

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
) MB Docket No. 14-127
Expansion of Online Public File Obligations to)
Cable and Satellite TV Operators and)
Broadcast and Satellite Radio Licensees)
)

To: The Commission

**JOINT COMMENTS OF NATIVE PUBLIC MEDIA AND
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS**

Native Public Media (“NPM”) and the National Federation of Community Broadcasters (“NFCB”), by their attorneys, hereby submit their Joint Comments in response to the Federal Communications Commission’s (“FCC” or the “Commission”) *Notice of Proposed Rulemaking* released on December 18, 2014, in the above-captioned proceeding.¹

Native Public Media is a non-profit national organization whose mission is to promote healthy, engaged and independent Native Communities through media access, control and ownership. There are 566 federally-recognized American Indian Tribes and Alaska Native Villages in the United States and more than 5 million Native Americans in the United States.² Radio, and particularly noncommercial educational (“NCE”) radio, plays a uniquely vibrant role in Indian Country. There are currently 53 Native owned and licensed NCE radio stations

¹ See *Expansion of Online Public File Obligations to Cable and Satellite TV Operators and Broadcast and Satellite Radio Licensees*, Notice of Proposed Rulemaking, MB Docket No. 14-127, FCC 14-209, 29 FCC Rcd 15943 (rel. Dec. 18, 2014) (“NPRM”). A summary of the NPRM was published in the Federal Register on February 13, 2015, setting March 16, 2015 as the deadline for comments, 80 FR 8031 (Feb. 13, 2015).

² See www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/; <http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff26.html>.

providing critical information about education, culture, public safety, and health to Tribal members across fifteen states. On these stations, you can hear Hopi, Navajo, Sioux, Apache and a host of other rich and vibrant Native American languages.

The National Federation of Community Broadcasters is the oldest and largest national alliance of stations, producers, and others committed to community radio. NFCB advocates for national public policy, funding, recognition and resources on behalf of its membership, while offering services that empower and strengthen community broadcasters' capacity for providing reliable and effective public service media to the American people. NFCB's 140 members are primarily Latino, Native American, African American and rural NCE stations.

I. Native and Community Radio Stations Operate Under Significant Technological Constraints and Economic Pressures.

Despite the success of Native-owned and community radio stations, many communities served by these stations have yet to enjoy the same level of broadband Internet and other media services the rest of America takes for granted. For many Native and community NCE radio stations, uploading public files would be technically impossible because of the lack of broadband access; for others such a requirement would have a significant budgetary impact on stations that already grapple with limited technical and staff resources.

Beyond these technical and economic challenges, small NCE radio stations are also subject to significant FCC regulations – often the same regulations as those applicable to larger market stations owned by large corporate broadcasters – that impose high operating costs relevant to station revenues. Any decision by the Commission to impose additional regulatory requirements, such as mandatory online public files, would place even more pressure on Native and community NCE radio operators – and on station employees who are often already pushed beyond their limits.

In responding to an August 2014 Public Notice that sought comment on whether to launch this rulemaking, the Commission acknowledged that “the majority of commenters addressing [the issue of whether to extend the online file requirement to radio] either objected to extending the online filing requirement to radio and/or argued that the Commission should carefully consider the financial burden on struggling radio stations as well as the technical and financial challenges to the FCC that would be posed by expanding the online file to include radio.”³ As the Commission is well-aware, “many radio stations are very small and have limited financial resources and small staffs,”⁴ and “many small stations already face significant economic challenges simply to stay on the air.”⁵

II. Expansion of Online Public Files to Noncommercial Educational and Smaller Market Radio Stations Should be Entirely Voluntary.

The NPRM proposes to require online public files for commercial radio stations in the 50 biggest radio markets but to delay mandatory online public file requirements for three categories of radio stations: (1) NCE stations; (2) stations with fewer than five full-time employees; and (3) stations located in Nielsen Audio markets 51 and below.⁶ The Commission has, however, proposed that this delay last only for two years.⁷

³ NPRM at ¶ 12 (footnote omitted). See also *Commission Seeks Comment on Petition for Rulemaking Filed by the Campaign Legal Center, Common Cause and the Sunlight Foundation Seeking Expansion of Online Public File Obligations to Cable and Satellite TV Operators, Bureau Also Seeks Comment on Expanding Online Public File Obligations to Radio Licensees*, Public Notice, DA 14-1149, MB Docket No. 14-127, 29 FCC Rcd 9556 (rel. Aug. 7, 2014).

