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Federal Communications Commission  
Washington, DC 20054

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

MM Docket No. 00-168 /

REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS

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## **Executive Summary**

The National Association of Broadcasters (“NAB”) submits these reply comments in the Commission’s proceeding considering various proposals to standardize and enhance public interest disclosure requirements for television broadcasters. NAB urges the Commission to refrain from adopting its proposals, as the record shows these proposals to be of questionable public benefit, doubtful constitutionality, and considerable burden for broadcasters.

As an initial matter, NAB reemphasizes that the record in this proceeding does not support the resurrection of programming-related regulatory policies (such as ascertainment) that the Commission previously eliminated as unnecessary and ineffective. NAB also notes that the Commission, and commenters supporting the Commission’s proposals, have exaggerated the significance and public benefit to be derived from requirements for broadcasters to collect and disclose information relating to programming when that information is already publicly available.

A number of commenters agreed with NAB that the adoption of a standardized disclosure form inquiring about broadcasters’ airing of government-defined categories of television programming would create significant pressure on licensees to offer programming with content fitting the FCC’s favored categories. Particularly in light of this coercive effect, the Commission’s proposal to create a standardized form containing government-preferred categories of programming raises serious constitutional questions.

Even beyond any constitutional problems, NAB asserts that the proposed standardized form would appear to serve no significant regulatory purpose in today’s competitive media marketplace. Given the unprecedented amount and variety of video

programming (including non-entertainment programming) currently offered to consumers, there is no reason to establish FCC-favored program categories, which would pressure all broadcasters to offer programming of the same type regardless of the wants or needs of the public. There are, moreover, definitional and other practical problems involved in the establishment of the suggested program categories.

Finally, the record clearly demonstrates that requiring all television stations – even those currently without websites – to place their entire public inspection files on the Internet would be unduly burdensome. Commenters described in some detail the lengthy and expensive process of converting very large paper public files to electronic format, and the significant costs and burdens associated with creating new (or upgrading existing) websites to store and provide access to such large volumes of data. If the Commission wishes to utilize the Internet with regard to station public files in some manner, then it must consider much less burdensome alternatives.

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TO: The Commission

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits this reply to certain comments on the Commission’s *Notice of Proposed Rulemaking* in this proceeding.<sup>2</sup> In the *Notice*, the Commission sought comment on proposals to standardize and enhance public interest disclosure requirements for television broadcasters. Specifically, the Commission proposed to create a new standardized public interest disclosure form inquiring about, *inter alia*, (1) broadcasters’ airing of certain defined categories of television programming, and (2) the actions taken by broadcasters to ascertain their communities’ programming needs and interests. The *Notice* also proposed to require television licensees to make the contents of their public inspection files (including the new form) available on their stations’ or a state broadcasters

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

<sup>2</sup> *Notice of Proposed Rulemaking* in MM Docket No. 00-168, FCC 00-345 (rel. Oct. 5, 2000) (“*Notice*”).

association's Internet website. A number of broadcasters, trade associations, foundations, and consumer and advocacy groups submitted comments on these various proposals.

In this reply, NAB agrees with the many commenters who concluded that the record in this proceeding does not justify the adoption of regulatory policies reminiscent of those discarded nearly two decades ago by the Commission. NAB questions the need for a standardized disclosure form with defined program categories and ascertainment inquiries, particularly in light of the ever increasing number of media outlets, the promise of even greater media abundance in the digital future, and the wide availability of information about all broadcast programming. Given that consumers today have access to an unprecedented variety of video programming provided by an increasingly competitive market, NAB again urges the Commission to refrain from embarking on the constitutionally dubious course of establishing government-preferred categories of programming content. NAB also agrees with commenters who demonstrated that requiring television stations to place their entire public inspection file on the Internet would constitute an undue burden.

### **I. The Record In This Proceeding Does Not Support A Return To Ineffectual Regulatory Policies Of The Past.**

A number of commenters agreed with NAB that the record in this proceeding fails to justify the reinstatement of detailed programming-related broadcasting policies similar to those previously eliminated as unnecessary or ineffective.<sup>3</sup> These commenters noted that the

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<sup>3</sup> See, e.g., Comments of Association of Local Television Stations, Inc. at 4-5; Sinclair Broadcast Group, Inc. at 2-4; The Walt Disney Company at 12-15; National Broadcasting Co., Inc. at 4-7; State Broadcasters Associations at 5-8; Viacom Inc. at 3-6; Benedek Broadcasting Corporation, *et. al* at 7-9.

