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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
1998 Biennial Review --)
Streamlining of Mass Media Applications,)
Rules, and Processes)

MM Docket No. 98-43

**REPLY COMMENTS OF
MEDIA ACCESS PROJECT**

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SUMMARY

MAP joins other commenters in this proceeding in commending the Commission's decision to take full advantage of new technology to ease unnecessary burdens. MAP also joins with the private sector in cautioning the Commission not to retreat from important substantive requirements in the guise of adopting administrative and technological changes.

As set forth in MAP's initial comments, broadcast deregulation has been premised upon the Commission's expectation that it can substitute public scrutiny for direct government oversight as an enforcement tool. In proposing to place ever greater responsibility on the public to identify inadequate service and misconduct, the Commission must enhance, not cripple, public access to information.

Many of the industry parties act as if the purpose of this proceeding is to remove regulation indiscriminately. Regulatory streamlining, like all broadcast regulation, must serve the public interest by enabling broadcasters to be more efficient and to provide more and better service in the public interest.

The most egregious example of this misplaced emphasis is the NAB's proposal to allow broadcasters -- but not the public -- to benefit from advances of technology. MAP absolutely opposes the NAB's demand that the Commission deny the public electronic access to electronically-filed applications. Insofar as the public already relies on electronic access to materials submitted under the Children's Television Act, this proposal amounts to a back door attack on the Congressional mandate to improve service to the nation's children. Such action would also violate the

Paperwork Reduction Act. Even if it were not unlawful to deny public access, experience with the Commission's web site demonstrates that the NAB's claims that public disclosure would be a security hazard are unfounded.

MAP vehemently opposes proposals to privatize the Commission's reference room. By placing these critical documents in the hands of private entities, and out of the reach of Commission staff, the Commission would be unlawfully abdicating its duty to take into account all relevant information during the application review and renewal process. Such action would be irrational as well as unlawful: it is hopelessly inconsistent for the Commission to claim to increase its reliance on public scrutiny while simultaneously placing a price on public access to information.

Additionally, MAP:

- o Observes that industry comments demonstrate that submission of full sales contracts benefits broadcasters, particularly potential minority and women owners, and is necessary for adequate public review of broadcaster transactions.**
- o Shares the concerns of other commenters that proposed revisions of Commission forms will result in substantive decisions as to which the Commission must, and in any event should, seek public comment.**
- o Favors strong audit procedures and an audit rate of 15 percent, which will increase compliance with Commission rules.**

COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these reply comments in response to comments filed in the Commission's *Notice of Proposed Rulemaking*, FCC 98-57, MM Docket 98-43 (rel. Apr. 3, 1998) ("*Notice*").

INTRODUCTION

The comments reflect a broad consensus that, while the Commission's efforts to realize the benefits of new technology are commendable and well-timed, the Commission should not use a proceeding designed to address administrative matters as an excuse to adopt substantive changes in its rules. Commenters representing all viewpoints agree that the Commission's proposals go too far in seeking to scale back the information the Commission collects.

MAP reminds the Commission that its overriding obligation is to implement the public interest standard of the Communications Act. Citizens, not broadcasters, are the intended beneficiaries of the Commission's processes. Deregulation is not a goal in itself; it is simply better to achieve the Commission's statutory responsibilities in a less burdensome manner. Broadcast deregulation has been premised upon the Commission's expectation that it can substitute public scrutiny for direct government oversight. Any action that the Commission takes to inhibit public participation, therefore, directly contradicts the Commission's own justifications in support of its deregulatory initiatives.

I. Suggestions to Limit Public Use of Electronically-Filed Documents Must Be Rejected.

A. Electronically-filed Applications Must Be Available to the Public Electronically.

The NAB suggests the Commission prohibit the public from obtaining electronic access to electronically-filed documents. NAB Comments at 9-10. The NAB argues that the Commission cannot guarantee the security of files viewed by the public. *Id.* Attempts to limit the public's access to electronically-filed applications will cripple the Commission's successful initiatives with respect to the Children's Television Act, violate the Paperwork Reduction Act, and disregard the current state of technology which is better equipped to protect the integrity of files than the current paper system.

Acceding to the NAB's call to limit or prohibit public access to Commission files would block the Commission's implementation of the Children's Television Act by denying parents access to information about children's programming. Currently, broadcasters file Form 398 on-line and the public can view those reports on-line on the Commission's web site. If the Commission shared the NAB's irrational fears about electronic tampering, it would never have placed Form 398 on-line and parents would not have access to this information today. The Commission's entire effort to increase public access to its documents would be halted if it adopted the reasoning put forth by the NAB.

