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December 18, 2000

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

RE: MM Docket No. 00-168 In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Notice of Proposed Rule Making (Released Oct. 5, 2000)

Dear Ms. Salas,

Enclosed please find one original and five copies of Comments of The Media Institute in the above captioned proceeding.

We are also furnishing disks to Ms. Wanda Hardy, FCC Mass Media Bureau, and to International Transcription Service, Inc., per para. 40 of the NPRM.

If you have any questions, please feel free to contact me at the above numbers, or at my direct e-mail, kaplar@clark.net.

Sincerely,



Richard T. Kaplar
Vice President

No. of Copies rec'd at 5
List A B C D E

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

In the Matter of)
Standardized and Enhanced)
Disclosure Requirements for)
Television Broadcast Licensee)
Public Interest Obligations)

MM Docket No. 00-168

NOTICE OF PROPOSED RULE MAKING

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF THE MEDIA INSTITUTE

December 18, 2000

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**Before the
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Standardized and Enhanced)	MM Docket No. 00-168
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Television Broadcast Licensee)	NOTICE OF PROPOSED RULE MAKING
Public Interest Obligations)	
)	

COMMENTS OF THE MEDIA INSTITUTE

I. INTRODUCTION

The Media Institute¹ submits these Comments in response to the FCC's Notice of Proposed Rule Making in the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations (NPRM). We wish to express our serious concerns about a number of constitutional and practical issues raised by the proposed regulatory scheme. The idea of requiring television broadcasters to keep track of their "public interest" programming via a standardized form may strike many observers as fairly innocuous. Indeed, at first glance the proposal may seem to have little impact on broadcasters' First Amendment rights compared with many of the other proposals discussed in the Notice of Inquiry (NOI)² and subsequent comments and reply comments. That is not the case.

¹ The Media Institute is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; the maintenance and development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and the Supreme Court of the United States. The Institute also conducts research projects and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

² In the Matter of Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, *Notice of Inquiry*, 14 FCC Rcd. 21633 (1999), at para. 9 (NOI).

Proposals contained in this NPRM raise serious concerns at four levels: (1) the proposals raise the specter of government influence over the editorial content of television programming and Internet communications, an unacceptable infringement on First Amendment rights; (2) the proposals beg the question of whether the government should be contemplating this level of regulatory micro-management at a time when deregulation should be the preferred course of action; (3) there is no compelling need for these regulations; and (4) the specific proposals outlined in the NPRM would not advance the government's stated goals.

II. THE REGULATORY PROPOSALS POSE SERIOUS FIRST AMENDMENT THREATS REGARDING PROGRAM CONTENT AND INTERNET COMMUNICATIONS

A. A Standardized Form Would Exert Government Pressure on Program Content Decisions

The proposed regulations would require broadcasters to list "public interest" programming under a number of standardized categories. This may seem like an attempt to make reporting requirements easier for broadcasters to meet, and easier for the public to understand. In reality, however, it is a very concrete way for the government to exert subtle control over the program content decisions of broadcasters.

Who will determine the categories to be included? On what basis should certain types of programming be included and others excluded? How will the "public interest" be defined for this purpose? Will the FCC in Washington determine a "one-size-fits-all" set of standards that must be followed by broadcasters in every community throughout the country? Is the public interest in Los Angeles the same as the public interest in Bangor, Maine?

Knowing that these forms will be reviewed by the FCC at license renewal time, and that the forms are subject to review at any time, broadcasters will want to make sure they are airing sufficient programming in each of the specified categories. No broadcaster will want to be characterized as "below average" in a given category, either by the FCC or by public interest groups that may use such reporting standards to pressure broadcasters.

