

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

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

**COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION  
STATIONS**

The Association of Public Television Stations (“APTS” or “Public Television”)<sup>1</sup> hereby submits comments in the above-captioned proceeding.<sup>2</sup> On July 7, 2004, the Commission released a Notice of Proposed Rulemaking seeking to require that all broadcast stations retain recordings of their programming for either 60 or 90 days in order to “increase the effectiveness of the Commission’s process for enforcing restrictions on obscene, indecent, and profane broadcast programming.”<sup>3</sup> The Commission also sought to restrict the recording requirement to the hours of between 6 a.m. and 10 p.m. (the time when children are likely to be in the audience), but it solicited comment on whether it should extend this proposal to the entire day to support enforcing its children’s television commercialism limits and sponsorship identification requirements.<sup>4</sup> In addition, the

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<sup>1</sup> APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation’s 356 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.

<sup>2</sup> Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking, FCC 04-145 (rel. July 7, 2004) (NPRM).

<sup>3</sup> Id. at ¶¶ 1, 7.

<sup>4</sup> Id. at ¶ 7.

Commission sought comment on how its proposal would apply to digital broadcasting,<sup>5</sup> the financial burden on stations,<sup>6</sup> First Amendment implications,<sup>7</sup> as well as copyright and contractual implications of its proposal.<sup>8</sup>

Public Television's record regarding indecency enforcement is unblemished and second to none. Since the inception of the Commission's indecency enforcement, there has been not a single recorded, adjudicated decision by the Commission against a public television station for violations of the Commission's rules regarding the broadcast of indecent material. Yet many of the Commission's most recent actions in this area may cause unintended adverse effects on the editorial independence of public television stations.<sup>9</sup> Public Television believes that the recent NPRM issued in this docket represents an additional – and unnecessary—burden on the financial and editorial resources of public television stations. In particular, Public Television believes that the Commission proposal adversely and unnecessarily impacts the financial condition of many public television stations that are already struggling financially. Moreover, as Chief Judge Wright of the D.C. Circuit observed in 1978, a recording requirement of the sort currently proposed poses substantial First Amendment issues through its chilling effect on speech. Lastly, the current proposal, if unmodified, risks being struck down by

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<sup>5</sup> Id. at ¶ 7.

<sup>6</sup> Id. at ¶ 9.

<sup>7</sup> Id. at ¶ 10.

<sup>8</sup> Id. at ¶ 11.

<sup>9</sup> Comments of Public Broadcasters on Petitions for Reconsideration, Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globe Awards" Program, File No. ED-03-1H-0110 (May 4, 2004).

a reviewing court under the “arbitrary and capricious” standard of the Administrative Procedures Act.

For the above reasons, Public Television urges the Commission to forebear from promulgating its proposed recording requirement. However, if the Commission were to enact some recording requirement, Public Television urges it to consider a limited and targeted exemption for public television stations in light of their exemplary record and financial condition.<sup>10</sup> Alternatively, the Commission may wish to consider limiting any recording requirement solely to licensees who have repeatedly violated the Commission rule in question, perhaps as an element of enhanced reporting mandated after an adjudicated offense.

**I. The Commission’s Proposed Recording Requirement Would Impose Unreasonable Financial Burdens on Public Television Stations**

The proposed recording requirement would impose unreasonable financial burdens on all broadcasters but most especially on public television stations. For example, assuming a 16 hour recording requirement for a 90 day period and a bit-rate of 19.4 Mbs, engineer and technical commentator Mark Schubin has estimated that this would require close to 13 terabytes of storage. A 24-hour requirement would increase the storage needs to 20 terabytes.<sup>11</sup> At a much slower bit rate of 128 Kbs, a 16 hour, 90 day

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<sup>10</sup> Such an exemption would be consistent with existing Commission exemptions or accommodations with regard to: annual regulatory fees (47 C.F.R. § 1.1162(e)), application fees (47 C.F.R. §§ 1.1114(c) and (e)(1)); children’s programming (Policies and Rules Concerning Children’s Television Programming; Revision of Programming Policies for Television Broadcast Stations, Report & Order, FCC 96-335, 11 FCC Rcd 10660, n.119 (August 8, 1996)); and the digital television build-out (Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12809, ¶ 104 (1997)).

