Copies rec'd 0-8
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SUMMARY

Commenters are advocacy organizations which represent the public's interest in promoting accessible, diverse and responsive media. We are concerned that adopting the proposals in these two Notices, MM Docket No. 98-43 and CS Docket No. 98-61, would make it increasingly difficult for the public and the FCC to monitor the broadcast and cable industries.

Commenters believe that rather than relying on its current piecemeal approach of reviewing its record-keeping requirements, the Commission should instead conduct a systematic overview of its information needs and the effects any changes will have on its ability to review broadcast and cable operations. Such a comprehensive approach will enable the Commission to ensure that it is not eliminating its ability to collect information that may prove to be critical to its fulfillment of its statutory obligations.

More specifically, to meet its statutory obligations to oversee broadcast licensees, Commenters maintain that the Commission should continue to require the submission of contracts with assignment and transfer applications. The Commission should also require all broadcasters to file periodic ownership reports which could be modified to solicit information relevant to important policy concerns like ownership diversity. In addition, to assess licensees' compliance with its policies, the Commission should conduct periodic audits and should require the electronic filing of Children's Programming Reports. Similarly, to adhere to its statutory obligations to monitor cable operators' compliance with horizontal integration, must-carry, and leased access rules, the Commission should continue to collect relevant industry data. Continued collection of this vital information is necessary to facilitate public and Commission review of broadcast and cable industry practices.

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**COMMENTS OF

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In April, the Federal Communications Commission (“Commission” or “FCC”) issued two Notices of Proposed Rulemaking as part of its 1998 biennial regulatory review: Streamlining of Mass Media Applications, Rules and Process, Notice of Proposed Rulemaking, FCC 98-57, MM Docket No. 98-43 (rel. Apr. 3, 1998) (“Mass Media NPRM”) and “Annual Report of Cable Television System, Form 325, Filed Pursuant to Section 76.403 of the Commission’s Rules, Notice of Proposed Rulemaking, FCC 98-79, CS Docket No. 98-61 (rel. Apr. 30, 1998) (“Cable NPRM”) Commenters are advocacy organizations which represent the public’s interest in promoting accessible, diverse and responsive media.¹ We are concerned that the cumulative

¹The Institute for Public Representation (IPR) is a public interest law firm founded by Georgetown University Law Center in 1971. IPR’s work in communications is an outgrowth of its merger in January 1981 with the Citizens Communications Center, which was founded in 1969. IPR represents advocacy, consumer, and civil rights organizations before the FCC, other federal administrative agencies and the federal courts. IPR also serves as a clinical program for Georgetown University Law Center.

effect of adopting the proposals in these two Notices, along with past streamlining efforts,² would be to make it increasingly difficult for the public and the Commission to monitor the broadcast and cable industries.

At the outset, Commenters want to express their concern about the Commission's piecemeal approach of reviewing its record-keeping requirements. Instead of focusing only on whittling down industries' record-keeping duties to reduce their administrative burden, the Commission should instead conduct a systematic overview of its information needs and the effects any changes will have on its ability to review broadcast and cable operations. Such a comprehensive approach will enable the Commission to ensure that it is not eliminating its

The Association of Independent Video and Filmmakers has a membership of over 5,000 independent media producers. The Association is a leading advocate for access by independent filmmakers to distribution opportunities on television and cable systems across the country.

The Center for Media Education (CME) was founded in 1991 to improve the quality of electronic media on behalf of children, families, non-profit groups and the general public. To carry out its mission, CME engages in a variety of activities including public education, research, advocacy and outreach to the press.

The Civil Rights Forum (the Forum) is a project of the Tides Center, a national non-profit organization that promotes principles of social justice, broadly shared economic opportunity and a robust democratic process. The Forum works to bring civil rights organizations and community groups into the current debate over the future of our media environment by holding conferences, creating educational materials, and conducting research.

OMB Watch is a non-profit research and advocacy organization that works to encourage greater public participation in federal government decision-making and to promote a more open, responsive and accountable government.

²See, e.g., Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Notice of Proposed Rulemaking, 12 FCC Rcd 6993 (1997), in which the Commission proposed modifying the main studio rule by relaxing the rules dictating its location, and reducing the amount of information that must be kept in the public file located there.

ability to collect information that may prove to be critical to its fulfillment of its statutory obligations.