Any attempt to limit electronic access to industry groups would also violate the Paperwork Reduction Act. The Paperwork Reduction Act states, in relevant part:

(d) With respect to information dissemination, each agency shall--

(1) ensure that the public has timely *and equitable* access to the agency's public information, including . . .

. . . .

(B) in cases in which the agency provides public information maintained in electronic format, providing timely *and equitable* access to the underlying data . . .

. . . .

(4) not, except where specifically authorized by statute--

(A) *establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public;*

Paperwork Reduction Act of 1995, PL 104-13, sec. 3506(d)(emphasis added). Electronic access for the benefit of broadcasters at the expense of the public is neither equitable and nor lawful. Congress, by adopting the Paperwork Reduction Act, has instructed the Commission to ensure that proposals such as the NAB's are not adopted. Government must serve citizens as well as the corporate sector; it cannot limit the benefits of new, technologically-advanced modes of access to industry groups alone.

The NAB cannot seriously argue that electronic access will create greater security risks than those that presently exist at Room 239, 1919 M St., NW. The NAB ignores the fact that the Commission now makes available almost all of its official documents *via* its web site, including electronically-filed children's television reports. The NAB also ignores innumerable government and private initiatives to not only maintain, collect, and provide access to data electronically.¹ If

¹ For example, the U.S. EPA provides access to its Envirofacts data warehouse, which publishes most of the EPA's primary regulatory and oversight databases covering nearly every industrial facility in the country. Similarly, the Unison Institute is using the Internet to publish data from the Federal Reserve on bank-lending practices. No documented compromises of either database

the Commission can make children's television reports and its official documents available to the public electronically without incidents of tampering, it can protect electronically-filed applications of broadcasters. Security concerns do not preclude allowing public access to electronically-filed forms. To the contrary, the integrity of broadcaster filings must be secure to protect members of the public who might rely on those filings.

B. The Privacy of Citizens Who View Electronic Files Must Be Protected.

The Commission must also reject the NAB's highly offensive demand to restrict the public's right to participate in the broadcast-licensing process, *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), by allowing the Commission or broadcasters to monitor the identity of individuals viewing electronic applications. NAB comments at 9-10. Far from increasing citizen access necessary to permit deregulation, this action would impede or halt it.

The NAB's analogy with physical files is inapposite. See NAB comments at 9-10. The ability of a broadcaster to monitor individuals who access a physical file is important because the broadcaster must ensure the integrity of the physical file and ensure the safety of the office where it maintains the public file. These concerns are not applicable when a member of the public views a file electronically.

have ever occurred and these systems have earned the trust of both members of industry and advocacy groups that rely upon them. Databases such as these rely upon commercially available software including a DBMS (database management system) such as Oracle or Infomix and the Unix operating system. Further, additional security mechanisms, such as SSL (Secure Sockets Layer), can provide extra layers of encryption and identification that can provide even more certainty.

Because electronic documents can be protected through automated mechanisms without identifying the individuals viewing the files, they are far preferable to the current paper system. Adoption of an electronic database will allow members of the public to view public broadcaster filings without undergoing harassment that might be imposed by a broadcaster hostile to the individual viewing a public file. There is a long history of some broadcasters intimidating citizens viewing station files by making improper demands of this kind. *See, e.g., Catoctin Broadcasting Corp. of New York*, MM Docket 85-92, 2 FCC Rcd 2126, 2130-31, *aff'd* 4 FCC Rcd 2553 (1989). Despite the NAB's frequent invocation of the First Amendment to justify its policy proposals, the NAB entirely overlooks citizens' privacy and reply rights. *See, e.g., McIntyre v. Ohio*, 514 US 334 (1995); *Talley v. California*, 362 US 60 (1960); *NAACP v. Alabama*, 357 US 449 (1958). The characteristics of electronic filing that the NAB seeks to eliminate are some of the very characteristics that make electronic filing more beneficial to the public than physical records. The Commission must not adopt the NAB's proposal.

II. The Commission Must Not Deprive the Public or Itself of Information Necessary to Analyze Broadcaster Applications By Privatizing the Commission Reference Room.