Commission's deregulatory actions of the 1980's were taken after careful consideration of an extensive record,<sup>4</sup> and certainly no remotely comparable review has been undertaken here.

For example, the Commission eliminated the ascertainment requirements for radio and television stations only after a thorough review of the history of ascertainment, a detailed discussion of the economics of the broadcast marketplace, and the consideration of several studies specifically examining the costs and effects of the existing ascertainment requirements.<sup>5</sup> In stark contrast, the Commission has now proposed to adopt a new ascertainment requirement based merely on the assertion by one party that broadcasters "ignore certain communities," *Notice* at ¶ 24, a statement with which only one additional commenter in this proceeding expressed agreement.<sup>6</sup> A few generalized assertions cannot be regarded as a sufficient basis for the Commission to change its regulatory course and resurrect a policy that was discarded because it failed to "positively influenc[e] the programming performance of stations." *Television Deregulation Order* at 1098.<sup>7</sup> Even an admittedly less formal and detailed ascertainment

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<sup>4</sup> See *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981), *recon. granted in part and denied in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (1983) ("Radio Deregulation Order"); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part*, *ACT v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) ("Television Deregulation Order").

<sup>5</sup> See *Radio Deregulation Order* at 993-99, 1022-1039, 1073-91; *Television Deregulation Order* at 1097-1101; 1126-1130.

<sup>6</sup> See Comments of Office of Communication, Inc. of the United Church of Christ, *et. al* ("UCC") at 13 (stating that "there is anecdotal evidence that some local broadcasters are largely indifferent to the needs of the deaf and hard-of-hearing members of their community").

<sup>7</sup> See also *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (an agency changing course "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency

requirement<sup>8</sup> should not be adopted absent an adequate basis, and no commenter provided evidence indicating that the new ascertainment proposal would be effective when the Commission's more elaborate rules were found to be ineffective in positively influencing the programming offered by broadcasters.<sup>9</sup>

To bolster the deficient record supporting the information collection and reporting proposals in this proceeding, the Commission and some commenters have also exaggerated the significance and benefits to the public of these disclosure proposals.<sup>10</sup> For example, NAB disagrees with the Commission and with commenters when they compare the benefits to be gained from the proposed information collection and reporting requirements with the benefits derived from environmental disclosure statutes.<sup>11</sup> *See Notice* at ¶ 10 and n. 27; *Comments of UCC* at 5 and n. 10. But information about potentially hazardous chemicals stored by any firm was, prior to the passage of EPCRA, non-public, and there was no method for members of the public to gain access to such significant information in the absence of the legislation. In contrast, information about the content of broadcast programming is already widely available to any

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does not act in the first instance"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed").

<sup>8</sup> *See* *Comments of People for Better TV ("PBTv")* at 16 (supporting proposal because it is "significantly different" from the earlier "burdensome" ascertainment requirements); *UCC* at 14 (new proposal is "substantially different from the old ascertainment rules that were repealed").

<sup>9</sup> And, as NAB pointed out in its initial comments, the Commission in 1984 declined to adopt a more limited ascertainment obligation similar to the one proposed in this proceeding. *See Television Deregulation Order* at 1098.

<sup>10</sup> *See, e.g., Comments of UCC* at 16 (supporting new standardized disclosure form because the "public has a right to know how broadcasters are using the public airwaves," and "[p]roviding the public with information concerning broadcasters' provision of public interest programming directly furthers" First Amendment rights of the public).

interested member of the public. The programming itself is, of course, offered free over-the-air to anyone who wishes to watch, and numerous program guides and newspapers provide detailed programming listings. In addition, broadcasters are currently required to keep extensive programming-related documentation in their public files (including the issues/programs lists), and make those files available for inspection by members of the public. Thus, the benefits to be derived from additional information collection and reporting requirements would be incremental at best, and certainly cannot be equated with the benefits derived from disclosure requirements in the area of hazardous chemicals.

In sum, NAB does not dispute that the “public has a right to know” about broadcaster use of the airwaves. We do emphasize, however, that members of the public either already possess – or can easily obtain – information they may desire pertaining to broadcast programming. Given the limited significance of any further disclosure requirements in the broadcast context, and the failure of commenters to establish that the proposed disclosure requirements serve another, independently significant regulatory purpose, the Commission should refrain from “turning back the clock” by adopting programming-related information collection and reporting requirements resembling rules jettisoned nearly 20 years ago. Certainly the record in this proceeding provides no basis to return to the highly regulatory approaches of the past, particularly in light of the explosion of both broadcast and non-broadcast media in recent years.

