

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

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

To: The Commission

**JOINT COMMENTS OF THE
NORTH CAROLINA ASSOCIATION OF BROADCASTERS
AND VIRGINIA ASSOCIATION OF BROADCASTERS**

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Summary

The Commission should not adopt its proposed recording and retention rule on the grounds that such a requirement violates the First Amendment, is unduly burdensome, is at odds with the Commission's promotion of localism, and raises serious concerns regarding copyright liability.

Especially in light of the Commission's recent stepped-up enforcement of its indecency regulations—in particular, its expansion of the definition of “indecent” programming to include “vulgar, irreverent or coarse” words or their equivalents and its push for and implementation of greater penalties for indecency violations—the proposed taping rule will cause broadcasters to rein in any speech which could be called into question. Indeed, this seems to be the very intent of the proposed requirement. As the recording and retention proposal sweeps too broadly by including all programming and all broadcasters, even those who have never had an indecency complaint, and as the requirement fails to consider existing enforcement mechanisms which are sufficient to enforce indecency restrictions, the proposed rule is not “narrowly tailored” and cannot survive constitutional scrutiny.

The burdens of the proposed rule are significant. In addition to the out-of-pocket expenses associated with purchasing taping equipment, broadcasters will incur storage costs and staff costs in administering the proposed recording and retention rule. These costs are substantial, particularly for small-market broadcasters, many of whom do not have the resources or the staff to implement the proposal and virtually all whom have never had an indecency complaint. These burdens are wholly out of proportion to any public benefit to be gained from the requirement.

Moreover, the proposed rule will discourage the very programming that the Commission is seeking to encourage in other pending proceedings—local programming. Live and unscripted local

programming will be eliminated by broadcasters as they seek to avoid any potential for liability under the Commission's new draconian approach to indecency regulation.

Finally, the proposed rule raises serious questions concerning potential copyright liability. Many programming contracts prohibit any unauthorized copying of licensed programming and the "fair use" doctrine may not protect the large-scale copying proposed by the Commission.

In sum, the proposed rule is unnecessary, overly burdensome, and not narrowly tailored; it raises serious First Amendment and copyright issues; and there has been no showing that existing rules and procedures are insufficient to enforce the indecency rule. The proposed rule should not be adopted.

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The North Carolina Association of Broadcasters (“NCAB”) and the Virginia Association of Broadcasters (“VAB”) (collectively “the Associations”), by their attorneys and pursuant to Section 1.415 of the Commission’s rules (47 C.F.R. § 1.415), respectfully submit the following comments in response to the Commission’s *Notice of Proposed Rulemaking* (“*Notice*”), released July 7, 2004, in which the Commission proposed to require broadcasters to retain recordings of their programming for a period of time (*e.g.*, 60 or 90 days) to allegedly increase the effectiveness of the Commission’s process for enforcing restrictions on obscene, indecent, and profane broadcasts. The Associations are voluntary trade associations that represent the interests of radio and television broadcast stations that have a direct stake in this proceeding.¹

The *Notice* represents the third layer of the Government’s effort to restrain speech it deems undesirable. First, the Commission has both muddied and expanded the scope of its rules against

¹ NCAB currently has 203 radio and 30 television members. VAB currently has 79 radio and 28 television members.

indecent or profane broadcasts by forbidding the broadcast of any language that is “vulgar, irreverent or coarse” and imposing sanctions against even a single indecent or profane utterance.² Second, Congress continues to push for draconian penalties—including a tenfold increase in the maximum statutory fines and an automatic license revocation proceeding for stations who accrue three separate violations.³ The Commission also has begun to “sharpen [its] enforcement blade” by putting broadcasters on notice that it may impose fines for each indecent utterance within a single program (as opposed to imposing fines on a per-program basis) and will begin license revocation proceedings for “egregious and continuing disregard of decency laws.”⁴

Now the Commission proposes that broadcasters build a record against themselves, at their own expense, to assist the Commission’s enforcement efforts. But such a rule is fraught with both constitutional and practical peril. It raises serious First Amendment questions, imposes unreasonable and costly burdens on stations, undermines the Commission’s recent efforts to promote localism, and exposes broadcasters to potential liability for copyright infringement.

