

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

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Review of the Commission's Rules)
regarding the main studio and)
local public inspection files of)
broadcast television and radio stations)
)
47 C.F.R. §§ 73.1125,)
73.3526 and 73.3527)

MM Docket No. 97-138

To: The Commission

JOINT PETITION FOR PARTIAL RECONSIDERATION

Schwartz, Woods & Miller, on behalf of Barry Telecommunications, Inc., Board of Trustees of Michigan State University, Charlotte-Mecklenburg Public Broadcasting Authority, Connecticut Public Broadcasting, Fairleigh Dickinson University, Four Rivers Community Broadcasting Corporation, Isothermal Community College, Lehigh Valley Public Telecommunications Corp., Long Island Educational Television Council, Inc., Maryland Public Broadcasting Commission, Metropolitan Board of Public Education, Mid-South Public Communications Foundation, Mississippi Authority for Educational Television, New Jersey Public Broadcasting Authority, North Texas Public Broadcasting, Inc., Oregon Public Broadcasting, Rhode Island Public Telecommunications Authority, St. Lawrence Valley Educational Television Council, Inc., University of New Hampshire, University of North Carolina Center for Public Television, University of Southern Colorado, Western New York Public Broadcasting Association, and WHYY, Inc., collectively referred to herein as the Joint Parties (see Attachment A), pursuant to Section 1.429 of the rules, hereby requests partial reconsideration of the Report and Order in MM Docket No. 97-138, FCC 98-175.

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released August 11, 1998 revising the rules regarding the main studio and local public inspection files of broadcast television and radio stations (Report and Order). In support thereof, the following is shown:

A. Background

1. The Joint Parties are licensees of public broadcasting facilities providing quality program service to many communities and areas throughout the United States. This program service has always been predicated on their collective mission to respond to the problems, needs and interests of their communities. The Joint Parties generally welcome the additional flexibility afforded by the Commission with respect to the location of main studios and the streamlining of certain local public file requirements. They agree with the Commission's goal of preserving public access to licensee operations while affording licensees increased flexibility and eliminating unnecessary regulatory burdens.

2. In the Joint Parties' view, however, the Commission's decision is flawed in certain respects and should be reversed on reconsideration. In particular, the Joint Parties strongly believe that the Commission's ruling requiring continued retention of donor lists in public files is clearly erroneous and must be reversed. Also, the "accommodation" provisions raise serious logistical concerns and constitute a substantial new burden on public broadcast licensees. Furthermore, the Commission's requirement that public broadcasters provide summaries in their renewal applications of any letters they receive regarding violent programming is unnecessary and in any event does not provide any guidance to licensees as to what in fact constitutes "violent programming." In addition, the Joint Parties believe that the new rule requiring

indefinite retention of materials relating to rule waivers should also be reversed. Finally, the reference in the public file to inclusion of ownership certifications should be deleted.

B. Donor Lists

3. The Joint Parties urge the Commission to reconsider the Report and Order insofar as it requires public broadcasters to retain donor lists in their public files pursuant to Section 73.3527(a)(8) of the rules. In this regard, one of the Joint Parties, the University of North Carolina Center for Public Television(UNCTV), filed comments in this proceeding requesting elimination of the donor list requirement as obsolete. See UNCTV Comments, p. 4. In particular, UNCTV pointed out that the donor list provision of Section 73.3527 was specifically adopted in connection with program logging requirements to permit noncommercial educational broadcasters an alternative to repetitive listings of donors in program logs for each time a program in a series aired. See, In the Matter of Reregulation and Oversight of the AM, FM and TV Broadcast Rules, 77 FCC 2d 251 (1980) (Order). In 1984, the Commission entirely eliminated program logging requirements for public broadcasters. In the Matter of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees, 98 FCC 2d 746 (1984). Inasmuch as the donor list “alternative” set forth in Section 73.3527(a)(8) was an outgrowth of the rules regarding maintenance of program logs, the elimination of mandatory compilation of those logs compelled the conclusion that the donor lists referred to in that provision were likewise no longer required.¹

¹It should be noted that Schwartz, Woods & Miller filed a letter dated March 7, 1996, requesting editorial amendment of the rule with the Complaints and Political Programming Branch, Enforcement Division, Mass Media Bureau (Bureau). Schwartz, Woods & Miller was informed informally by Bureau staff members that the donor list requirement should in fact be eliminated because of the prior deregulatory actions respecting program logs.