⁴ *Id.* at ¶ 19 (footnote omitted).

⁵ *Id.*

⁶ NPRM at ¶ 69.

⁷ *Id.*

NPM and NFCB urge the Commission to refrain from hastily setting a two-year transition period for all stations. Instead, the Commission should indefinitely exempt both NCE stations and stations with fewer than five full-time employees, but allow these stations to transition to online public files on a purely voluntarily basis.⁸ The Commission should monitor the transition by commercial radio stations in the top 50 markets (and by other stations choosing to make a voluntary transition) and then make a timing decision based on concrete information regarding both the technological challenges and the economic impact unique to NCE and small market radio stations.

The NPRM noted that similar technological and economic concerns were raised when the Commission decided to require online files for small television stations, and recognized that the “concerns regarding the potential cost of an online public file requirement carry more weight, particularly for very small radio stations, which may struggle financially and have fewer resources than small television stations.”⁹ The Commission has nonetheless proposed to treat NCEs and stations with fewer than five full-time employees to the same two-year phase-in period that was previously applied to small television stations.

A. The Commission’s EEO Rules Provide a Workable Bright-line Standard.

As the Commission is well aware, radio stations with fewer than five full-time employees are exempt from nearly all of the FCC’s EEO program requirements.¹⁰ It has been this way for decades, and for good reason – “such stations have limited personnel and financial resources to

⁸ *NPRM* at ¶¶ 29, 68, 70 and 71.

⁹ *Id.* at ¶ 20.

¹⁰ *See* with 47 C.F.R. § 73.2080(d).

carry out those requirements.”¹¹ The “fewer than five full-time employees” standard is a tried-and-true, bright-line test that has proved workable in the EEO context.

B. A Delayed Transition Will Not Provide Budgetary Relief.

Although the Commission has suggested that a delayed transition is sufficient to “assist small stations to budget for any initial cost to upload documents to the file and any extra staff time required for this effort,”¹² no matter how long the phase-in period is, there is simply no way for NCEs and the smallest of stations to “budget for” these costs when they are often already finding it nearly impossible to make ends meet.

III. Noncommercial Radio Donor List Should Not Be Included in Online Public Files.

If, despite the compelling technological and economic concerns discussed above, the Commission nevertheless requires NCE stations to transition to online public files, the Commission should not include the so-called “donor list” (the list maintained by each NCE station of its donors who have supported specific programs) as part of the online public file requirement.¹³ For the same reasons that the Commission has already excluded letters and emails from listeners and viewers in commercial stations’ online public files, the Commission should ensure the privacy of donors by excluding NCE radio station donor lists from the online

¹¹ See *Report and Order* in MM Docket Nos. 98-204 and 96-16, 15 FCC Rcd 2329, 2381 (2000).

¹² *Id.*

¹³ See 47 C.F.R. § 73.3527(e)(9).

public file system.¹⁴ NCE stations that receive grants from the Corporation for Public Broadcasting are required to protect the privacy rights of their donors.¹⁵

IV. Native American and Rural Noncommercial Stations Operate Under Special Circumstances.

Although NPM and NFCB urge the Commission not to impose mandatory online public file requirements on any NCE radio stations, there are additional compelling reasons to exempt Native-owned and rural NCE radio stations from online public file requirements.

A. Many Native and Rural Communities Lack Broadband Access.

Many Native-owned and rural NCE radio stations operate in economically struggling communities that are sorely lacking in broadband access. The importance of this issue is highlighted by a letter sent last June from U.S. Representative Anna Eshoo, Ranking Member on the House Subcommittee on Communications and Technology, and several other House Members, to the U.S. Government Accountability Office (“GAO”), requesting that GAO examine the current state of communications services on Tribal lands.”¹⁶

In last month’s Broadband Progress Report, the Commission noted that approximately 55 million Americans still live in areas unserved by wireline broadband service meeting the 25 Mbps/3 Mbps benchmark.¹⁷ The Report notes that people living on Tribal lands and in rural

¹⁴ Noncommercial stations are not subject to the same public file requirements for letters and emails from listeners and viewers. Compare 47 C.F.R. § 73.3526(e)(9) with 47 C.F.R. § 73.3527(e)(9).

¹⁵ See 47 U.S.C. § 396(k)(12).

¹⁶ Available at <http://eshoo.house.gov/news-stories/press-releases/bipartisan-group-requests-gao-study-on-tribal-land-communications-services/>.