Our local broadcast system is steeped in the obligation of local stations to ensure the content of its programming reflects the needs, interests, and standards of their local communities. The most effective external pressures to enforce this obligation come from local audiences, not the Federal

² *In the Matter of Complaints Against Various Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, FCC 04-43, ¶¶ 9, 13 (rel. March 18, 2004) (“*Golden Globe Awards*”).

³ H.R. 3717, 108th Cong. (2004); S. 2056, 108th Cong. (2004).

⁴ Hearing on H.R. 3717 before the U.S. House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, 108th Cong. (Feb. 11, 1998) (Statement of Honorable Michael K. Powell); *In the Matter of Infinity Broadcasting Operating, Inc.* (WKRK-FM), FCC 04-49, ¶ 15 (rel. March 18, 2004).

government. And that pressure is formidable. For as one broadcaster candidly explains, “If I were to broadcast such filth the FCC would have to come after the crumbs as my listeners would hang me first!”⁵ Even if the Commission *were* to come after the crumbs, the proposed rule is an unnecessary governmental mandate that is ill-tailored to improve the Commission’s enforcement process.

I.
The Proposed Rule Would
Violate the First Amendment by
Inhibiting Protected Speech

The First Amendment prohibits the Commission from imposing any restrictions on broadcast speech that are not narrowly tailored to further a substantial governmental interest.⁶ The proposed rule would indirectly restrict or chill broadcast speech by causing a station to censor its content to avoid the “raised eyebrow”⁷ of government regulators.⁸ Indeed, the mere perception that the government has unfettered access to a station’s program archives—especially where a station’s

⁵ Comments of Archie Morgan, WIXE.

⁶ *FCC v. League of Women Voters*, 468 U.S. 364, 380-81 (1984).

⁷ *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978).

⁸ A restriction on speech may include a direct restriction on the content of broadcasts or an indirect restriction that chills speech or leads to self-censorship. *American Communications Association, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) (indirect “discouragements” on speech are as coercive as “imprisonment, fines, injunctions or taxes”); *see also Reno v. ACLU*, 521 U.S. 844, 872-73 (1997) (vagueness of law and severity of sanction “may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67 (1963) (“We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.”); *Virginia v. American Booksellers Association*, 484 U.S. 383, 393 (1988) (noting that self-censorship is “a harm that can be realized even without an actual prosecution”).

license or a hefty fine hangs in the balance—may cause station management to dilute, modify, or eliminate certain programming content to satisfy the social or political viewpoints of regulators.⁹

The Commission's new indecency rules—which expose stations to liability for a single indecent utterance¹⁰—already have had a chilling effect on the content of television and radio programs. The most highly-publicized examples include NBC's decision not to air an episode of *ER* that contained partial nudity of an eighty-year old medical patient and the firing of several radio personalities.¹¹ The chill has blanketed educational and cultural programming as well. North Carolina's public television network has modified or rescheduled documentary or other educational or artistic programs that contain material the Commission could conceivably claim to be indecent.¹² And, ultimately, the chill may have the most ominous impact on local programming because a station has no opportunity to review the content of live, unscripted coverage of local news, information or public affairs programs that lie at the core of broadcasters' public interest obligations.

The chilling effect will simply expand if the Commission now requires broadcasters to archive evidence that the Commission intends, by its own admission,¹³ to use against them in an indecency enforcement proceeding. The D.C. Circuit previously struck down a similar law that

⁹ *Community-Service Broadcasting*, 593 F.2d at 1114-1118.

¹⁰ *Golden Globe Awards*, ¶ 9.

¹¹ See generally "The Big Chill? Congress and the FCC Crack Down on Indecency," 22 *Communications Lawyer* No. 1 (Spring 2004) (citing examples).

¹² "Cleavage Prompts UNC-TV Change," *The News and Observer*, page A2 (April 14, 2004); "Clumsy Edit Irks Viewers," *The News and Observer*, page E1 (May 12, 2004).

