

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Retention by Broadcasters of) **MB Docket No. 04-232**
Program Recordings)

To: The Commission

COMMENTS OF THE LIVINGSTON RADIO COMPANY

1. The Livingston Radio Company (“Livingston Radio”) hereby submits these Comments in response to the Notice of Proposed Rule Making in the above-captioned matter, FCC 04-145, released July 7, 2004. Livingston Radio opposes the proposal because it would impose a burden on every broadcast station to address a problem created by only a few stations. Adoption of the proposal would also interfere with and burden Livingston Radio in its relationships with parties other than the Commission.

2. Livingston is the licensee of Station WHMI-FM, Howell, Michigan. WHMI-FM is the only commercial broadcast station licensed to any community in Livingston County. The station is a hub for the distribution of local news and information and has a broad audience in the county. Livingston Radio has no other media interests; WHMI-FM is a stand-alone broadcast station. It is a family-owned and operated business. Gregory and Marcia Jablonski own the company, and operation of the station is their principal occupation. Livingston Radio’s resources are sufficient to operate WHMI-FM in the public interest, but they are from unlimited. Mr. and Mrs. Jablonski feel strongly that their company’s resources can be put to better use than to support what they see as an inappropriate, wasteful, and potentially unconstitutional governmental mandate.

3. WHMI-FM does not broadcast obscene or indecent material. It is not part of the problem that is the focus of this proceeding, so it should not be forced to be part of the solution. Indecent programming is principally the product of a small number of programs on big market stations operated by large group owners. *They* should bear the full responsibility and costs of the Commission's enforcement efforts.

4. The Commission's approach of requiring all stations to record their programming would burden all stations alike, both the innocent and the guilty. The burden would not be minimal on a station such as WHMI-FM. The burden is not just the cost of buying and maintaining recording equipment and storage media, although that cost is not insignificant. It is also a burden of time. The time that Mr. and Mrs. Jablonski and their staff would have to spend making sure that recordings are properly made and stored would reduce the time they can spend on community-oriented activities. Even if the Commission can justify imposing a burden on everyone from a legal point of view, which may or may not be the case,¹ it is certainly not fair or just to make Livingston Radio pay the price for "shock jocks" who have never appeared and will never appear on WHMI-FM. WHMI-FM does not broadcast and makes no money from these programs, so it should not be required to pay to control them.

5. Requiring recording all programming would also relieve complainants of a simple burden that it not unfair for them to have to meet -- the burden of making a *prima facie* case that objectionable material was broadcast. If the Commission's proposal were adopted, anyone -- whether a member of the general public or an organized special interest group -- could lob a

¹ Livingston Radio does not have the resources to commission the writing of a long legal brief; but in addition to First Amendment burden issues, it questions whether the Commission can justify its proposal under laws intended to avoid imposing burdens on small businesses.

complaint at any station; and it then would be up to the station to produce a recording or else face a presumption of guilt. Such a result is certainly not justified, and it runs counter to the basic constitutional principle that a defendant is presumed innocent unless proved guilty. A complainant should bear the burden of coming forward with some kind of specific information about what was broadcast. If a complainant cannot remember or articulate that much detail, then it is questionable whether the material -- if it was broadcast at all -- truly offended the complainant or whether the complaint merits the time and attention of the Commission to adjudicate.

6. Finally, a mandatory recording requirement would subject Livingston to serious additional burdens outside the Commission's ambit. As the only station licensed to Livingston County, and a station that makes it a point to cover local news extensively,² WHMI-FM from time to time is served with subpoenas for broadcast material in support of all kinds of litigation. Retrieving material and responding to subpoenas would require significant time and attention and would serve as negative incentive for covering news and public issues. Livingston Radio deals with this problem by having a firm policy of *not* recording any of its broadcasts. Its answer to a subpoena is thus a simple "we do not record our programming and do not have what you seek." It will be most disturbing if Livingston became subject to a federal requirement to record its programming, because the burden of making and retaining recordings would be compounded many times by virtue of the station becoming an open information field for lawyers to mine.

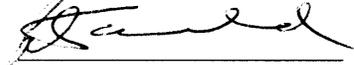
² Although the population of Howell is under 10,000 persons, and the population of Livingston County is only about 175,000, Mr. Jablonski reports that WHMI-FM has a news staff of five persons – a significant commitment to information and localism in a market the size of WHMI-FM's.

7. In sum, Livingston strongly objects to the proposed recording requirement. It does not want to pay for the transgressions of others, and it does not want to be subject to the burden of subpoenas. Livingston also does not know whether making recordings would constitute a violation of any copyright in the music it plays or the advertising it broadcasts.³ If there is a problem, the solution should be imposed on those who cause the problem. Perhaps the Commission would be justified in requiring recording for a period of time by stations against which there have been findings of indecency. Beyond that, the proposal should be scrapped altogether, as an over-broad and unjustifiable burden on innocent broadcasters, as well as an incentive against the production of the local news and public affairs programming that the Commission seeks to encourage.

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Respectfully submitted,



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³ The performing rights society licenses that radio stations normally have cover only the performance and not the recording of musical compositions. It is not at all clear that retaining recordings of an entire day's broadcast for 60-90 days would be deemed an "incidental" recording that may not require a separate license.