4. The Commission disagreed that the donor list provision had become obsolete, opining that it is a necessary adjunct of the sponsorship identification requirements. It concluded that the provision is related to “the Commission’s determination that noncommercial educational stations are permitted to limit their on-air program sponsorship announcements to major donors or underwriters only, but must maintain a complete donor list in their public file.” Report and Order, para. 58. However, a complete review of the history of the donor list “requirement” compels the conclusion that there is not and never has been such requirement grounded in the public file rule, and that the Commission’s continued inclusion of it in Section 73.3527(a)(8) cannot be justified.

5. The donor list provision of the public file rule was originally adopted without notice or comment in 1980 as an alternative to program logging requirements in an oversight order. See Order, 77 FCC 2d 251 (1980). There, the Commission stated:

Non-commercial educational stations frequently broadcast a series of continuing programs supported by a group of ‘donors.’ Since the repeated listing of donors in the program log for each time a program in the series is broadcast would require a considerable number of repetitive entries, NCE stations may, as an alternative logging procedure, enter the word ‘donor’ in the log and keep a listing of the donors by program series title in the public inspection file. These procedures are described in program log rules Section 73.1820. The public inspection file requirement in Section 73.3527 is being revised to show ‘donor’ lists should be included if the licensee elects to use the alternative logging procedures. This revision does not add a new public inspection file requirement, but is intended to guide licensees using the rule in reviewing the file for completeness (emphasis supplied).

77 FCC 2d at 255. Consistent with the wholly discretionary nature of this option and its genesis in logging rules which no longer exist, the Commission stated the rule as follows:

§73.3527(a)(8) The lists of donors supporting specific programs placed in the public file under the provisions of §73.1810(f)(2) in lieu of showing the donors on the program log.²

6. The Commission's conclusion that the donor lists are related to sponsorship identification rules reflects an accretion of reasoning which is wholly unrelated to the genesis of the donor list option set forth in the public file rules. The Commission may not rely upon post hoc rationalization which has the effect of imposing a substantive requirement upon a class of licensees without proper notice and comment procedures.³ The donor list provision in the public file rule was expressly not a public file "require-

²At some point, an editorial revision of the rule was made which deleted the optional nature of the lists. This revision was made without any notice or comment procedures.

³In this regard, the Commission's reliance upon Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, BC Docket 21136, 90 FCC 2d 895, 901 note 18 (1982) is misplaced. There, the Commission addressed a request by a regional public broadcast organization for general guidance in identifying small donors to a nationally distributed public affairs program. This organization was not a Commission licensee subject to Commission jurisdiction, but the Commission nonetheless suggested that it should make the list of minor donors accessible through PBS, another non-licensee, or individual stations. In short, the Commission made no reference to the local public file rule or to any specific requirement for compliance by public broadcast licensees. Similarly inapposite is the Commission's reliance on note 23 to the decision eliminating program logging requirements applicable to public broadcasters. That note merely reiterated that stations would still be required to "provide donor identification announcements in accordance with Section 73.1212"; it simply did not address the donor list issue.

ment.” It was an alternative related solely to program logging rules and it was effectively eliminated when those logging rules were eliminated.⁴

C. Accommodation Provisions

7. Although the Commission ostensibly sought to increase licensee flexibility and eliminate unnecessary regulation, the Commission’s accommodation provisions in fact impose a wholly new and unwarranted burden upon licensees, especially public broadcast licensees. These provisions will require substantial new staff time to handle telephone requests from the public. Of special concern during the political season, stations may in effect be required to act on behalf of candidates and the public as monitors of candidates’ requests for time.⁵ Perhaps more important, the scheme seems likely to lead to confusion and misunderstandings between licensees and the public as well as additional responsibilities for station management. Notwithstanding the Commission’s surmise to the contrary (Report and Order, para. 26), there is no real protection of licensees from repetitive and frivolous requests.⁶ The Commission suggests that its revised main studio rule may have reduced the accessibility of stations’ public files. This is simply not the case, and certainly not for public broadcasters such as the Joint Parties. The Commission’s concerns that the consolidation of the commercial broadcast industry combined with a relaxed main studio rule will

⁴Even if, for argument’s sake, the Commission’s transformation of a voluntary alternative into a form of mandatory listing could be justified, the Joint Parties submit that the Commission has also totally failed to proffer any reasonable guidelines as to its definition of “donors supporting specific programs” and procedures by which individual donors could be added or deleted consistent with a two-year retention requirement for “lists.”