¹³ *Notice*, ¶ 3.

required public broadcasters to keep recordings of public affairs programming.¹⁴ In doing so, the Court spoke to the “serious danger” that the law would chill vigorous public affairs programming in order to avoid governmental scrutiny:

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 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.¹⁵

Similarly, the Commission recommended repeal of the fairness doctrine 20 years ago because, among other things, it operated as a “demonstrable deterrent” to broadcasters’ coverage of controversial issues of public importance by requiring the Commission to second-guess its programming decisions in order to resolve any complaints.¹⁶ Rather than suffer “minute and subjective scrutiny of program content resulting from enforcement of the fairness doctrine,” the Commission found that stations simply chose to reduce or eliminate issues of controversial importance.¹⁷ The Commission’s proposed recording and retention rule echoes this same concern that stations may alter the content of their programs rather than face scrutiny into potentially indecent programs that can only be described as minute and subjective.

¹⁴ *Community-Service Broadcasting*, 593 F.2d 1102.

¹⁵ *Id.* at 1116-1117.

¹⁶ *In the Matter of Inquiry into § 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145, ¶ 44 (1985).

¹⁷ *Id.* at 1175, ¶ 73.

The chilling effect of the Commission's proposed rule is perhaps most troubling—and most vulnerable to a constitutional challenge—because it is not narrowly tailored to further a substantial governmental interest.¹⁸ Even assuming the dubious proposition that the Commission's stated interest in retaining recordings to assist in the enforcement of its indecency rules qualifies as a “substantial” governmental interest,¹⁹ mandating that stations retain copies of *each* and *every* program broadcast between 6 a.m. and 10 p.m. is not narrowly tailored to further that interest. Indeed, the rule is not “tailored” at all.

First, the “remarkable breadth”²⁰ of the rule would punish an entire industry for the sins of a few. The NAB reports that since 2002 less than 1% of all broadcasters have been sanctioned for airing indecent broadcasts. And the Commission acknowledges that, over a two year period, it only dismissed 169 of 14,379 complaints where it was not able to locate a copy of the program in question.²¹ The rule, however, is not targeted to programs that have a pattern of generating complaints or to stations that have a pattern of broadcasting indecent or profane material. Instead, the rule would require the more than 99% of broadcasters who have never violated the indecency rules to record and retain every second of broadcasting for 16 hours each day. Such a sweeping

¹⁸ *League of Women Voters*, 468 U.S. at 380-81.

¹⁹ *Cf. Community-Service Broadcasting*, 593 F.2d at 1121 (casting doubt that the desirability of preserving significant broadcasts or maintaining open archives or libraries of programs “should be considered sufficiently substantial and important to justify restrictions on First Amendment rights”).

²⁰ *American Library Association v. Thornburgh*, 713 F. Supp. 469, 477 (D. D.C. 1989), judgment vacated as moot, *American Library Assoc. v. Barr*, 656 F.2d 1178 (D.C. Cir. 1992) (Court of Appeals recognizing that constitutional question was mooted by subsequent Congressional action).

²¹ *Notice*, ¶ 6, n. 8.

requirement causes serious constitutional concern because of its similarity to other restrictions on speech—including recordkeeping requirements—that courts routinely strike down as either overly broad or insufficiently tailored to the interest they seek to serve.²²

Second, the number and nature of the programs engulfed by the proposed rule borders on the absurd. Broadcasters will be forced to tape pre-recorded gospel music, reruns of *Matlock*, and detergent commercials. Because there is no intersection between programs that may contain indecent material and the mechanical application of the proposed rule, there is no constitutional foundation to support such a rule.²³ As the Supreme Court explained when it struck down a ban on editorializing on public broadcast stations:

[The] broad ban on all editorializing by every station that receives CPB funds far exceeds what is necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorials by public broadcasting stations represent the official view of the government. The regulation impermissibly sweeps within its prohibition a wide range of speech by wholly private stations on