The standardized form would become, in effect, a means of enforcing a quota system for the types of programming deemed to be in the “public interest” by the FCC. Herein lies the rub: a reporting system is generally thought to be in play “after the fact,” *i.e.*, as a way of recording what went on previously without affecting the outcome. However, the proposed system would exert influence on broadcasters before the fact because broadcasters would feel compelled to air programming that conformed to the FCC’s specified categories. This editorial influence would be all the more pernicious precisely because it was cloaked in the guise of a seemingly benign “reporting” requirement. Such coercive pressure is totally inappropriate and subject to constitutional challenge. The Supreme Court has already made it unmistakably clear, in a directly relevant pronouncement, that “the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.”³

Commissioner Harold Furchtgott-Roth refers to the proposed scheme of standardized categories as a “clear and present First Amendment danger”⁴ and correctly labels it for what it is: “direct content regulation.”⁵ “The coercion to air certain kinds of programming that the Commission has deemed to be in the ‘public interest’ is not the sort of ‘general affirmative dut[y]’ that courts have sanctioned under the First Amendment,” he notes.⁶ Commissioner Michael Powell likewise recognizes the First Amendment threat: “Selecting one program category over another and then requiring broadcasters to list the programming aired in that particular category involves the Commission in content-based regulation,” he observes. “It would require this Agency to make value judgments as to what programming we deem to be in the ‘public interest.’”⁷

The prospect of a standardized form listing “FCC-approved” categories of programming raises serious First Amendment concerns. We heartily agree with Commissioner Furchtgott-Roth

³ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994).

⁴ NPRM, Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, at para. 3.

⁵ *Id.*

⁶ *Id.* at para. 4.

⁷ NPRM, Separate Statement of Commissioner Michael K. Powell, at para. 4.

that the Commission should instead employ its traditional and more general approach of relying on broadcasters' descriptions of the ways in which their stations serve the public.⁸

B. The FCC Cannot Coerce Broadcasters' Speech Over the Internet

The NPRM proposes to extend the FCC's regulatory authority over broadcasters into non-broadcast territory: "[W]e propose to enhance the public's access to public interest information by requiring broadcast television licensees ... to make a station's public inspection file, including the form, available on the Internet. ... We tentatively conclude that each licensee must, each quarter, post the proposed standardized form and other contents of its public inspection file on its website or its state broadcasters association's website."⁹ This proposal demands careful scrutiny on First Amendment grounds -- particularly because the constitutional concerns here might easily be overlooked on the assumption that a Web site was merely an electronic filing cabinet.

Station licensees may choose to post "public interest" information on their Web sites, but that must remain a voluntary choice. The Commission is overreaching to suggest that it can compel broadcasters to post certain types of speech on their Web sites. The Commission is likewise overreaching when it asks whether it should require broadcasters to create Web sites for the purpose of posting such information, or require broadcasters to make it available in a disability-friendly format. (It is ironic indeed that the same FCC that prohibits a television licensee from owning a newspaper in the same market would consider requiring a licensee to establish another medium of communication expressly to carry FCC-approved speech.)

The Commission's proposal is equally, if not more, suspect when applied to state broadcasters associations. These are private-sector trade associations that are not themselves engaged in the business of broadcasting. By what authority could the FCC compel a private organization, not under FCC regulatory control in any way, to carry certain types of speech on its Web site? The constitutional infirmities of this proposal deserve the Commission's attention.

⁸ Statement of Commissioner Harold W. Furchtgott-Roth, *supra* note 3 at para. 4.

⁹ NPRM, at paras. 26, 31.

III. THE COMMISSION MUST COME TO GRIPS WITH ITS REGULATORY FUNCTION IN THE INFORMATION AGE

Our comments thus far have addressed the significant First Amendment problems of the proposed disclosure requirements. These specific proposals, and the overall regulatory framework of which they are a part, raise yet another pertinent question: Does the FCC any longer have a meaningful role to play in the “public interest” issue as it pertains to broadcasters?

We discussed this question at length in our comments responding to the Notice of Inquiry,¹⁰ which was the basis for the instant NPRM. Our discussion here will therefore be very brief -- but we would be remiss if we did not reiterate our long-held belief that the Commission must rethink its fundamental regulatory role regarding the public interest in the face of a vastly changed communications landscape. The very issuance of the NPRM, and the specific regulatory proposals it recommends, suggest two alternatives: Either the Commission has once again ignored the opportunity to return to “first principles” and redefine its role, or has thought about it and decided to continue with the same regulatory philosophy it has embraced since it started to regulate radio broadcasting in the early years of the 20th century.