## **II. A Standardized Disclosure Form With Program Categories Appears Unnecessary In Today’s Competitive Media Marketplace, And Raises Constitutional Concerns.**

### **A. The Adoption of a Standardized Form Will Coerce Broadcasters into the Airing of Government-Preferred Content.**

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<sup>11</sup> Specifically, the Emergency Planning and Community Right-to-Know Act (“EPCRA”) requires firms and individuals to report to state and local governments the quantities of potentially hazardous chemicals that have been stored or released into the environment.

As NAB explained in its initial comments, the adoption of a standardized form with government-defined program categories would create significant pressure on broadcasters to offer programming with content fitting the Commission's preferred categories.<sup>12</sup> Numerous commenters agreed with NAB's (and Commissioner Furchtgott-Roth's) assertion that the proposed standardized form would almost inevitably produce *de facto* programming quotas, as broadcasters would feel compelled to air at least some amounts of programming in each category selected by the Commission for inclusion on the form.<sup>13</sup> As the U.S. Court of Appeals for the District of Columbia Circuit recently observed,

A regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others. The *Commission in particular* has a long history of employing "a variety of sub silentio pressures and 'raised eyebrow' regulation of *program content . . .*" (*quoting Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)) (emphasis added).

*MD/DC/DE Broadcasters Association, et al. v. FCC*, No. 00-1094 (D.C. Cir. Jan. 16, 2001).

The assertion by proponents of the new standardized form that it is similar to the existing issues/programs list because neither require the airing of any specific program is accordingly unconvincing. *See* Comments of PBTv at 11. The proposed standardized form would set forth a number of government-defined program categories, and then specifically inquire about the amounts of programming aired in those preferred categories. In stark contrast, the issues/programs list contains no pre-selected categories of government-preferred programming,

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<sup>12</sup> *See* Statements of Commissioners Harold Furchtgott-Roth (the proposed standardized form "would create governmental pressure on broadcasters to air FCC-favored content, thereby creating a soft quota on that content") and Michael Powell (if program categories were established, then broadcasters may "be coerced into airing programming that fits" into them).

<sup>13</sup> *See, e.g.*, Comments of The Walt Disney Company at 10; Viacom Inc. at 9-10; National Broadcasting Company, Inc. at 2-4; State Broadcasters Associations at 10-11; The Media Institute at 2-3.

but defers to broadcasters' method of describing the programming they air to cover issues facing their communities. Thus, the issues/programs list does not have the same coercive effect as a government-created reporting form identifying favored categories of programming based on their content.

Indeed, it is this coercive effect of a standardized form that NAB suspects appeals to certain proponents. Because a standardized form identifying government-preferred categories of programming would pressure broadcasters into providing programming fitting those categories, and reducing the amount of air time for other, less favored programming content, those who believe all broadcasters should be required to air specified amounts of certain types of programming support the adoption of a standardized disclosure form. For example, UCC, while asserting that the standardized form would "simply identify a particular category" of programming and "inquire whether broadcasters have provided it," nonetheless proposed that the form ask broadcasters whether they aired at least six hours of public affairs programming per week. Comments of UCC at 8, 18.<sup>14</sup> From this proposal, it is clear that at least some proponents of a standardized disclosure form view that form as a vehicle for setting *de facto* quotas for the types of broadcast programming they prefer.

**B. Particularly Because of the Coercive Effect of a Standardized Form with Program Categories, the Commission's Proposal Raises Constitutional Questions.**

Because, as described above and in NAB's initial comments, the proposed standardized form will involve the Commission in content regulation and will pressure broadcasters to offer programming with content fitting the Commission's favored categories, the form raises

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<sup>14</sup> UCC also urged the Commission to include another question on the form asking whether at least half of that amount was dedicated to local public affairs.

significant constitutional concerns.<sup>15</sup> Numerous commenters agreed that the Commission should not embark on this constitutionally dubious course of establishing government-preferred categories of programming content.<sup>16</sup>

The only commenter attempting a constitutional defense of the Commission's proposal focused, predictably, on the alleged scarcity of spectrum.<sup>17</sup> But as numerous jurists, scholars and this agency have pointed out, broadcast frequencies are not uniquely scarce.<sup>18</sup> Since scarcity is a universal fact, it cannot be the basis for justifying a reduced level of constitutional protection for broadcasters but not, for example, for the print media.<sup>19</sup> But even beyond the illogic of the scarcity doctrine in the economic sense, the concept of scarcity of electronic media is, according to Chairman Powell, "certainly farcical in the modern digital era, which is marked by

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<sup>15</sup> See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) ("FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (any "content-based definition" of "diverse programming" gives "rise to enormous tensions with the First Amendment"); *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress "has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities," and any "Commission requirement mandating particular program categories would raise very serious First Amendment questions").