MAP vehemently opposes proposals to price public participation out of the reach of ordinary citizens and non-profit organizations by privatizing the Commission's reference room. *See, e.g., Berry Best* comments at 3; *FCBA* comments at 12-14. Currently the information collected by the Commission is available for review free of charge. Putting a price on public participation will inhibit it and thus is contrary to the Communications Act and long-standing Commission policy

to promote increased public scrutiny. Charging excessive amounts for public information and establishing a private, exclusive means to make public information available is contrary to the Paperwork Reduction Act.²

It appears that underlying the FCBA's proposal is a supposition that the Commission would never seek out additional information from a broadcaster or from publicly-available files unless a private party submitted that information to the Commission. See FCBA comments at n.7 (stating "the FCC [would] assume[] no responsibility for a review of the information contained in [publicly available files] *unless and until* someone brings such information to the Commission's attention . . .") (emphasis added). **The Commission cannot, consistent with its obligations under the Communications Act, fail to pursue irregularities of which it may be aware to approve broadcaster applications.** MAP opposes any privatization of the Commission's reference room if such privatization could be used as an excuse by the Commission to avoid obtaining documents contained there.³

All publicly-available documents must be available to Commission staff. As the experts most familiar with Commission rules, it is likely that Commission staffers will be more likely than

² The Paperwork Reduction Act provides that an agency shall not "(A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public " . . . [or] "(C) charge fees or royalties for resale or redissemination of public information; or (D) establish user fees for public information that exceed the cost of dissemination." Paperwork Reduction Act of 1995, PL 104-13, sec. 3506(d)(4).

³ If the Commission does, in fact, wish to limit and/or track access to information by Commission staff -- a result which MAP strongly opposes -- MAP proposes that the Commission utilize a private reference room and make a record of what information Commission staffers obtain from that source.

private parties to notice a potential problem in a streamlined broadcaster application. Additionally, the Commission often becomes aware of potentially significant information from proceedings unrelated to a particular application, or from "tips" gleaned from the press or other public documents. If a Commission staffer becomes aware of a discrepancy or potential problem with an application, the Commission would be derelict in its duty if it did not pursue the irregularity and determine whether the broadcaster application did, in fact, comply with federal law and Commission rules. 47 USC §§ 309(a), (d)(2) (requiring the Commission, *inter alia*, to examine an application, the pleadings filed, or such other matters that it may officially notice, and, to find that the public interest, convenience, and necessity are served before it approves a broadcaster application).

As detailed in MAP's comments, and *infra* in these reply comments, the information that currently is placed in the Commission's public reference room is critical for public review of broadcaster applications.⁴ For this reason, MAP would support privatization of the Commission's public reference room if MAP's only alternative would be to be deprived of this information altogether. Further, MAP could support creation of a private reference room only if the Commission requires the private contractor to adopt a dual pricing schedule to distinguish between for-profit and non-profit individuals and entities. The prices of the Commission's current document contractor, at \$1 a page, are not affordable for either MAP or ordinary citizens.

⁴ This information includes, as described below, sales contracts, corporation bylaws, and stock pledge agreements.

One benefit of an electronic database is that unlimited access can be obtained at the price of a computer and a modem. Instead using technology as an excuse not to collect additional information, the Commission should use the benefits of technology to increase information access for all. MAP favors creation of a Commission-maintained database including applications and supporting documentation instead of elimination or privatization of the Commission reference room.

III. Commenters Agree that the Commission's Proposals With Respect to Sales Contracts Should be Scaled Back.

Commenters demonstrate that the information provided in sales contracts continues to be critical, and that, through the initiation of electronic filing, the burdens on broadcasters connected with their submission are reduced. See Notice at ¶30. The Commission should continue to collect sales contracts and should allow the broadcasters to realize cost savings by submitting contracts electronically.

Radio and Records *et al.* and the FCBA both explain that collecting price information from sales contracts helps the broadcast industry to raise capital. Radio & Records *et al.* comments at 7, 9-10; FCBA comments at 18, 19 n.11. More important to MAP, this information provides a race and gender neutral method to assist minorities and women in raising capital. *Id.*

The Commission must proceed with caution in reducing current application procedures to a series of yes/no questions. Even the NAB does not believe that simple yes/no questions will adequately capture the complexity of sales contracts. NAB comments at 11-12; *see also* Radio

& Records *et al.* at 11. Moreover, although broadcasters favor increased reliance on certifications in some areas, they oppose reliance on "mere certifications" in areas that are critical to their business interests -- namely, interference. NAB comments at 12-13. MAP holds the same concerns with respect to certifications in areas that MAP considers critical -- compliance with the letter and spirit of the Commission's ownership rules. MAP comments at 12-15.