⁵It may be noted that the Commission has temporarily suspended the accommodation provisions of the rules as they relate to requests for political file documents.

⁶Contrary to the FCC’s suggestion, the costs of photocopying a required advance payment of such costs afford no protection against frivolous, abusive or otherwise harassing requests.

significantly reduce public access to stations' local public files simply do not apply to public broadcast licensees like the Joint Parties.

D. Violent Programming

8. The Joint Parties also request reconsideration and/or clarification of the Commission's determination to require noncommercial educational broadcasters to provide information respecting the receipt of letters from the public concerning "violent programming" in connection with their renewal applications. As the Commission itself acknowledges, the concerns about "violent programming" have "almost exclusively been raised in connection with programming aired by commercial television licensees," and public broadcasters need not retain letters in their local public files regarding "violent programming." Report and Order, para. 56. There is thus no basis at all in the long history of public broadcasters' program service to justify raising the issue of "violent programming" as a barometer of these licensees' performance. Moreover, the Commission has provided no guidance as to just what constitutes "violent programming." For example, does the term embrace nature programs which include scenes of conflict, feeding or death in the wild? Does news, public affairs or other coverage of domestic strife or international conflict fall within the definition? Are animated portrayals of conflict included? Could a program addressing traffic injuries and fatalities or other accidents be considered "violent programming"? Is the term limited to violence among people? In the absence of any evidence of public concern with respect to the programming provided by public broadcasters and any meaningful guidance as to what program fare is embraced by the term, the Commission's application of "violent programming" provisions to public broadcasters is inappropriate.

E. Waiver Showings

9. The Joint Parties urge the Commission to reconsider its requirement that new construction permit, assignment and transfer applications that are granted pursuant to a waiver showing must be retained in the public file for as long as the waiver is in effect. Report and Order, para. 48. The Commission reasons that the indefinite retention period for these kinds of applications is necessary so that the public “can assist the FCC in evaluating licensee performance in light of the representations made in the application and waiver request.” Ibid. The Joint Parties observe that certain kinds of waivers do not raise concerns respecting licensee performance of the kind warranting indefinite retention of materials to assure ongoing public scrutiny. In particular, satellite operations entailing waiver of the main studio rule have been a necessary adjunct of service provided by many public broadcasters for years and even decades. While the Commission from time to time has expressed the hope that such operations should if possible be reconfigured to permit local origination from local studio facilities, there has never been any suggestion of any actions by public broadcast licensees warranting indefinite public file retention of documents to assure licensee accountability in this area. In short, these are accepted and noncontroversial operations which do not require heightened levels of scrutiny. However, the Commission’s rule will require any licensee which expands service through the addition of satellite facilities to retain these proposals in the public file indefinitely. This is an unnecessary requirement which erodes the laudable “bright line” rule respecting public file retention periods adopted by the Commission. Other waivers, often of a technical nature, may also be implicated by the Commission’s new requirement. At the very least, the Commission should clarify

the exact nature of the waivers it has in mind which would trigger applicability of this new rule.

F. Ownership Certifications

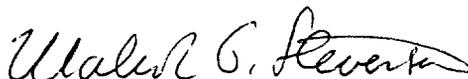
10. Finally, the Joint Parties request that the Commission delete the reference to ownership certifications from Section 73.3527(e)(4) of the rules. The certification scheme contemplated in that language applies only to commercial broadcasters. Its inclusion in the public broadcast public file rule is not appropriate.

WHEREFORE, for the foregoing reasons, the Joint Parties respectfully urge the Commission to grant reconsideration of its Report and Order consistent with the views expressed herein.