<sup>16</sup> See, e.g., Comments of The Walt Disney Company at 9-11; The Media Institute at 2-4; Association of Local Television Stations, Inc. at 6; Belo at 5; State Broadcasters Associations at 9-15; National Broadcasting Company, Inc. at 4; Viacom Inc. at 9-16; Benedek Broadcasting Corporation, *et al.* at 7-8; Sinclair Broadcast Group, Inc. at 5.

<sup>17</sup> See Comments of UCC at 17 ("In light of the limited availability of the broadcast spectrum, and the public's First Amendment right in this scarce resource, broadcast regulations are traditionally subject to a relaxed standard of First Amendment scrutiny.").

<sup>18</sup> See, e.g., *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508-9 (D.C. Cir. 1986); Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 Colum. L. Rev. 905, 910 (1997); *In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5055 (1987).

<sup>19</sup> See, e.g., *Syracuse Peace Council v. FCC*, 867 F.2d 654, 683 (D.C. Cir. 1989) (Starr, J. concurring) (spectrum scarcity, "without more," does not "justify regulatory schemes which intrude into First Amendment territory").

abundance.”<sup>20</sup> Indeed, the Commission in 1987 expressly concluded that “there is no longer a scarcity in the number of broadcast outlets” available to the public.<sup>21</sup> The Commission should therefore not rely on claims of spectrum scarcity to justify increased content-based regulation of broadcast programming.<sup>22</sup>

UCC also contends that the proposal does not present constitutional difficulties because it would promote the First Amendment rights of the viewing public, and further the public’s right to have the broadcast medium function in a manner consistent with the ends and purposes of the First Amendment. *See* Comments of UCC at 15-17. But given the vast increase in the number and variety of media outlets and the promise of even greater media abundance in the digital future, a standardized form with program categories is certainly not needed to insure that viewers are able to receive diverse programming content. *See* Section III.C. below. In fact, the adoption of a standardized form would, as NAB and other commenters argued, actually tend to produce more homogenized and less varied programming for viewers.<sup>23</sup> The Commission has also in the past correctly expressed skepticism about furthering the general “ends” or “purposes” of the First

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<sup>20</sup> Speech by Michael K. Powell before The Media Institute (Oct. 2, 1999). Not only has the number of television, AM and FM stations increased by 85% since 1970, there has been a vast increase in the number and variety of nonbroadcast outlets, including cable, Direct Broadcast Satellite and the Internet. *Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 29 (1999).

<sup>21</sup> *Syracuse Peace Council*, 2 FCC Rcd at 5054. Numerous jurists and scholars have agreed with this assessment. *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998); *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1443 (8th Cir. 1993) (concurring opinion); *Telecommunications Research and Action Center*, 801 F.2d at 508 n.4; Hazlett, *Physical Scarcity* at 911; Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998).

<sup>22</sup> For a more complete discussion of the constitutional infirmities of the scarcity doctrine, *see* NAB’s Comments in MM Docket No. 99-360, *Public Interest Obligations of TV Broadcast Licensees* at 11-14 (filed March 27, 2000).

<sup>23</sup> *See, e.g.,* Comments of State Broadcasters Associations at 13; Belo at 5.

Amendment through the promotion of certain types of speech.<sup>24</sup> Similarly in this proceeding, the Commission should reject, as inimical to the First Amendment, any calls by commenters to promote the purposes or values of the First Amendment by pressuring broadcasters to air programming with content fitting certain favored categories.<sup>25</sup>

**C. Beyond Raising Constitutional Problems, the Proposed Standardized Form Would Appear to Serve No Significant Regulatory Purpose in Today's Diverse Media Marketplace.**

The video programming market has never been more competitive, with the marketplace now providing a greater variety of programming from a greater number of sources than ever before.<sup>26</sup> Audiences clearly “benefit by the increasing diversity of programs” offered by all these outlets “across the market,” *United Church of Christ*, 707 F.2d at 1434, and this diversity will only increase in the digital and interactive future. But even in the predominantly analog present, television broadcasters are airing substantial amounts of non-entertainment programming,

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<sup>24</sup> For example, the Commission has rejected arguments urging it to “require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it.” In response to these arguments, the Commission has stated that the “First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it,” and concluded that the Constitution “flatly forbids governmental interference, benign or otherwise.” *Network Programming Inquiry, Report and Statement of Policy*, 44 FCC 2303, 2308 (1960).