Contrary to Allbritton's comments, electronic filing procedures will facilitate rather than hinder submission of sales contracts. *See* Allbritton comments at 7. In fact, as noted by Radio and Records *et al.* and the FCBA, submission of lengthy documents is much simpler when a word processing file may be submitted in the place of hundreds of physical pages. Radio & Records *et al.* comments at 12; FCBA comments at 18. MAP notes that the NAB favors the submission of textual attachments in an electronic format. NAB comments at 12-13.

Electronic filings will also be more manageable and useful. Large quantities of information are easily processed and sorted in the electronic medium -- search engines will allow parties to analyze information submitted to the Commission more meaningfully than they can with paper records.

Many commenters agree that sales contracts should be maintained in a central location. *See e.g.*, Berry Best comments at 3; FCBA comments at 12-14; Radio & Records *et al.* comments at 13. As MAP and these commenters noted, innumerable professionals and journalists with expertise in analyzing submissions to the Commission are located in Washington D.C. Allowing broadcasters to maintain files at various locations across the country will inhibit meaningful public

participation in Commission proceedings. *Id.*

IV. Ownership Reports are Important Sources of Information and Should Be Not Be Filed Less Frequently or With Less Information.

Commenters that favor reductions in the frequency of ownership reports, *see, e.g.*, NAB comments at 20, do not recognize that such reports summarize information in a way that incremental 30-day notices of change do not. The present burdens are small – if an ownership report is current, a broadcaster need only file a letter certifying the report is up-to-date.

MAP supports APTS's suggestion that the Commission clarify immediately, as part of this docket, the circumstances under which changes in a non-commercial station's board of directors require them to file a new ownership report. APTS comment at 3-4. Although the Commission is ostensibly considering this question in MM Docket 89-77, its failure to close the docket, after more than nine years of consideration, is inexcusable.

MAP supports some well-targeted proposals to eliminate unnecessary burdens. MAP supports Allbritton's suggestion that separate ownership reports should not be required of each corporate sub-entity. *See* Allbritton comments at 4-5. MAP also supports APTS's suggestion that reporting requirements of non-commercial broadcasters should be no more burdensome than the requirements imposed on commercial broadcasters. APTS comments at 3. MAP further supports Allbritton's proposal that percentages of ownership, not numbers of stock shares, should be included in ownership reports. *See* Allbritton comments at 8.

MAP, however, does oppose Allbritton's proposal to cease requiring submission of bylaws

and stock pledge agreements as part of ownership reports. Allbritton comments at 6-7. These documents are critical in evaluating the corporate relationships that determine which entities control the behavior of a licensee. Stock pledge agreements, in particular, reveal whether a party can exert influence over a licensee. As with sales agreements, *see supra*, submission of these documents becomes simpler, not more complicated, when electronic filing procedures are adopted. A series of yes/no questions will be no more effective in obtaining information about corporate organizational documents and stock pledge agreements than they will be with respect to sales contracts. As MAP explained in its comments, yes/no questions will not identify licensees who are either willing to lie to the Commission, or, who are sophisticated practitioners able to draft documents so that they may answer questions in a manner that will obscure questionable arrangements from Commission scrutiny. *See* MAP comments at 14-15.

MAP supports the NAB's suggestion that the FCC should maintain a database of ownership interests, as long as the database is open to all members of the public. NAB comments at 20. Any action the Commission could take to facilitate public scrutiny of ownership interests would be welcome.

V. All Parties Agree That the Commission's Processes Must Maintain Integrity and Reliability, and Must Comply with the APA.

In many respects, MAP's interests in this proceeding do not diverge from the those of the private sector in general. As participants in the Commission's process, everyone must be able to rely upon electronic filings to the same, or greater, degree that we rely upon the paper process.

In addition, like other commenters, MAP views this streamlining docket as an opportunity to correct some flaws in current Commission procedure. Specifically, MAP supports the FCBA's request to make applications available more quickly to the public, *see* FCBA comments at 8, but MAP believes that any increase in speed must be accompanied by a concomitant increase in the quality of notice provided to the public with respect to application filings, *see* MAP comments at 9-10.⁵ FCBA and MAP also agree that any alterations in an electronic application must be readily identifiable. FCBA comments at 7.

