

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	
Review of Media Bureau Data Practices)	MB Docket No. 10-103
Amendment of Part 1 of the Commission's)	MB Docket No. 10-234
Rules, Concerning Practice and Procedure,)	
Amendment of CORES Registration System)	

To: The Commission

**COMMENTS OF AMERICA'S PUBLIC TELEVISION STATIONS, CORPORATION
FOR PUBLIC BROADCASTING, NATIONAL PUBLIC RADIO,
AND PUBLIC BROADCASTING SERVICE**

America's Public Television Stations ("APTS"),¹ Corporation for Public Broadcasting ("CPB"),² National Public Radio, Inc. ("NPR"),³ and Public Broadcasting Service ("PBS")⁴ (collectively, "Public Broadcasting") submit these comments in support of the Petition for Reconsideration ("Petition") filed by numerous noncommercial educational broadcasters

¹ APTS is a non-profit organization whose membership comprises the licensees of nearly all the nation's CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

² CPB is a private, non-profit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars in grant monies for support and development of public broadcasting stations and programming.

³ NPR is a non-profit membership corporation that produces and distributes noncommercial educational radio programs, including All Things Considered® and Morning Edition®, through more than 1000 radio stations nationwide. NPR's member stations are themselves significant producers of local, regional, and national news, information and cultural programming. NPR also operates the Public Radio Satellite Interconnection System and provides representation and other services to its member station licensees.

⁴ PBS, with its over 350 member stations, offers all Americans the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches nearly 109 million people through television and over 28 million people online, inviting them to experience the worlds of science, history, nature, and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances.

(collectively, “NCE Licensees”) in the above-referenced dockets.⁵ As the Petition makes clear, the Commission’s decision to require that members of governing boards of noncommercial educational (“NCE”) television and radio stations disclose highly sensitive personal information for the purposes of obtaining “FCC Reference Numbers” (“FRNs”) or “Restricted Use FCC Reference Numbers” (“RUFNRNs”) is ill-founded and must be reconsidered.

Overview. The Commission’s decision is flawed in multiple respects. In addition to the policy point that Public Broadcasting and many NCE commenters have made consistently in these dockets over time – *i.e.*, that the basic ownership-tracking purposes of the FRNs and RUFNRNs are not relevant to noncommercial television and radio stations – the Commission cites no sustainable statutory authority for requiring NCE board members to abide by the FRN/RUFNRN disclosure mandates. Yet even if the Commission’s legal authority were not in question, the agency lacks any evidentiary support for its conclusion that burdening NCE board members with sensitive and unnecessary disclosure obligations will have no negative impact on NCE stations, their governance, or their relationships with the donors and viewers who are critical to the stations’ operations. To the contrary, the record contains considerable evidence concerning the harms traceable to FRNs/RUFNRNs mandates for NCE board members. Thus, the Commission’s unsupported adoption of the obligations is arbitrary and capricious under the Administrative Procedure Act and so warrants reconsideration and reversal. Public Broadcasting urges the Commission to take these steps.

From the perspective of its broader policy objectives, the FCC also ought to more seriously consider the publicly available information that CPB-eligible stations provide concerning both leadership demographics of stations as well as detailed annual reports about

⁵ See Petition of Alaska Public Telecommunications, Inc., et al. for Reconsideration (filed May 3, 2016) (challenging *Promoting Diversification of Ownership in the Broadcasting Services, et al., Report and Order*, 31 FCC Rcd 398 (2016) (“*Report and Order*”).

their on-air service to minorities and other diverse audiences. The Petition and Public Broadcasters have explained that CPB-eligible stations already report regularly to CPB on race, ethnicity, and gender).⁶ It is not clear from the text of the *Report and Order* that the Commission fully appreciates the wealth of information that CPB-eligible stations also report annually concerning the programming they air (and other services they provide) to address the needs and interests of diverse audiences. To the degree that the Commission’s objectives in establishing FRNs and RUFNRs for NCE station board members are rooted in analyzing the connection, if any, between the diversity of station leadership (and other employees) and the diversity of programming content, potentially relevant information is available for analysis. There is no need for the Commission to gather more data before it evaluates the data already collected.