<sup>25</sup> See *CBS, Inc. v. DNC*, 412 U.S. 94, 145-46 (1973) (Stewart, J., concurring) (“[D]angers . . . beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its ‘values’ . . . . For if those ‘values’ mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.”).

<sup>26</sup> Today there are 1663 full service television stations, 2379 low power and Class A television stations, thousands of cable systems service 67.7 million subscribers, as well as other multichannel video providers (including Direct Broadcast Satellite) that serve 16.7 million viewers. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, CS Docket No. 00-132, FCC 01-1 at 4, 7 (rel. Jan. 8, 2001).

including news and public affairs,<sup>27</sup> and the total amount of non-entertainment programming aired across local markets has, reflecting the increase in the number of outlets, never been greater.<sup>28</sup> Clearly, a standardized form containing program categories is not needed to insure the provision of non-entertainment and other programming to consumers.

To the extent, moreover, that proponents such as UCC view the adoption of a standardized form as a vehicle for setting *de facto* programming quotas for *every* broadcaster, then such an effort appears misguided. Given the unprecedented amount and variety of video programming offered across local television markets, there is no reason to establish FCC-favored program categories, which would have the effect of impelling broadcasters to be “all things to all people” by offering programming in every category devised.<sup>29</sup> As the Commission has previously recognized, it is not necessary that every station broadcast every type of programming, so long as different types of programming are available to consumers on a market basis.<sup>30</sup> Indeed, the Commission has explicitly recognized that “the public interest is not

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<sup>27</sup> NBC-owned stations offer between 26.5 to 40 hours per week of local news and public affairs programming, with the average exceeding 31.5 hours per week, and an additional 30 hours per week of network news and public affairs programming is aired by each station. Similarly, Belo reports that the majority of its stations surveyed broadcast 72 or more hours of non-entertainment programming each week, while all of its stations surveyed air over 60 hours per week of such programming. *See* Comments of National Broadcasting Company, Inc. at 9; Belo at 3.

<sup>28</sup> *See, e.g.*, Comments of Belo at 3 (in the six markets surveyed, network affiliates dedicated in the aggregate approximately one-third or more of their total broadcast hours to non-entertainment programming); National Broadcasting Company, Inc. at 9 (each NBC-owned station operates in a market in which other local stations, both commercial and noncommercial, air very extensive amounts of local, national and international news and public affairs programming).

<sup>29</sup> *See Lutheran Church*, 141 F.3d at 355-56 (while it is “understandable why the Commission would seek station to station differences, . . . its purported goal of making a single station all things to all people makes no sense” and “clashes with the reality” of the market).

<sup>30</sup> *See, e.g., Television Deregulation Order* at 1088 (requiring television stations to “present programming in all categories” is “unnecessary and burdensome in light of overall market

offended by permitting each station to base its service, including the issues to which it will be responsive with programming, upon the nature” of the broadcast services “otherwise available in the community and the interests” of its own audience.<sup>31</sup> By adopting a standardized form that would pressure all television broadcasters to offer programming of the same type regardless of the wants or needs of the public, or the services offered by competitors, in their individual markets, the Commission would be acting inconsistently with its own precedent and contrary to the public interest.<sup>32</sup>

**D. Individual Categories of Programs Suggested for Inclusion on the Proposed Form Raise Other Policy and Practical Concerns.**

Beyond the above-described problems with the general concept of a standardized form with program categories, the difficulties in defining these various categories will be considerable. For example, with regard to programming for “underserved communities,” will the Commission determine how to measure “underservice,” and will it identify certain communities it believes to be underserved, or will those determinations be left to the discretion of individual broadcasters?

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performance”); *Radio Deregulation Order* at 977, 1037 (rejecting arguments that the availability of non-entertainment programming across a market is insufficient and that each station must provide such programming).

<sup>31</sup> *Radio Deregulation Order* at 998. See also Comments of State Broadcasters Associations at 13 (complaining that standardized form, with its associated pressure on stations to maintain certain quantitative minimums of specified programming, will not permit a television broadcaster, when deciding what programming types to air, to take into consideration the programming of other broadcasters in the same community).