In a similar vein, MAP agrees with the NAB that the Commission must provide complete versions of the proposed electronic applications for comment to comply with the Administrative Procedure Act. NAB comments at 19. MAP also agrees with the FCBA that the Commission should not use the forms-promulgation process as a substitute for adopting substantive rules. *See* FCBA comments at 17, n.8 (noting that proposed forms include requirements that have not been adopted in compliance with the APA). MAP therefore endorses requests for additional proceedings in this docket before an electronic submission mechanism is adopted. MAP notes that a number of commenters advocate an extensive permissive electronic filing period prior to mandatory electronic filing. *See, e.g.*, NAB comments at 5. MAP encourages the Commission to ensure that members of the public will be able to identify easily whether a particular broadcaster has filed

⁵ As MAP stated in its comments, the Commission's public notices regarding broadcaster applications do not even state what type of waiver is sought, much less the justification claimed, by a particular broadcaster. This lack of information makes it impossible for citizens to identify proceedings in which important issues are at stake without expending significant administrative resources. MAP comments at 9-10.

electronically or on paper during any transitional period it might adopt. The public should not bear increased burdens of identifying where a broadcaster's application is located.

VI. The Commission Lacks the Statutory Authority to Approve *Pro Forma* Transfers After the Transfer is Complete.

MAP notes that the NAB has all but conceded that section 310(d) of the Communications Act precludes the Commission from approving *pro forma* transfers in the manner proposed. See NAB comments at 10-11 (does not believe the Commission's proposal "would be at odds with at least the spirit of the relevant statutory provisions"); Notice at ¶78. MAP shares the NAB's concerns about the limitations on the Commission's authority to allow transfers without prior approval. MAP does not oppose efforts to streamline *per se* grantable application procedures, provided they do not violate the Act.

VII. Audits Must Be Fair to All Sides and Must Be Sufficient to Deter Misconduct in a Deregulated Environment.

MAP does not oppose NAB's suggestion to ensure broadcasters benefit from procedural safeguards in the event that an audit reveals misrepresentations in a broadcaster application. See NAB comments at 19. Procedural safeguards that ensure the integrity of audits will benefit everyone because they will allay fears that an unjustified penalty might be imposed on a broadcaster and will encourage broadcaster compliance with the audit process. MAP, however, favors procedural safeguards that will not unduly delay Commission action against broadcasters who violate federal statutes or the Commission's rules. Further, any opportunity that broadcasters are provided to contest the Commission's findings should be part of the public record and subject to

public review and comment.

MAP notes that while the FCBA rejects, out-of-hand, an audit rate of 1 percent, the FCBA believes an audit rate of 3.3 percent is appropriate. FCBA comments at 19-20. MAP believes that figure is too low -- in the past the Commission has adopted an audit rate of 5 percent. See MAP comments at 21. Moreover, because the current proposals involve a large reduction in direct Commission review of broadcaster applications, a audit rate higher than the one adopted in the past is justified. An audit rate of 15 percent is fully justified in light of the proposals contained in the *Notice*. *Id.*

MAP agrees with the FCBA that the highest standards should be adopted with respect to Commission audits. MAP agrees, for example, broadcasters should maintain worksheets and should retain signed copies of applications forms for verification.⁶ See FCBA comments at 11.

VIII. MAP Supports Several Other Proposals to Facilitate Application Processing.

MAP believes that other proposals to enable broadcasters to file electronic applications are sound. MAP supports allowing broadcasters to file applications on diskette. See NAB comments at 4. MAP supports the FCBA's proposal that the electronic filing system not favor one computer operating system or brand of software over another. FCBA comments at 3-4. If it adds accuracy and integrity to the process, MAP supports the NAB's proposal to require an engineer to attest

⁶ Allbritton and MAP agree that documents in a broadcaster's public file must be retained for the full license period. See Allbritton comments at 9. MAP reiterates that a broadcaster that is under investigation must retain its public file documents throughout the pendency of the investigation. MAP comments at 11.

to the accuracy of technical submissions. NAB comments at 16.

CONCLUSION

Adoption of an electronic filing system for broadcaster applications has the potential of allowing all citizens access to the Commission's processes through their personal computers or computers located at their local libraries. Completion of the project, if done appropriately, can improve the Commission's procedures by allowing more citizens to participate in proceedings that affect their communities.

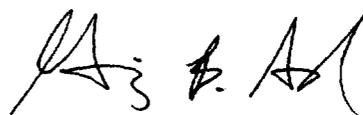
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