We recommend that the Commission combine its proposals for changes in information collection practices in one Notice to facilitate the public's ability to respond. Because these limited Notices do not attract as much attention as larger policy issues, members of the public, who must monitor industry activity, do not necessarily know about them. Moreover, the public interest community has limited resources and cannot easily comment on multiple rulemakings. Thus, Commenters are using this opportunity to object to the Commission's practices and to respond specifically to some of the proposals presented in both the Mass Media NPRM and the Cable NPRM.

I. The Commission's Plans to Reduce or Eliminate Information Collection from the Broadcast and Cable Industry Would Hinder the Ability of the Public and the Commission to Monitor these Industries

The Commission has repeatedly stated that it relies on the public to monitor the broadcast and cable industry and to bring misconduct to its attention for a determination of whether such actions are consistent with the public interest. In Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1003 (1966), the Court noted that "the Commission has always viewed its regulatory duties as guided, if not limited, by our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life." Over the years, the Commission itself has expressed its reliance on public monitoring of industry. For example, in Deregulation of Radio, 73 FCC 2d 457, 535 (1979), the Commission stated, "[w]e expect and encourage the public to keep the Commission informed as to how well the marketplace is performing. Based upon complaints from the public, we will monitor market

performance.” Similarly, in Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial TV Stations, 98 FCC 2d 1076, 1091 (1984), the Commission noted, “[a]s we have stated on numerous proceedings, citizen complaints and formal petitions to deny provide an important monitoring function in our regulatory endeavors.”³ The public can fulfill its monitoring role only if the Commission collects from the broadcast and cable industries the information necessary for the public to stay informed. In addition, the Commission must have access to information about these industries to evaluate their practices and to verify the public’s claims.

The Commission asserts that its proposals to reduce or eliminate the collection of information from broadcasters and cable operators will increase efficiency by reducing the industries’ paperwork burden and enabling the Commission to channel its staff resources to other tasks. Yet, the Commission also recognizes that it must “preserve the public’s ability to participate fully” in its processes.⁴ The Commission should make the public’s interest its primary goal. To serve the public interest, and facilitate the enforcement of FCC rules, the Commission must ensure that its adoption of efficiency measures does not compromise its statutory obligations to review industry actions, nor diminish its role as an information clearinghouse.

³See also, Policies and Rules Concerning Children’s Television Programming, Revision of Programming Policies for Television Broadcast Stations 11 FCC Rcd 10660, 10682 (1996).

⁴Mass Media NPRM at ¶ 1.

A. The Commission should continue to collect important data from broadcasters

Much of the information that the Commission collects from broadcasters is important to the public and cannot be reasonably obtained from any other source. Specifically, Commenters believe that the Commission should continue to require that sales contracts be submitted by applicants seeking to sell or transfer licenses. In addition, the Commission should continue to require the periodic submission of ownership forms and should modify the forms to collect information pertinent to policy concerns. Moreover, to ensure broadcasters' compliance with Commission rules in those cases in which they are permitted to self-certify, the Commission should conduct periodic audits of licensees.

1. The Commission should continue to require the submission of contracts with assignment and transfer applications

In the Mass Media NPRM, the Commission proposes eliminating the requirement that applicants seeking to assign or transfer broadcast licenses file their sales contracts with the Commission. The Commission would instead allow applicants to certify compliance with Commission rules.⁵ As part of this change, the Commission also proposes that sales contracts be placed in the station's public file rather than the Commission's Washington, D.C. office.⁶ The Commission seeks comment "on whether these procedures are sufficient to discharge our obligation under Section 310(d) of the [Communications] Act to grant only those applications that serve the public interest, convenience and necessity."⁷

⁵Id. at ¶¶ 30-31.

⁶Id. at ¶ 32.

⁷Id. at ¶ 31.

The Commission should not adopt this proposal. The Commission is obligated to review the potential impact on the public interest of each application for sale or transfer. Without easy access to sales contracts, it would be impossible for the Commission to determine whether proposed transactions serve the public interest. Indeed, the Commission states that it “has used the sales agreement, together with the application, to understand the overall structure of each transaction involving the assignment or transfer of a broadcast authorization.”⁸ Access to sales contracts enables the Commission to enforce the laws regarding unauthorized transfers of control, and illegal media cross-ownership.⁹

In addition, this information is vital to members of the public as well, particularly if they are considering whether to file a petition to deny an application. For example, having access to the sales contracts in the pending WQED Communications/Cornerstone TeleVision, Inc. application (File Nos. BALET-970602IA, BALCT-970530IA), enabled the Institute for Public Representation (IPR) to have a more complete understanding of the proposed transaction and the parties’ plans for dividing the proceeds from the proposed sale. This information allowed IPR to gain a clear understanding of the impact the proposed transaction would have on the community. Without this information, IPR would have been limited in its ability to represent its clients.