The Commission’s definition of the “public interest” has always been vague and shifting. That fact alone has rendered the advancement of the public interest through regulation largely futile. Moreover, the Commission continues to rely on the scarcity argument and the notion of “public ownership” of the airwaves as underlying rationales for continued regulation. These and other rationales such as supposed “market failure,” and the “free” spectrum justifying a *quid pro quo* from broadcasters, have been roundly criticized and repudiated.¹¹

Given the well-documented explosion in other media (cable, satellite, VCRs, the Internet, etc.) it is no longer necessary for every broadcast station to meet every “public interest” need

¹⁰ Public Comments of The Media Institute, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, *Notice of Inquiry* (Dec. 20, 1999), filed March 27, 2000.

¹¹ *Id.* at 13-27 (describing an array of case law, agency documents, and scholarly articles critical of the scarcity argument and other rationales). See also Robert Corn-Revere, ed., *Rationales & Rationalizations: Regulating the Electronic Media* (The Media Institute, 1997).

imagined by the FCC. The Commission itself has recognized this fact.¹² The public will identify its own interests and seek them out through a multitude of media. Perhaps there was a role for the FCC when a local television marketplace consisted of three stations. When one's choice of media outlets numbers in the hundreds, however, there is no reason for government to regulate the "public interest" activities of a handful of those outlets. We call again on the Commission to abandon its outdated regulatory framework and to adopt a new approach that gives broadcasters the full First Amendment rights they deserve.

If instead the Commission pursues its present course, it must be mindful that the implementation of additional disclosure regulations would come at a substantial constitutional price, as discussed above. Faced with that prospect, the Commission might be expected to proceed only if the regulations in question addressed some extraordinary need in a particularly effective way. That, however, is not the case. The sort of disclosure requirements contemplated by the Commission are simply not necessary and, if implemented, would be ineffective at meeting the government's stated goals.

IV. THERE IS NO COMPELLING NEED FOR THESE REGULATIONS

A. The Regulatory Proposals Have No Particular Connection to Digital Television

The prospect of requiring standardized and/or enhanced disclosure requirements for television broadcasters was raised in last year's Notice of Inquiry, which dealt specifically with issues related to broadcasters' conversion to digital signal transmission, or digital television (DTV). "At this the advent of the digital age, we seek comment on how broadcasters can best serve the public interest during and after the transition to digital technology. We seek comment on challenges unique to the digital era...."¹³

¹² See, e.g., *Deregulation of Radio*, 84 F.C.C.2d 968, *aff'd in part, remanded in part sub nom. Office of Communications, Inc. of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); see also *Revision of Programming Policies for Commercial Television Stations*, 98 F.C.C.2d 746 (1984), *aff'd in part, rev'd in part sub nom. Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987).

¹³ NOI, at para. 9. The NOI also made reference to "analog and digital channels during the transition period [to digital]," *id.*, but the primary focus was clearly on digital television (without which there would be no transition period involving analog channels).

As The Media Institute and other commenters have noted, however, there is no nexus between additional public interest obligations and the conversion to digital technology. The fact that a broadcast signal is transmitted in digital rather than analog format does not mean that changes in public interest obligations are called for. Commissioners Harold Furchtgott-Roth and Michael Powell noted this reality in separate statements accompanying the NOI,¹⁴ and both have reiterated this position in separate statements accompanying the present NPRM.¹⁵

Interestingly enough, the Commission acknowledges that its proposed requirements for standardized and enhanced disclosure are not driven by the conversion to digital television. “The mechanisms proposed below do not relate exclusively to digital transmissions. Given the benefits to be derived from the proposals set forth below, we believe we should not wait until after the digital transition is complete to implement them,” the NPRM states.¹⁶ From this statement it is clear that the Commission sees no direct nexus between the proposed rules and digital television per se. Indeed, the Commission is saying that it believes new disclosure regulations are a good idea and should be pursued regardless of the means (analog or digital) of signal transmission. In short, the Commission is acknowledging that there is no compelling need for the rules based on the conversion to digital television.