<sup>11</sup> Mark Schubin, Mark’s Monday Memo (July 12, 2004), available at: <http://www.digitaltelevision.com/mondaymemo/mlist/>.

recording requirement for four multicast channels would require at least 332 gigabytes of storage.<sup>12</sup>

While these estimates consider size of the storage required, they do not factor in the cost of the storage, the need to purchase additional equipment, maintenance, staff time, and a variety of other factors that contribute to the significant financial costs of the proposal. For instance, one large public television station has received a bid for recording of one high-definition and five standard-definition channels over 90 days at a 400 Kbs bitrate. The equipment costs are over \$25,500 with an additional \$2,500 per year in system support. Other public television stations report that the costs, which significantly increase with the number of multicast channels that must be recorded, can reach as high as \$44,000 per year.

In some markets, this is the equivalent of, or greater than, the salary for a full-time staff member that could otherwise be conducting outreach and education for many of public television's educational initiatives, such as the federally-funded Ready to Learn initiative.<sup>13</sup>

The cost is even higher for licensees that operate multiple transmitters where local variation in programming requires recording of each transmitter. In this regard, the cost

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<sup>12</sup> Id.

<sup>13</sup> Ready To Learn is public television's contribution toward our nation's most urgent educational goal—ensuring that all children begin school ready to learn. The core of Ready to Learn is to provide non-violent, commercial-free, educational children's television programming broadcast free of charge to every American household. Through local public television stations, Ready To Learn coordinators read to children in their communities and provide extensive outreach services to parents, child care providers and other early childhood professionals. In addition to the millions of children reached nationwide through broadcasting, 650,000 parents and early childhood professionals have participated in 20,000 community-based Ready To Learn workshops on using television wisely, developing children's learning skills and preparing children to read. In addition, approximately 7 million children have benefited from their parents' and teachers' participation in Ready To Learn outreach services. And this initiative has enabled over a million free, new books to have been distributed to disadvantaged children.

must be multiplied by the number of transmitters. This is particularly burdensome for public television state networks that have multiple transmitters as high as fifteen in number, some of which may be programmed independently with localized content.

This is a financial burden public television stations are ill-equipped to bear, particularly in light of the digital transition expenditures that public stations have undertaken. Public television stations throughout the nation are staggering under the financial load of constructing and operating two facilities—one in analog and one in digital—until the digital transition has been completed. Additionally, throughout the nation, state funding has dropped considerably, due to financial crises the individual states are experiencing. In addition, other sources of funding, such as corporate underwriting, foundation support and individual donations, are either flat or stagnant. Rarely in the over 30 years of public television’s existence have the stations been so stressed financially. It is therefore a particularly inapt time for the Commission to be requiring any new regulation that unnecessarily imposes such large financial burdens on a segment of the broadcast media that has no history or pattern of violating the Commission’s prohibitions against the broadcast of indecent material.

## **II. The Proposed Recording Requirement Poses Significant First Amendment Issues**

Public Television also believes that a recording requirement of the sort currently proposed poses substantial First Amendment issues through its chilling effect on speech. In addition, as proposed and without an exemption for public television stations, the requirement is too over-inclusive to be narrowly tailored to address the apparent ills the Commission is attempting to cure.

In 1978, the D.C. Circuit invalidated a similar recording requirement as it applied to public broadcasters.<sup>14</sup> This case involved the required audio recording of all broadcasts by public broadcasters of programs in which “any issue of public importance” was discussed.<sup>15</sup> Additionally, the broadcaster was required to retain the recording for 60 days and provide a copy to any member of the Commission or the general public that asked for it.<sup>16</sup> Although the case was ultimately disposed of on Fifth Amendment equal protection grounds, then Chief-Judge Wright’s opinion provided considerable guidance to the Commission on the First Amendment impact of a recording requirement on all broadcasters.

First, Judge Wright argued that it is axiomatic that “where the purpose of a statute is related to the suppression of free expression of ideas or information” the First Amendment requires the “strictest form of scrutiny.”<sup>17</sup> He proceeded to explain that the recording requirement at issue was triggered by particular content—namely programming concerning issues of public importance—and was therefore decidedly not content neutral.<sup>18</sup> However, in light of the “scarcity rationale” underlying reduced scrutiny of broadcast regulation, Judge Wright applied intermediate scrutiny, which requires that the regulation will be upheld only if (a) it is within the constitutional power of the Government; (b) it furthers an important or substantial governmental interest; (c) the governmental interest is unrelated to the suppression of free expression; and (d) the

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<sup>14</sup> *Community-Service Broadcasting of Mid-America, Inc v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978).