Requiring that an applicant place the contract in its station’s public file would not be sufficient. Often, it is not easy for members of the public to get to the main studio, and, if the

⁸*Id.* at ¶ 29.

⁹*See, e.g.*, 47 U.S.C. § 310 (a) (prohibiting transfers to foreign governments); 47 U.S.C. § 310(d) (requiring that transfers serve the public interest, convenience and necessity); 47 U.S.C. § 202 (restricting media ownership within markets).

Commission adopts its proposal to modify the rules regarding the location of the public file,¹⁰ members of the public may find it even less convenient to access the information. Moreover, in many cases, the public relies on Washington, D.C.-based counsel to assist them in reviewing transfers or assignments. In light of the short deadline for filing such challenges,¹¹ it is crucial that these attorneys have easy access to all materials relevant to the application.

Relying only on applicants' certifications that they have complied with the rules for sales and transfers would also make it more difficult for the Commission to enforce its rules.¹² As noted above, the Commission must ensure that all sales and transfers serve the public interest, convenience and necessity.¹³ If an applicant falsely certifies that it has complied with Commission rules, such a violation would be virtually undetectable.¹⁴ Moreover, if the Commission approves a transfer based on an applicant's certifications of its compliance with Commission rules, and then through an audit, later determines that the applicant misrepresented the transaction, the Commission may have only limited redress. Because "it may be difficult to unwind sales or transfer transactions after they have occurred,"¹⁵ the Commission may be unlikely to seek this remedy. It is unclear whether the Commission could take any effective

¹⁰See Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, 12 FCC Rcd 6993 (1997).

¹¹See 47 C.F.R. § 73.3584 (providing that petitions to deny be filed "not later than 30 days after issuance of a public notice of the acceptance for filing of the applications.")

¹²Mass Media NPRM at ¶ 47.

¹³47 U.S.C. § 310(d).

¹⁴A random audit policy would not be enough to expose every instance of malfeasance.

¹⁵Mass Media NPRM at ¶ 81.

measures to correct problematic transactions that have been allowed to occur. As a result, allowing broadcasters to consummate a transaction based only on the broadcasters' self-certification may permit sales and transfers that do not serve the public interest.

2. The Commission should require all broadcasters to file periodic ownership reports

The Commission has proposed changing the rules regarding the filing of ownership forms to require their submission every four years or every two years.¹⁶ Rather than focusing on reducing the number of times that the form must be filed, the Commission instead should consider modifying the form so that it provides data that is essential to evaluating the success of important FCC policies.

The Commission has reiterated on numerous occasions its goal to promote diverse ownership of broadcast media.¹⁷ Yet, the Commission does not have access to the information it needs to evaluate its diversity policies. For example, the Commission has no source of information on female broadcast media ownership.¹⁸ As the American Women in Radio and Television (AWRT) recently noted, data on women-owned companies has not been updated

¹⁶Id. at ¶ 84.

¹⁷See, e.g., 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, FCC 98-37, MM Docket No. 98-35 (rel. Mar. 13, 1998) at ¶ 4.

¹⁸For facts about minority ownership, the Commission relies on information collected by the National Telecommunications and Information Administration (NTIA). It may be a more efficient use of government resources for the FCC to collect this information on its ownership forms.

since the 1992 Census.¹⁹ Moreover, the Census combines the information about communications companies, without distinguishing broadcasting from telecommunication services. While the Commission is currently studying the role of female-owned small businesses,²⁰ the results of this study are not yet available and there is no means in place for updating the findings on a regular basis. With some minor modifications, the ownership form could be used to provide the Commission with information about the diversity of media ownership. If the ownership form becomes a source of such important information, the Commission should require all broadcasters, both commercial and noncommercial, to file it periodically and to modify it within 30 days of ownership changes.²¹

3. The Commission should conduct periodic audits of licensees

The Commission asserts that it plans to accompany its “streamlining initiative” with a “commitment to sanction severely those applicants that fall short of discharging their obligations of full disclosure and complete candor” and by “establish[ing] a formal system of random audits.”²² Commenters support these plans. Without the threat of possible review, some broadcasters are likely to attempt to evade the rules. Moreover, to facilitate these audits,

¹⁹Comments of AWRT, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, et al., MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264 (January 26, 1998) at 7.

²⁰Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Business (Report), 12 FCC Rcd 16802, 16920 (1997).