<sup>32</sup> UCC’s suggestion that the form inquire whether every broadcaster has aired at least six hours of public affairs programming each week (with at least half of that amount dedicated to local public affairs) seems particularly contrary to the Commission’s regulatory approach during the past 20 years. See, e.g., *Radio Deregulation Order* at 1064 (“[I]t may be offensive to the public interest to require any type of programming be offered in amounts that please the Commission rather than the public whose interest, after all, is intended to be the interest served under the public interest standard.”); *License Renewal Applications of Certain District of Columbia Broadcast Stations*, 77 FCC 2d 899, 906 (1980) (“we have never held that only locally produced material can satisfy local programming obligations”).

If left to the discretion of broadcasters, what will be the Commission's response when it receives complaints or petitions to deny contending that a broadcaster has failed to provide programming for some particular community, or that a broadcaster has failed to serve the public interest because it provided programming for one community but not another? And what, in any case, precisely constitutes a "community"? In its comments, UCC seemed to think of communities in economic terms,<sup>33</sup> while others may contend that communities should be defined according to characteristics of nationality, ethnicity, language, religion, gender, age or sexual orientation. The definitional possibilities seem almost endless, as do the practical difficulties raised if the Commission adopts this "underserved communities" programming category.

Other suggested programming categories seem unnecessary or unlikely to serve their alleged regulatory purposes. UCC supported the adoption of a "benchmark" minimum number of public service announcements ("PSAs") that broadcasters should air per hour (*see* comments at 12), even though the average television station runs 142 PSAs per week, 56% of which address local issues.<sup>34</sup> In addition, as commenters noted, a requirement that a broadcaster report each quarter which, or how many, programs it broadcast with closed captioning (or video description) *last* quarter would provide little assistance to consumers in determining whether a specific program to be aired in the future will be captioned or described.<sup>35</sup> It also appears premature for any standardized form to require reporting of extensive information about ancillary or other services "unique to digital television," even assuming a public interest need could be

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<sup>33</sup> *See* Comments of UCC at 10 (contending that broadcasters do not provide adequate service to the "disadvantaged" and the "needy").

<sup>34</sup> *Local Broadcasters, Bringing Community Service Home: A National Report on Local Broadcasters' Community Service* at 7 (April 2000).

<sup>35</sup> *See, e.g.*, Comments of State Broadcasters Associations at 18-19.

shown for the disclosure of additional information about digital television offerings in particular.<sup>36</sup> Given this myriad of practical and policy problems raised by its proposal, the Commission should refrain from adopting a standardized form incorporating program categories.<sup>37</sup>

### **III. The Record Demonstrates That Requiring All Television Stations To Place Their Entire Public Inspection Files On The Internet Would Be Unduly Burdensome.**

Numerous commenters agreed with NAB that requiring television stations to convert their entire public inspection files into electronic format and place them on Internet websites would constitute an undue burden.<sup>38</sup> These commenters described the substantial size of public files;<sup>39</sup> the lengthy and expensive process of converting so much paper to electronic format;<sup>40</sup> the

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<sup>36</sup> See Comments of PBTv at 8-9 (calling for standardized form to inquire about (1) all digital services provided by broadcasters, including those that are non-program oriented, and (2) stations' policies regarding the use of information collected from viewers about their purchase of products through station websites or interactive programming). Such consumer protection/privacy issues may be more properly within the purview of the Federal Trade Commission, rather than the FCC.

<sup>37</sup> Because NAB believes that the Commission should not even create the proposed standardized form, we do not respond in detail to suggestions by UCC and PBTv that broadcasters be required (1) to file the new form with the FCC as well as retain it in their public files, and (2) to provide on-air (or other) notifications of the availability of the new form and where viewers can obtain it. We briefly note that the need for these additional disclosure proposals has not been demonstrated, especially since licensees are not required to file their issues/programs lists with the FCC or to provide on-air notification of the availability of the lists for public inspection.

<sup>38</sup> See, e.g., Comments of Benedek Broadcasting Corporation, *et. al* at 2-4; Viacom Inc. at 24-27; National Broadcasting Company, Inc. at 14-15; The Walt Disney Company at 15-19; Sinclair Broadcast Group, Inc. at 6-7; State Broadcasters Associations at 19-22.

<sup>39</sup> See Comments of The Walt Disney Company at 16 (their stations estimated that public files contained 100-150 inches of paper, or approximately 25,000-40,000 pages).