B. There Is No Need To Replace Existing Disclosure Rules

If the proposed rules cannot be justified on the basis of a connection to digital transmission, we must next ask whether there is any compelling need for new rules at all. Currently there is no dearth of publicly available information about broadcasters’ public interest programming -- starting with the programming itself, which is free for all to see. Moreover, FCC regulations already

¹⁴ NOI, Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, at para. 7 (“The NOI transforms this proceeding into a roving mandate to seek out ‘good’ things that we can make broadcasters do. The item does not appear to require any particular linkage between the proposals and the transition to DTV.”); NOI, Concurring Statement of Commissioner Michael K. Powell, at para. 4 (“as a fundamental matter, I question why the mere use of a digital medium rather than an analog one justifies new public interest obligations, particularly ones of the breadth and scope envisioned in this NOI”).

¹⁵ NPRM, Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, at para. 1 (“I do not support, however, the notion that the transition provides a basis for increasing or otherwise changing the nature of broadcasters’ public interest duties”); NPRM, Separate Statement of Commissioner Michael K. Powell, at para. 2 (“I question why the mere use of digital technology, rather than analog, justifies new public interest obligations.”).

stipulate the type of information that stations must maintain on file and make available to the public. “[O]ur public inspection file rules require television broadcast station licensees to maintain in a station’s public file quarterly issues/programs lists, information on children’s programming, and documents pertaining to the station’s management and operation. Licensees also must maintain a separate political file within the public inspection file. ... Currently, this ‘issues/programs list’ must include a description of what issues were given significant treatment and the programming that provided the treatment as well as the time, date, duration, and title of each program.”¹⁷

The Commission makes no claim that broadcast stations have failed to provide the information required by the “issues/programs list” rule, or that the rule itself is inherently deficient in requiring too little information or the wrong type of information. The problem, the Commission says, is that stations currently offer “an assortment of information”¹⁸ and that People for Better TV found a “lack of consistency and uniformity” among stations’ public files.¹⁹ The Commission speculates that because of this assortment of information, “the public may have difficulty determining the extent to which the station is serving the public interest.”²⁰ The NPRM also cites one commenter’s assertion that “individuals ... might be required to go to different areas in a building to inspect the public files.”²¹ Such speculation by the Commission, and limited anecdotal reports of minor inconvenience, are hardly compelling reasons to justify the imposition of a standardized disclosure requirement on all broadcasters. An abundance of information is not a bad thing. Nor must it necessarily be tamed into a standardized format out of a fear that some people might find a wide array of information confusing or inconvenient.

¹⁶ NPRM, at para. 4.

¹⁷ *Id.* at paras. 12-13.

¹⁸ *Id.* at para. 13.

¹⁹ *Id.* at paras. 8, 17.

²⁰ *Id.* at para. 13.

²¹ *Id.* at para. 8.

V. THE REGULATORY PROPOSALS WILL NOT ADVANCE THE COMMISSION'S STATED GOALS

The Commission articulates a number of reasons, or goals, for promulgating a standardized and enhanced disclosure scheme. According to the NPRM, implementation of such a scheme could be expected to “enhance the public’s ability to access information on the extent to which broadcasters are serving the public interest” and to “increase a broadcaster’s ability to interact with its local community.”²² The NPRM further states that a standardized form could be expected to:

- “facilitate access to information on how licensees are serving the public interest”;
- “allow the public to play a more active role in helping a station meet its obligation to provide programming that addresses the community’s needs and interests”;
- “make broadcasters more accountable to the public”;
- “minimize the need for government involvement in monitoring how broadcasters comply with their public interest obligations”;
- “significantly reduce the time needed to locate information requested by the public”; and
- “provide the public with a better mechanism for reviewing a broadcaster’s public interest programming and activities.”²³

These may be laudable goals, of course, but there is no reason to assume that a standardized form will achieve them. The overriding goal, stated slightly differently at several points in the NPRM, is that a standardized form will “enhance the public’s ability to access information.”²⁴ All of the other benefits would flow from this principal goal. In reality, however, the only thing a mandatory standardized form will enhance for certain is the public’s ability to find a standardized form in a station’s public file. There would be no guarantee that the information on such a form would be uniform and consistent from one station to the next, or that it would necessarily be more informative than the present “issues/programs” list.

How programs are categorized likely would be subject to widely varying interpretations by different station managers. Take, for example, a public affairs program in which candidates for the local elected school board discussed their respective platforms for improving city schools. Under

²² *Id.* at para. 3.