²² See, e.g., *League of Women Voters*, 468 U.S. 364, 393 (ban on editorializing on public broadcasting, “includes within its grip a potentially infinite variety of speech, most of which would not be related in any way to governmental affairs, political candidates, or elections”); *Community-Service Broadcasting*, 593 F.2d at 1121 (public broadcasting recording rules “at odds” with requirement that the regulations be no more restrictive than essential to further any substantial government interests); *American Library Association*, 713 F. Supp. at 477 (requirement that *all* “producers” personally ascertain a performer’s age not narrowly tailored to prosecution of child pornography where many producers have no practical access to the information and the requirement does little to curb black market pornography or false identification of performers); see also *CBS v. Democratic National Committee*, 412 U.S. 94, 169 (1973) (monetary and other burdens imposed upon the press “lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose”) (Douglas, J., concurring).

²³ *Community-Service Broadcasting*, 593 F.2d at 1120.

topics that do not take a directly partisan stand or that have nothing whatever to do with federal, state or local government.²⁴

Third, the proposed rule fails to reflect mechanisms already in place to assist the Commission's enforcement process. For instance, the rule does not take into account that networks, syndicators, or other distributors of broadcast programs may keep recordings that a station may be able to retrieve, when necessary, without enduring the duplicative costs of taping and storing hours of the same material.²⁵ The rule also is unnecessary because, as the Commission itself acknowledges, where no recording is available to verify the content of an alleged indecent broadcast, the Commission presumes the broadcast occurred.²⁶ If a station wants to ensure it is never subject to a bogus indecency complaint, it can voluntarily bear the cost of taping the programs it determines may run an appreciable risk of containing indecent utterances. As this presumption already assists the Commission's enforcement process through voluntarily incentives, there is no need for duplicative and overly broad governmental mandates to achieve that same goal.

II. The Proposed Rule Would Impose Unreasonable and Overly Burdensome Costs on Broadcasters

To require *all* broadcasters to record and retain copies of each and every broadcast between 6 a.m. and 10 p.m. would impose enormous practical burdens and costs on all stations in North

²⁴ *League of Women Voters*, 468 U.S. at 395.

²⁵ *American Library Association*, 713 F. Supp. at 477 (requirement that all "producers" personally ascertain a performer's age is overbroad because it would apply "*even if* the original producer of the film provided the distributor with his own documentation of the age of every performer")(emphasis in original).

²⁶ *Notice*, at ¶ 9.

Carolina and Virginia—but most especially small market stations forced to shoulder the unanticipated costs of recording equipment, as well as securing sufficient storage and staffing needs. These costs alone could raise constitutional concerns in cases where they have the incidental effect of restricting speech.²⁷

First, there is the out-of-pocket cost of purchasing recording equipment. For a single station, radio broadcasters estimate the capital investment for recording equipment could range from \$10,000²⁸ to as much as \$15,000.²⁹ For those seeking to record through computer equipment, a “media logger” computer system could cost approximately \$5,000.³⁰ While the raw dollars cited may not appear daunting at first blush, they would be especially crippling to a small broadcaster operating out of cramped quarters, on a shoestring budget, with no resources (financial or human) to share this unanticipated cost of purchasing recording equipment.³¹

Then there are storage costs. One television station estimates that the proposed rule would require it to generate 540 VHS cassettes for each 90-day retention period, and its three distinct digital

²⁷ See *Miami Herald v. Tornillo*, 418 U.S. 241, 256-57 (1974) (burdens on newspaper to comply with right-of-reply statute, including the “cost in printing and composing time and materials and in taking up space” may lead editors to blunt or reduce election coverage.”); *American Library Association*, 713 F. Supp. at 477 (recordkeeping requirements on adult films are “direct burdens imposed on much material that is clearly protected by the First Amendment”).

²⁸ Declaration of Howard McLaurin, Jr. (McLaurin Decl.) ¶ 3 (copy attached).

²⁹ Declaration of Howard Keller (Keller Decl.) ¶ 3 (copy attached).

³⁰ Declaration of David Paulus (Paulus Decl.) ¶ 3 (copy attached).