<sup>15</sup> *Id.* at 1104.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1111.

<sup>18</sup> *Id.* at 1112-1113.

restriction on First Amendment liberties is no greater than is essential to further the identified interest.<sup>19</sup> Judge Wright concluded that no substantial government interest had been adequately articulated in the legislative history to support passage of the law under review,<sup>20</sup> and he further concluded that the law did not carefully advance some of the government interests offered by the Commission in the course of litigation.<sup>21</sup>

Importantly, the core of Judge Wright’s analysis centered on the chilling nature of the regulation on freedom of speech. In words that have equal applicability to the current proposal, Judge Wright observed that the structure of Commission regulatory oversight already provides a dangerous opportunity to chill free speech rights, particularly as applied to public broadcast stations.

“[T]he fact is that the system of broadcast regulation by Congress and the FCC, as currently structured, provides ample opportunity for substantial chilling of First Amendment freedoms, particularly where relatively small, publicly supported stations are concerned.”<sup>22</sup>

Judge Wright continued, explaining the particular vulnerability of public broadcast stations to what he called “raised eyebrow” regulation.

“The vulnerability of noncommercial licensees to official pressures is increased by Section 399(b), for the operation of the taping requirement serves to facilitate the exercise of “raised eyebrow” regulation. Quite simply, it provides a mechanism, for those who would wish to do so, to review systematically the content of public affairs programming; based on such review they may make use of existing means for communicating their displeasure.

“In seeking to identify the chilling effect of a statute our ultimate concern is not so much with what government officials will actually do, but with how

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<sup>19</sup> *Id.* at 1114.

<sup>20</sup> *Id.* at 1119.

<sup>21</sup> These included oversight of federal funds, *id.* at 1119 et. seq., archival preservation of significant programs, *id.* at 1120 et. seq., and enforcing CPB’s mandate to facilitate “objectivity and balance” in programs or series of programs of a controversial nature, *id.* at 1121 et. seq.

<sup>22</sup> *Id.* at 1115.

reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation. Mere passage of a statute which clearly serves the purpose of allowing government officials to review program content on a program-by-program basis--and does not clearly serve any other legitimate purpose --is reason enough for local licensees to fear and to dilute their public affairs coverage. For it is one thing for a broadcaster to decide independently to retain recordings of his programming; it is quite another for him to be told by Congress that when the programming concerns issues of public importance he must retain recordings and make them available to the Commission or to any individual who requests them.”<sup>23</sup>

In summary, however, Judge Wright was careful to observe that these concerns were not necessarily unique to public broadcasting but could be equally problematic from a First Amendment point of view if the requirement were applied to all broadcasters. In this case, the “spectre of government censorship” would be unmistakable and all broadcasters would be forced to self-censor.

“In this case the spectre of government censorship and control hovers, not only over public broadcasting, but over all broadcasting. For if this legislation is constitutional as to public broadcasting, similar legislation as to all broadcasting is standing in the wings. If the Government can require the most pervasive and effective information medium in the history of this country to make tapes of its broadcasting for possible government inspection, in its own self-interest that medium will trim its sails to abide the prevailing winds.”<sup>24</sup>

Although there are differences between the public broadcasting recording requirement that failed constitutional scrutiny in 1978 and the Commission’s present proposal, there are enough significant parallels between the two to counsel extreme caution in the current context. For instance, the law that was struck down in 1978 applied to programs in which “any issue of public importance” was discussed – a content-based trigger that provoked careful judicial scrutiny. Similarly, the present proposal is also triggered by program content—in this case the range of indecent, obscene and profane

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<sup>23</sup> *Id.* at 116-117.

<sup>24</sup> *Id.* at 1123.

utterances or depictions that the Commission has recently broadened in significant ways. Clearly, the intent of the proposed policy is to suppress free expression, namely the expression of content deemed objectionable in accordance with the Commission's newly expanded policies.<sup>25</sup> As such, it will be viewed as inherently suspect by a reviewing court. In addition, like the law struck down in 1978, the current proposal enhances the ability of government officials to review programming and to make judgments affecting content while raising the specter of "raised eyebrow" regulation that has such a significant potential to create a chilling effect.

Moreover, even the differences between the two situations underscore the problematic nature of the proposed rule. For instance, arguably the effect of the chill on free expression is greater under the Commission's proposed policy because of the potential for substantial, even crippling, fines that were not present in the 1978 law. In addition, the burden is now much more substantial on the broadcasters, because the 1978 law required only the retention of audio recordings, as contrasted with the current proposal that would require retention of audio and visual recordings.