Statutory Authority Infirmities. The Commission erred in resting on Section 309(j) of the Communications Act of 1934, as amended, and Section 257 of the Telecommunications Act of 1996 as empowering the FCC to impose FRN/RUFNR burdens on NCEs and their governing boards – for neither provision is relevant to noncommercial broadcast stations.⁷ The thin, one-paragraph recitation of the two provisions in the *Report and Order* plainly is no substitute for serious statutory analysis.⁸ In generally referencing Section 309(j), which establishes goals and procedures for competitive bidding on spectrum licenses, the Commission fails to mention – much less distinguish – the fact that Section 309(j) *explicitly* bars the FCC from extending its authority under the provision to noncommercial educational broadcast licenses.⁹ Similarly, the

⁶ Petition at 9-10; *see also, e.g.*, Public Broadcaster Comments, MB Docket No. 07-294, et al. at 8 (June 26, 2009) (“Public Broadcaster June 2009 Comments”). We note that the “CPB-eligible” qualification covers a substantial number of all NCE stations.

⁷ Petition at 10-12.

⁸ *Report and Order* at ¶ 44.

⁹ 47 U.S.C. § 309(j)(2)(c). The Commission cites many other subsections of Section 309(j) in seeking to justify its authority to impose the FRN/RUFNR mandates on board members, officers, and attributable owners of commercial

Commission’s citation to Section 257, which addresses “market entry barriers” confronting “entrepreneurs and other small businesses,” makes little sense in the context of noncommercial educational broadcasting. By virtue of their nonprofit status, NCE licensees operate outside of the “market” – and particularly with respect to governmental licensees, including state-level agencies, universities, and school boards, citation to Section 257 simply makes no sense whatsoever as a basis for regulating NCE licensees.

Arbitrary and Capricious Decision-making Unsupported by Record Evidence. As the Petition details at length, the record in this proceeding is filled with well-grounded concerns that the imposition of FRN/RUFRN disclosure mandates on NCE board members will lead to unintended – and harmful – consequences.¹⁰ Comments from more than 100 NCE licensees forecast the problems likely to flow from the Commission’s decision to burden the individual volunteers and public officials who make up the vast majority of our member stations’ governing boards. Because these individuals do not have an equity stake or other financial incentives from their stations to balance against the privacy and data security risks of the mandated disclosures, their calculus in deciding whether to serve (or continue to serve) on an NCE station board is not at all like that of their commercial station counterparts. Scores of NCE licensees explained that the new FRN/RUFRN burdens would discourage recruitment and retention of individual board members – or put board members who cannot decline to serve, such as state government officials, in a particularly unique and complex bind.¹¹ NCE commenters also predicted that the

stations, but they cannot be deemed – as the FCC attempts to claim – to apply equally to NCE stations. Rather, the relevant subsections of Section 309(j) must be construed *in pari materia*, see *Branch v. Smith*, 538 U.S. 254 (2003) (citing *U.S. v. Freeman*, 44 U.S. 556 (1845)), and a plain English reading of the full provision leads most logically to the conclusion that NCEs are exempt from all the subsections.

¹⁰ Petition at 4-7.

¹¹ See Petition at 5-6 (quoting more than a dozen individual NCE licensees, organizations, and former board members).

new rules could set off extensive ripple effects that might undermine station operations generally, including the risks of serious FCC enforcement sanctions and the reputational damage such sanctions could create among donors and other station supporters.¹²

The *Report and Order* inexplicably discounted all of these experience-based concerns. Instead, the Commission rests solely on its own “belief” that the predicted harms will not come to pass.¹³ This falls woefully short of the Commission’s fundamental obligations under Section 706 of the Administrative Procedure Act, which courts have long construed to require that agencies have some empirical basis in their rulemaking records to justify the decisions made.¹⁴ Moreover, as the Petition points out, the Commission cannot fall back on deference to its predictive judgments in this setting¹⁵ – for it has no expertise with respect to recruiting and retaining volunteer or appointed members of nonprofit governing boards, much less operating NCE stations with quite varied organizational structures.