³¹ See, e.g., McLaurin Decl. ¶ 3-5; Comments of WCPE (“operating on a bare bones budget”); Comments of Francis E. Wood, Colonial Broadcasting Co. (citing costly burden on small stations that will be required to purchase extra storage and hire extra personnel to complete this “overwhelming task”); Comments of Family Radio Network (citing “tremendous burden” placed on small non-profit Christian ministry).

television streams would generate and additional 1,620 cassettes.³² That's more than 2,000 tapes that a single station would be required to purchase and store every three months. Worse, some small broadcasters literally operate out of a single room and simply have no place to store tapes without enduring the costs of securing additional storage space.³³ For broadcasters who plan to store the recordings digitally, the computer storage capacity required to archive 60 to 90 days of material could cost \$1,000 (not including recording costs).³⁴

Finally, there are the labor costs, specifically the cost to record, monitor, and perform maintenance on the equipment. Small broadcasters are hit particularly hard by this requirement because, in some cases, they could be forced to add burdens on already busy employees or to hire additional staff they cannot afford. As one commenter pointedly asks:

We would also have to budget for extra payroll in order to accomplish the task. Whom on our morning staff would the Commission suggest be replaced? Our News Director? Our Morning Show host? Our Public Service director?³⁵

What makes these new burdens most offensive is that almost all of the costs will be borne by stations that fall far outside the scope of the Commission's enforcement activities—including religious programmers, classical music stations, and small family-run stations—many which have filed individual comments in this proceeding to protest the applicability of the rule to their

³² Declaration of Robert G. Lee (Lee Decl.) ¶ 3 (copy attached).

³³ McLaurin Decl. ¶ 5.

³⁴ Comments of David Gordon, WNCW.

³⁵ Comments of John T. Schick, Piedmont Communications, Inc.

circumstances.³⁶ Aside from the fact that the rule does nothing to allocate the costs and burdens to those most likely to be the subject of the Commission's enforcement activities, the proposed rule raises a serious question whether the Commission has sufficiently considered the costs upon small broadcasters as required by the Regulatory Flexibility Act or whether the rule will pass muster under the Paperwork Reduction Act if it ultimately is submitted to the Office of Management and Budget for review.

III. The Proposed Rule Is at Odds with the Commission's Promotion of Localism

The proposed recording and retention rule highlights the obvious tension between the Commission's promotion of localism and its efforts to restrain indecent and profane broadcasts. While localism requires stations to air local programming that is most responsive to the needs and interests of the community,³⁷ the Commission's new indecency rules actually *increase* the risk that broadcasters may be held liable for the content of such programs.

³⁶ See, e.g., Comments of Family Radio Network, Inc. (“[B]ecause all our programming is family oriented, this proposal and the resulting financial and labor expenses would be a waste of our time and money”); Comments of WCPE (“It is illogical and unrealistic to place extra regulatory burdens on small broadcasters, especially non-profit broadcasters for highly unlikely future speculation.”); Comments of John T. Schick, Piedmont Communications, Inc. (“In the absence of any complaint history, why does it make sense for our company to be unfairly burdened with this new record keeping requirement[?]”); Comments of William A. Reck, WPTL (“I have been in broadcasting since 1958 and have experienced a total of 3 involuntary possible indecency occurrences . . . none resulted in [a] complaint”).

³⁷ The concept of localism is steeped in broadcasters' public interest obligation, as stewards of the public airwaves, to “provide the first local service to a community” and is furthered by “a recognition of local needs for a community radio mouthpiece.” *In the Matter of Broadcast Localism*, FCC 04-129, ¶ 2 (rel. July 1, 2004) (“*Localism NOI*”). To that end, a number of the Commission's rules, policies, and procedures “reflect the Commission's overarching goal of establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities.” *Id.* ¶ 4.