¹⁷ See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry, FCC 15-10, at ¶ 79 (rel. Feb. 4, 2015). See also Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, at note 134 (rel. Mar. 12, 2015); Prepared Remarks of Tom Wheeler Chairman, Federal

(continued . . .)

areas disproportionately lack access to broadband at this increased benchmark speed. While 25 Mbps/3 Mbps service is available to 92 percent of Americans living in urban areas, only 37 percent of Americans on Tribal lands and 47 percent of Americans in rural areas have access to the broadband service at the benchmark speed.¹⁸

And even in communities where broadband is theoretically available, actual access is often severely hampered by high latency, compounded by slow dial-up speeds and unreliable coverage. Accordingly, the complete lack of broadband access in some Native and rural communities, and unreliable service in others, would make it difficult, if not impossible, for some Native-owned and rural NCE radio stations to upload large files to the Commission's online public file database. There would, of course, also be little benefit to making station public files available online in communities where listeners have little or no Internet access.

B. Online Public File Requirements Would Conflict with the Commission's Tribal Radio Priority Initiatives.

The Commission has proudly asserted that its new Tribal Priority¹⁹ will provide opportunities for "Tribal Nations themselves to preserve and advance their languages and cultural values through a communications medium, to increase economic development opportunities through advertising and promotion, to provide job training and employment opportunities, and to promote the further adoption of new communications technologies, such as

Communications Commission, National Congress of American Indians (Mar. 12, 2014) ("Our analysis estimates that the percentage of Americans in rural Tribal communities without access to fixed broadband is 8 times higher than the national average.").

¹⁸ *Id.*

¹⁹ See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket No. 09-52, *Third Report and Order*, 26 FCC Rcd 17642 (2011); see also Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket No. 09-52, *First Report and Order and Further Notice of Proposed Rule Making*, 25 FCC Rcd 1583, 1586 (2010).

broadband.”²⁰ Any requirement that new Tribal radio stations devote their severely limited resources to uploading public files in what may be a futile effort, given the dearth of broadband infrastructure, will only serve to discourage and delay the creation of new Tribal Nations radio stations. Worse yet, an online filing requirement may for some existing Native NCE radio stations, already struggling with limited technical and staff resources, become the difference between continuing to operate and being forced to go silent.²¹

V. **Any Expansion of Online Public Files to Radio Stations Should Include a Clear Waiver Policy.**

As the NPRM indicates, one of the Commission’s goals is to “ultimately, reduce the burden” and “reduce the cost” of maintaining a public inspection file. It follows then that if a station can show that the cost of transitioning and maintaining an online public file is materially greater than the cost of maintaining a paper public inspection file that the Commission should waive the requirement on a case-by case basis.²² By announcing that it will waive the online public file requirements for stations that can show that maintaining an online public file would impose an unreasonable burden as a result of undue economic hardship or technical impediments, the Commission would mitigate the risk that online public file requirements would become the proverbial “straw that breaks the camel’s back” for a radio station teetering on the edge of going dark.

²⁰ Office of Native Affairs and Policy, 2012 Annual Report at 6 (Mar. 23, 2013), available at transition.fcc.gov/cgb/onap/ONAP-AnnualReport03-19-2013.pdf.

²¹ According to the Commission’s Consolidated Database System (“CDBS”), there are currently 217 full-power radio stations (133 FM and 84 AM) that are “licensed and silent.” In contrast, not a single full-power television station is listed in CDBS as “licensed and silent.” Broadcast station information in CDBS is available at licensing.fcc.gov/prod/cdbs/pubacc/prod/sta_sear.htm.

²² See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (a waiver of the Commission’s regulations is appropriate when an underlying purpose of the rule would not be served, or would be frustrated by application of the rule to the instant case).

VI. Conclusion.

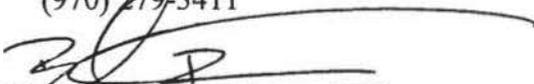
The radio stations represented by Native Public Media and the National Federation of Community Broadcasters are proud members of their communities, honored to provide service to their communities through quality radio programming. Any needlessly hasty effort by the Commission to impose mandatory online public file requirements on Native-owned and community NCE radio stations in this proceeding would have the inevitable impact of diverting already severely limited resources away from the core mission of serving their communities.

Respectfully submitted,

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Dated: March 16, 2015