<sup>40</sup> See Comments of State Broadcasters Associations at 21 (affidavit by consultant stated that it would take a professional listserver, at \$65 per hour, approximately 15 minutes to 1½ hours, *per page*, to complete the process of posting each sheet of paper contained in a station's public file on a website).

need to provide indexing and searching capabilities so that members of the public could actually browse, select, view and download public file documents;<sup>41</sup> the costs of creating, maintaining and hosting new websites for stations that currently do not have them;<sup>42</sup> and the costs of upgrading the existing websites and servers of stations to store and provide access to huge volumes of data.<sup>43</sup>

In addition, commenters agreed with NAB that personnel costs associated with the Commission's proposal would be considerable. Confirming the results of NAB's survey, which showed that stations have limited personnel available to deal with Internet and website issues, Viacom noted that "Web master duties" at several of its stations were currently performed part-time by staff members with other responsibilities and that the Commission's proposal "might well require the employment of a full-time Web master," at an estimated cost of \$30,000 per year. *See* Comments of Viacom Inc. at 26.<sup>44</sup> Commenters additionally agreed with NAB that the personnel demands associated with posting new and deleting out-of-date information from Internet public files would be particularly great in an election season, during which the "political file" portion of the Internet public file would need to be updated almost daily. *See* Comments of Benedek Broadcasting Corporation, *et. al* at 4. Based on all these submissions, the record clearly

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<sup>41</sup> *See* Comments of The Walt Disney Company at 17.

<sup>42</sup> *See* Comments of Viacom Inc. at 24-25 and n. 51 (just the cost of designing a small-business, non-service intensive website estimated to average \$26,100, but could reach \$200,000, and the costs of maintaining the site would be additional).

<sup>43</sup> *See* Comments of Benedek Broadcasting Corporation, *et. al* at 3-4 (estimating that just the cost of a server able to handle the volume of public file material posted on a station's website would be \$10,000 to \$15,000).

<sup>44</sup> Commenters also confirmed that many stations generally contract out the hosting, development and/or maintenance of their websites, and that the outsourcing of these tasks would likely increase the costs. *See, e.g.,* Comments of Benedek Broadcasting Corporation, *et. al* at 3-4.

shows, contrary to the assumption in the *Notice* (at ¶ 31), that converting public files to electronic format and placing them on websites would constitute a very significant burden for television stations.<sup>45</sup>

In contrast, commenters supporting the Commission's proposal either do not discuss the costs associated with posting public files on the Internet,<sup>46</sup> or else state that placing public files on the Internet would impose "*de minimis* costs" because of the "low cost of storing data on a website." Comments of UCC at 25-26. But in considering only the "cost of adding more storage space" to a website, UCC failed to address the substantial costs and burdens associated with (1) the initial conversion of thousands and thousands of pages of paper to electronic format; (2) the indexing and the provision of searching capabilities for these converted public file documents<sup>47</sup>; and (3) the creation, maintenance and hosting of a new website, or the upgrading of an existing website and server, to provide public access to a large volume of data. Because UCC failed to even recognize the majority of costs connected with posting public inspection files on the Internet, the Commission should not accept UCC's erroneous assertion that the burdens placed on broadcasters by the proposal would be "*de minimis*."

In light of all the comments submitted, NAB urges the Commission to refrain from imposing requirements that would be unduly burdensome to station owners, as it did in the recent

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<sup>45</sup> The time and expense involved in designing new and redesigning existing websites to make them accessible to persons with disabilities under W3C/WAI guidelines would be even greater. *See* Comments of State Broadcasters Associations, Exhibit A at 2 (estimating that it would cost between 2½ and 3 times more to design a website complying with guidelines).

<sup>46</sup> *See* Comments of PBTv at 11-14 (calling for public files to be placed on the Internet but not even referring to costs).

<sup>47</sup> A report by an outside consultant attached to NAB's initial comments concluded that the costs of converting a large paper public file (including indexing), and of providing a search mechanism that allowed for full text searching, could exceed \$290,000.

broadcast main studio/public file proceeding. Less than two years ago, the Commission considered the accommodation that a station locating its main studio and public file outside the city limits of its community of license should be required to make regarding access to its public file documents. The Commission ultimately required such a station to mail public file documents to persons within the station's geographic service area when requested to do so by telephone, but expressly rejected other proposals as being "unreasonably burdensome to station owners."<sup>48</sup> If a requirement to provide specifically requested public file documents by courier, fax or e-mail was regarded by the Commission as "unreasonably burdensome" less than two years ago, then the Commission should certainly not now adopt a proposal much more burdensome for station owners, especially in light of the limited benefits to be derived from posting station public files on the Internet.<sup>49</sup>

In its earlier order in the main studio/public file proceeding, the Commission also explicitly weighed the "comparative burdens and public benefits" associated with its various proposals. *MO&O* at ¶ 9. The Commission needs to follow that example here, and carefully consider "the costs as well as the benefits" of its proposal to require the Internet posting of public

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<sup>48</sup> *Memorandum Opinion and Order* in MM Docket No. 97-138, 14 FCC Rcd 11113, 11117 (1999) ("*MO&O*"). These other proposed accommodations had included requiring courier, fax or e-mail delivery of public file documents; requiring stations to make their studio available at non-business hours by appointment; and requiring stations to provide transportation to requesters or to transport the public file to them.