²¹This rule should apply to all broadcasters regardless of size. As the Commission notes in its Initial Regulatory Flexibility Act analysis, the majority of television and radio owners can be characterized as small businesses. Mass Media NPRM at Appendix A.

²²Mass Media NPRM at ¶ 1.

Commenters believe that the Commission must adopt its proposal to require licensees to retain worksheets documenting their compliance with Commission rules “for use in response to Commission audits or other Commission inquiries.”²³ In addition, to enhance the public’s ability to evaluate the licensees that serve their community, the FCC should also require licensees to place the worksheets in their public inspection files.²⁴

B. The Commission should require the electronic filing of Children’s Programming Reports

The Commission should require broadcasters to file electronically FCC Form 398, the Children’s Programming Report.²⁵ The Commission intended the public to monitor broadcast stations’ compliance with the children television rules. As the Commission stated in Policies and Rules Concerning Children’s Television Programming, Revision of Programming Policies for Television Broadcast Stations, 11 FCC Rcd 10660, 10682 (1996), “[e]asy public access to information permits the Commission to rely more on marketplace forces to achieve the goals of the CTA and facilitates enforcement of the statute by allowing parents, educators and others to actively monitor a station’s performance.” The availability of this form on-line promotes this policy. Indeed, IPR and CME relied on electronically-filed reports to review whether certain stations whose licenses were up for renewal were complying with the Commission’s rules. The

²³Id. at ¶ 18.

²⁴Id.

²⁵Id. at ¶ 7

ease of accessing these forms facilitated our review. In addition, requiring that broadcasters file electronically is consistent with the Commission's transition to electronic filing.²⁶

C. The Commission should continue to collect important data from cable operators

In the Cable NPRM, the Commission proposes to eliminate or modify Form 325 which collects important information from cable operators including their name and address, system-wide capacity, channel usage, and number of subscribers.²⁷ The Commission acknowledges that much of this information is critical to its assessment of the operators' compliance with its rules concerning leased access, must-carry and horizontal concentration.²⁸ Indeed, the Commission admits that this form provides the agency with its only information on leased access usage.²⁹ Moreover, the Commission must collect this information to comply with its obligation under Section 628(g) of the Communications Act of 1934, *as amended*, to report annually to Congress on the status of competition in markets for the delivery of video programming.³⁰ Thus, the Commission is statutorily obligated to collect this information, and cannot use its failure to collect this information for the past four years³¹ as an excuse to abandon forever its information collection efforts.

²⁶Electronic Filing of Documents in Rulemaking Proceedings, FCC 98-56, GC Docket No. 97-113 (rel. Apr. 6, 1998).

²⁷Cable NPRM at ¶1.

²⁸Id. at ¶ 7, citing 47 U.S.C. §§ 532 (a), 533 (f)(1)(A), 534 & 535.

²⁹Id. at ¶ 6.

³⁰47 U.S.C. § 548 (g).

³¹Cable NPRM at ¶ 5.

The Commission and the public need access to this information from all cable operators to monitor their practices. The Commission should not attempt to reduce its administrative burdens by limiting the number of operators who are subject to its forms or by collecting the information at less frequent intervals.³² Such modified collection practices would create an incomplete database and would not provide an accurate picture of the state of the industry. In addition, without reliable information on leased access usage, the Commission cannot assess the efficacy of its leased access rules.³³ Finally, the fact that some of the information on cable operators can be obtained through commercial sources, such as A.C. Nielsen or Warren Publishing,³⁴ does not eliminate the Commission's duty to collect it. Information compiled by commercial sources may not be as accurate as data provided directly by the operators. Furthermore, neither the Commission nor the public can afford access to these commercial sources. Information on cable operators must not be limited to those who can pay commercial rates.

II. Conclusion

While Commenters are not opposed to eliminating unnecessary record-keeping or repetitive reports, we believe that the Commission should adopt a comprehensive approach to information collection that will enable it to assess what information it needs, and the best means of collecting it. Commenters are concerned that the Commission's piecemeal efforts to reduce information collection will hinder the Commission's and the public's access to critical

³²Id. at ¶ 8.

³³47 C.F.R. §§ 76.970-01, 76.975 & 76.977.

³⁴Cable NPRM at ¶ 6.

information about the broadcast and cable industries. In addition, Commenters object to the Commission's specific plans to eliminate the requirement for filing broadcast sales contracts, broadcast ownership forms and Cable Form 325.

Respectfully submitted,



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