Data Potentially Relevant to “Viewpoint Diversity” Already Available. The Commission’s adoption of FRN/RUFNR mandates for the officers, directors, and attributable interest holders of commercial broadcast stations is tethered to two “diversity” objectives that

¹² Petition at 7.

¹³ *Report and Order* at ¶ 51.

¹⁴ See 5 U.S.C. § 706(2)(A); see also, e.g., *Chu v. U.S. Commodity Futures Trading Commission*, 2016 U.S. App. LEXIS 9560 (9th Cir. 2016) (APA “substantial evidence” standard requires “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”) (internal citations omitted); *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002) (invalidating decision on national television cap rule because, inter alia, FCC conclusion lacked “sufficient support in the present record,” contradicted prior findings, and was not grounded on any analysis of state of competition in marketplace), amended by 293 F.3d 537 (D.C. Cir. 2002) (declining to resolve meaning of statutory term “necessary”); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002) (“notwithstanding the substantial deference to be accorded to the Commission’s line drawing, the Commission cannot escape the requirements that its action not run ‘counter to the evidence before it’ and that it provide a reasoned explanation for its action”) (internal citation omitted); see also *id.* at [¶ 29] (“The rulemaking record does not fill the evidentiary gap.”); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004) (“*Prometheus I*”), (even under deferential review, agency decision may not “run counter to the evidence before the agency”).

¹⁵ Petition at 7.

underlie the agency’s media ownership rules: (1) policing ownership limits on commercial stations generally, which is relevant to diversity in the sense of a multiplicity of commercial broadcast voices; and (2) tracking the race, ethnicity, and gender of reportable individuals. With respect to the latter, the Commission hopes someday to empirically connect individuals’ demographic characteristics with a station’s programming content – and thereby establish a link between ownership and “viewpoint diversity,” particularly with respect to programming that serves minorities and other underserved groups in a station’s community.¹⁶ Public Broadcasters and other NCE commenters have pointed out that the first diversity objective is not relevant in the NCE context; neither the Communications Act nor any FCC rule limit the number of broadcast licenses that a qualified noncommercial licensee may hold.¹⁷

As for viewpoint diversity, NCE stations by their nature offer unique content not easily replicated by any commercial stations in their local markets – and so the viewpoint diversity goal underlying the commercial broadcast ownership rules also is inapposite to them. However, Public Broadcasters have through the course of this proceeding alerted the Commission to the availability of demographic data concerning CPB-eligible stations as well as the programming and other services these stations provide to minorities and diverse audiences.¹⁸ Our member licensees report data to CPB on the race, ethnicity, and gender, and the same licensees also provide detailed information each year to CPB on their diverse programming content. The Commission therefore could seek to analyze this data in considering what nexus, if any, there may be between the demographic characteristics of station leaders and the viewpoint-diverse

¹⁶ See, e.g., *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd 4371, ¶¶ 7, 70, 73, 111, 120, 246 (2014); *Prometheus Radio Project v. FCC*, 2016 U.S. App. LEXIS 9688, *29-31 (3d Cir. 2016).

¹⁷ See, e.g., Public Broadcaster June 2009 Comments at 7-8; see also Petition at 2.

¹⁸ See, e.g., Public Broadcaster June 2009 Comments at 5

programming that the stations broadcast. Given the availability of this as-yet unanalyzed data, the Commission has no need to impose burdensome FRN/RUFRN disclosure obligations on NCE stations and their board members.

Conclusion. The Commission should grant the Petition's request to reconsider and rescind the FRN/RUFRN disclosure mandates imposed on NCE stations and their individual board members. The FCC has no statutory authority to burden noncommercial licensees with disclosure obligations that Congress designed to serve policy goals relevant only to commercial stations. In addition, the Commission wholly lacks the evidentiary support it needs to justify these regulatory burdens in the NCE context. Finally, to the degree that the FCC's ultimate objective is to gather data that might be relevant to a connection, if any, between the race, ethnicity, and gender of station board members and the stations' programming content, the Commission has for several years been on notice that such data concerning CPB-eligible stations already is publicly available for FCC review at any time.

Respectfully submitted,

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