<sup>49</sup> As discussed in Section I. above, a station's paper public file is already available for inspection by the public, so any requirement to place public files on the Internet would provide only an incremental increase in access by members of the public. In addition, as NAB and other commenters noted, this incrementally increased access would primarily benefit persons outside a station's service area, who would have relatively little interest in that station's performance. *See* Comments of The Walt Disney Company at 18; Benedek Broadcasting Corporation, *et al.* at 5-6. Moreover, a considerable (and growing) proportion of the contents of station public files are already Internet accessible via the Commission's own website.

files. *State Farm*, 463 U.S. at 54. Despite the suggestion of one commenter, there is nothing inappropriate about agencies conducting cost/benefit analyses of proposed regulations.<sup>50</sup> To the contrary, a properly conducted cost/benefit analysis is an integral part of agency decision making, and the courts have not hesitated to challenge Commission decisions that failed to reasonably assess the costs of the agency's actions.<sup>51</sup> As Chairman Powell recognized in his separate statement to the *Notice* in this proceeding, posting public inspection files on the Internet "is neither a trivial nor an inexpensive burden" for broadcasters, and this proposal requires a "detailed cost/benefit analysis."

If the Commission wishes to utilize the Internet with regard to the public file in some manner, then it should consider our suggestion that stations with websites include information about their public files on their sites. *See* Comments of NAB at 26-27. The provision of this information on-line should reduce any confusion by members of the public as to the contents of public files, their right to view the files, and the procedures for viewing the files or obtaining file documents through the mail pursuant to telephone request. This more limited requirement

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<sup>50</sup> *See* Comments of PBTv at 17 and n. 25 (asserting that a cost/benefit analysis "distorts" core concerns, and "was a frequent tool of policy makers in the Reagan Administration to eliminate regulation or at least create paralysis and confusion about the appropriateness of regulatory reform").

<sup>51</sup> *See, e.g., People of the State of California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990) (reviewing court "must be satisfied that the Commission's assessment of the various costs and benefits is reasonable in light of the administrative record," and "if the FCC's evaluation of any significant element in the cost/benefit analysis lacks record support," then the court "cannot uphold the agency action" under the Administrative Procedure Act); *United States Telecom Association v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (finding that FCC's failure to explain how it implemented provisions of the Communications Assistance for Law Enforcement Act in a "cost-effective" manner was "a classic case of arbitrary and capricious agency action").

represents an appropriate weighing of the “comparative burdens and public benefits” associated with use of the Internet to insure access to station public files. *MO&O* at ¶ 9.<sup>52</sup>

#### **IV. Conclusion**

The record in this proceeding does not support a return to the programming-related regulatory approaches of the past, particularly given the incremental (at best) nature of any benefits to be derived from additional information collection and reporting requirements. The Commission should be especially wary of adopting a new standardized disclosure form with constitutionally questionable program categories. Such a course seems particularly unwise and unnecessary, given the ever increasing number of media outlets and the promise of even greater media abundance in the digital future. Finally, the record clearly does show that requiring television stations to convert their entire public inspection files into electronic format and place them on Internet websites would be unduly burdensome. For all these reasons, NAB urges the Commission to reassess its approach in this proceeding.

Respectfully submitted,

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February 16, 2001

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<sup>52</sup> And, if problems exist with access to the public files of individual stations, the Commission may, of course, institute enforcement proceedings and impose appropriate forfeitures.

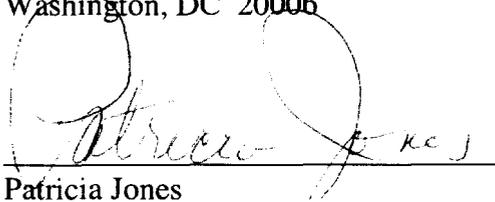
## CERTIFICATE OF SERVICE

I, Patricia Jones, Legal Secretary for the National Association of Broadcasters, hereby certifies that a true and correct copy of the foregoing Reply Comments of the National Association of Broadcasters was sent this 16<sup>th</sup> day of February, 2001, by first class mail, postage prepaid to the following:

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