In addition to the above infirmities, the proposed rule is not nearly narrowly tailored enough to survive exacting judicial scrutiny. As indicated above, public television stations do not have a record of violating the Commission's rules restricting the broadcast of indecent, obscene or profane material. By encompassing public television stations within the scope of recording requirements, the Commission's remedy is an over-broad regulation of speech and is not rationally related to the government interest in

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<sup>25</sup> Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking, FCC 04-145, ¶6 (rel. July 7, 2004) ("the specifics and context of the broadcast are critical to the determination of whether material is obscene, indecent, or profane").

indecentcy enforcement.<sup>26</sup> Moreover, if the policy were to be extended for the purpose of assisting with enforcement of the limits on children's television commercials, it would be over-broad to include public television stations within the scope of a recording requirement because this aspect of the Commission's rules does not apply to the noncommercial service.<sup>27</sup>

In this regard, the Commission should either forebear from promulgating the recording requirement, or impose reasonable limits on such a requirement to ensure a rational fit between means and ends as the Constitution demands.

### **III. Without Modifications, the Proposed Recording Requirement Would Fail Judicial Review under the Arbitrary and Capricious Standard**

In reviewing the Commission's recording requirement as proposed, a federal court will consider, among other factors, whether the new policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>28</sup> While judicial review is deferential, a reviewing court will strike down an administrative decision if it is established that the Commission failed to consider relevant factors or made a clear error

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<sup>26</sup> In fact, a recording requirement of general applicability may have very little impact on improving indecentcy enforcement. See NPRM, n. 8 (in the three-year period between 2000 and 2003, the Commission received 14,379 complaints, denying or dismissing only 169 complaints -- or 1.2% --for lack of a tape, transcript or significant excerpt).

<sup>27</sup> In addition, if, as the Commission has suggested, the recording requirement could be used to assist with enforcement of the sponsorship identification rules, which do apply to public television stations, the imposition on licensees would be just as burdensome without comparable benefits. An examination of the Commission enforcement of the sponsorship identification rules yields few if any cases in which a recording requirement would have changed the outcome of the decision.

<sup>28</sup> 5 U.S.C. § 706(2)(A).

in judgment.<sup>29</sup> In particular, the Commission “must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record” and that it has made “a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>30</sup>

Because of its exemplary record in the arena of indecency enforcement, and the fact that the children’s television commercial limits do not apply to a noncommercial service, Public Television believes that it would be a better policy choice, and a more rational approach, to exempt public television stations from any proposed recording requirement. If, indeed the Commission’s goal is to enhance enforcement in these two areas, it would be irrational to effectuate this goal by including public television stations within the scope of the recording requirement. A broader rule, on the other hand, would ignore these facts and would not demonstrate the kind of close connection between means and ends that reviewing courts require.

In addition, the Commission’s proposed requirement would fail the rationality test inherent in the Arbitrary and Capricious standard, because the quite substantial costs clearly exceed any purported benefits. In this regard, the Commission itself has stated that in the three-year period between 2000 and 2003, the Commission received 14,379 complaints, denying or dismissing only 169 complaints -- or 1.2% --for lack of a tape, transcript or significant excerpt.<sup>31</sup> If, as the Commission recognizes, that it was able in the past to resolve approximately 99% of indecency complaints without any program

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<sup>29</sup> Office of Communication, Inc of the United Church of Christ v. FCC, 327 F.3d 1222, 1224 (D.C. Cir. 2003) (citations omitted).

<sup>30</sup> Pac. Gas & elec. Co. v. FERC, 2004 U.S. App. LEXIS 14188, 8-9 (D.C. Cir. 2004) (citations omitted).

<sup>31</sup> NPRM, n. 8.

recording and retention requirements, then the issue becomes whether the means chosen rationally relate to the ends desired. Clearly in this case they do not.

### **Conclusion**

For the above reasons, Public Television urges the Commission to forebear from promulgating its proposed recording requirement. However, if the Commission were to enact some recording requirement, Public Television urges it to consider a limited and targeted exemption for public television stations in light of their exemplary record and financial condition. Alternatively, the Commission may wish to consider limiting any recording requirement solely to licensees who have repeatedly violated the Commission rule in question, perhaps as an element of enhanced reporting mandated after an adjudicated offense.

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