Respectfully submitted,

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October 16, 1998

ATTACHMENT A

Barry Telecommunications, Inc.
WXEL-FM-TV, West Palm Beach, FL

Board of Trustees of Michigan State University
WKAR-AM-FM-TV, East Lansing, MI

Charlotte-Mecklenburg Public Broadcasting Authority
WTVI(TV), Charlotte, NC

Connecticut Public Broadcasting, Inc.
WEDH(TV), Hartford, CT
WEDN(TV), Norwich, CT
WEDW-FM, Stamford, CT
WEDW(TV), Bridgeport, CT
WEDY(TV), New Haven, CT
WNPR-FM, Norwich, CT
WPLK(FM), Meriden, CT
WRLI-FM, Southampton, NY

Fairleigh Dickinson University
WFDU(FM), Teaneck, NJ

Four Rivers Community Broadcasting Corporation
WBYO(FM), Sellersville, PA

Isothermal Community College
WNCW(FM), Spindale, NC

Lehigh Valley Public Telecommunications Corp.
WLVT-TV, Allentown, PA

Long Island Educational Television Council
WLIW(TV), Garden City, NY

Maryland Public Broadcasting Commission
WCPB(TV), Salisbury, MD
WFPT(TV), Frederick, MD
WGPT(TV), Oakland, MD
WMPB(TV), Baltimore, MD
WMPT(TV), Annapolis, MD
WWPB(TV), Hagerstown, MD

Metropolitan Board of Public Education
WDCN(TV), Nashville, TN

Mid-South Public Communications Foundation

WKNA(FM), Senatobia, MS
WKNO-FM-TV, Memphis, TN
WKNP(FM), Jackson, TN
WKNQ(FM), Dyersburg, TN

Mississippi Authority for Educational Television

WMAA(TV), Columbus, MS
WMPN-FM-TV, Jackson, MS
WMAB-FM-TV, Mississippi State, MS
WMAE-FM-TV, Booneville, MS
WMAH-FM-TV, Biloxi, MS
WMAI(TV), Cleveland, MS
WMAO-FM-TV, Greenwood, MS
WMAU-FM-TV, Bude, MS
WMAV-FM-TV, Oxford, MS
WMAW-FM-TV, Meridian, MS
WMYC(TV), Yazoo City, MS

New Jersey Public Broadcasting Authority

WNJB(TV), New Brunswick, NJ
WNJB-FM, Bridgeton, NJ
WNJM(FM), Manahawkin, NJ
WNJN(FM), Atlantic City, NJ
WNJN(TV), Montclair, NJ
WNJP(FM), Sussex, NJ
WNJS-FM, Berlin, NJ
WNJS(TV), Camden, NJ
WNJT-FM-TV, Trenton, NJ
WNJZ(FM), Cape May Court House, NJ

North Texas Public Broadcasting, Inc.

KDTN(TV), Denton, TX
KERA-FM-TV, Dallas, TX

Oregon Public Broadcasting

KEPB-TV, Eugene, OR
KOAB-TV, Bend OR
KOAC-TV, Corvallis, OR
KOPB-TV, Portland, OR
KTVR(TV), La Grande, OR

Rhode Island Public Telecommunications Authority

WSBE-TV, Providence, RI

St. Lawrence Valley Educational Television Council, Inc.

WNPI-TV, Norwood, NY
WPBS-TV, Watertown, NY

University of New Hampshire

WEKW-TV, Keene, NH
WENH-TV, Durham, NH
WLED-TV, Littleton, NH

University of North Carolina Center for Public Television

WUNC-TV, Chapel Hill, NC
WUND-TV, Columbia, NC
WUNE-TV, Linville, NC
WUNF-TV, Asheville, NC
WUNG-TV, Concord, NC
WUNJ-TV, Wilmington, NC
WUNK-TV, Greenville, NC
WUNL-TV, Winston-Salem, NC
WUNM-TV, Jacksonville, NC
WUNP-TV, Roanoke Rapids, NC
WUNU(TV), Lumberton, NC

University of Southern Colorado

KTSC(TV), Pueblo, CO

Western New York Public Broadcasting Association

WNED-AM-FM-TV, Buffalo, NY
WNEQ-TV, Buffalo, NY
WNJA(FM), Jamestown, NY

WHYY, Inc.

WDPB(TV), Seaford, DE
WHYY-FM, Philadelphia, PA
WHYY-TV, Wilmington, DE