²³ *Id.* at para. 10.

²⁴ *See, e.g., id.* at paras. 2, 3, 6, 10, 18, 26, 37.

the categories noted in the NPRM,²⁵ would such a program be listed under “political discourse,” “local programming,” or “programming that meets the needs of underserved communities”? Three different station managers could easily list the program in three different categories. And if a station manager’s issues/programs list were already heavy in one category, would he or she just list the program under another applicable category? Such category shifting would fall squarely, and appropriately, within the station manager’s discretion, but would make it virtually impossible to make comparisons among stations.

Then there is the question of which programs to include in the first place -- a question not limited to, or solved by, a standardized form. Perhaps a station manager could include coverage of local high school football games or a community parade under “local programming,” even though some might argue that these are sports and entertainment rather than “public interest” programming.

Thus, although the form itself may be standardized, the information contained in the form would be subject to the same differences in judgment, discretion, and subjective interpretation as information in other reporting formats. In addition, it would be difficult to find uniformity from one broadcaster’s report to the next simply because broadcasters choose to meet their public interest obligations in different ways -- and therefore the content of their “standardized” reports would be as different as their programming. It is highly unlikely, in fact, that standardized forms from different stations could be compared to each other, or measured against a set of criteria, in any meaningful fashion -- despite the almost-certain attempts to do so.

In short, there is nothing to suggest that a standardized form will provide information that is more “objective,” uniform, or more availing of comparison or analysis. (If anything, it may pose a greater possibility of lulling the public into making flawed comparisons.) Moreover, a standardized form may end up leading to the provision of less, rather than more, information. If the proposed regulatory scheme fails to advance the government’s principal goal, as we believe it does, it will also fail to advance the myriad secondary goals that depend upon the principal goal.

²⁵ *Id.* at para. 15.

VI. CONCLUSION: THE PROPOSED REQUIREMENTS FOR STANDARDIZED AND ENHANCED DISCLOSURE ARE AN AFFRONT TO THE FIRST AMENDMENT, ARE UNNECESSARY, AND WOULD BE INEFFECTIVE

As our media environment continues to expand at an ever-accelerating pace, the government's burden to justify new regulations grows correspondingly heavy. The landmark Telecommunications Act of 1996 not only recognized this proposition but advanced it. In the section on broadcast ownership rules, for example, the Act directs that "[t]he Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."²⁶ Indeed, the U.S. Supreme Court has called the Act "an unusually important legislative enactment" whose "primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'"²⁷

The Telecommunications Act of 1996 signaled a clear-cut direction in regulatory policy -- away from unnecessary regulation. Against this backdrop, it is difficult to understand why the Commission is proposing to issue still more rules that would micro-manage the recordkeeping function of broadcasters, as if recordkeeping were an end in itself.

The proposals contained in this NPRM suffer from a number of serious if not fatal defects. We are especially concerned about the First Amendment implications. By establishing a standardized form with categories of public interest programming, the Commission would express its preference for certain types of program content -- and thus would exert subtle editorial control over broadcasters to provide that type of content.

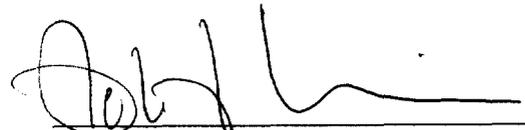
Turning to practical considerations, the rules are simply unnecessary. The Commission acknowledges that the rules are not related to the conversion to digital television; thus they cannot be justified on that basis. Since information on stations' public interest activities is already available as required under existing disclosure rules, there is no compelling need for an additional set of rules in this regard. Furthermore, the proposals would be ineffective at meeting the government's goals, since a standardized form might in fact lead to the provision of less, rather than more, information.

²⁶ 47 U.S.C. Sec. 161(b).

For all of these reasons, we urge the Commission not to pursue these regulatory proposals. We would urge instead that the Commission rethink its regulatory paradigm in the context of today's expanding communications landscape. We submit that the Commission will advance the public interest best by stepping back and allowing the media marketplace in its entirety to satisfy the needs and wants of the public.

December 18, 2000

Respectfully submitted,



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²⁷ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997) (quoting the Act) (emphasis added).