The Commission recently launched a Localism Task Force charged with conducting a series of public hearings across the country to determine how well broadcasters are serving the needs and interests of their local communities.³⁸ A station's commitment to localism is often measured by the quantity and quality of its local news, information, and public affairs programming.³⁹ Much of this local programming is live and unscripted—from on-the-spot coverage of courthouse news to local call-in shows that invite audiences to debate issues of public concern. Broadcasters may further connect with their local audiences through live broadcasts of events that are of specific interest to their community, such as high school football games or weekend “swap shop” radio call-in programs where listeners can buy, sell or trade items over-the-air.⁴⁰

³⁸*Localism NOI*, ¶ 6; Press Release, “FCC Chairman Powell Launches ‘Localism in Broadcasting Initiative,’” at 2-3 (rel. Aug. 20, 2003).

³⁹ *Localism NOI*, ¶ 5; 2002 *Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 (2003), ¶ 79 (“We agree that the airing of local news and public affairs programming by local television stations can serve as a useful measure of a station's effectiveness in serving the needs of its community.”). Commission Adelstein recently described the importance of local programming in this manner:

Localism is an integral part of serving the public interest . . . It means being alert and notifying the community of crisis situations. It means being accessible, sending reporters and cameras out to all parts of the community to cover not just the problems but the positives as well. It means airing sufficient programming responsive to community needs, and making programming decisions that truly serve and reflect the makeup of the community.

Localism NOI (Statement of Commissioner Jonathan S. Adelstein, approving in part and concurring in part).

⁴⁰ For example, WPTF in Raleigh, North Carolina airs a “Triangle Trader” program on Sundays from 12-3 p.m. <<http://www.wptf.com/showdj.asp?DJID=15977>> (last visited August 26, 2004), and WESR in Onley, Virginia airs a “Swap Shop” every day from 2-3 p.m. and every
(continued...)

Unfortunately, the very local programs that best reflect a station's commitment to localism are the same local programs that run a high risk of violating the Commission's new indecency rules. Live, on-the-spot coverage of local events occurs in uncontrolled, unscripted, and often highly-emotional environments—the throes of a political protest or the locker room of a losing basketball team thwarted by yet another buzzer-beater. Live call-in programs that allow listeners and viewers to debate politics or exchange emergency weather information are equally unscripted and carry the same risk that a caller may utter indecent material over the air without warning. Broadcasters are left, then, with a classic Catch-22—they can either increase the amount of live local programming and risk incurring potentially back-breaking fines for airing these very programs or they can reduce the amount of live local programming and risk failing to fulfill their public interest obligation as broadcast licensees to promote localism.

Requiring broadcasters to record and retain these programs simply exacerbates this Catch-22. Because the Commission's stated purpose for the rule is to allow it to scrutinize programs for potential indecency violations, the rule gives broadcasters yet another disincentive to air the type of live local programming the Commission seeks to promote through its localism initiatives. And, from a practical standpoint, it is not outside the realm of possibility that some may abuse the Commission's enforcement process by filing frivolous complaints simply to force a station to constantly comb through its recordings to prove that no indecent broadcast occurred. Until the

⁴⁰(...continued)

Saturday from 9-10 a.m. <<http://www.wesr.net/swapshop>> (last visited August 26, 2004). Lest there be any doubt that the content of small-market swap shops can spur legal action, one need look no further than the so-called “ugly man case,” in which a plaintiff sued the host of a local radio “swap shop” program who allegedly claimed the plaintiff was “the ugliest man in Danville.” See *Motsinger v. Kelly*, 11 Med. L. Rptr. 2459 (Va. Cir. Ct. 1985).

Commission harmonizes its efforts to restrict indecent and profane broadcasts with its efforts to promote localism, the proposed rule will create a bigger public interest problem than the one it proposes to solve.

IV. The Proposed Rule Raises Serious Concerns Regarding Copyright Liability

The proposed rule also could expose broadcasters to potential liability for infringing the copyrights of content providers. Congress has granted the owner of a copyright in radio and television programming the exclusive rights in their protected works. This means the copyright holder has the exclusive right to copy, publish, distribute, transmit or perform that work, as well as the right to grant—or withhold—licenses permitting others to make specific uses of all or parts of that copyrighted material.⁴¹

The copyright owner may, and often does, grant broadcast stations a license to broadcast (or perform) a program, but not to record (or copy) it. Indeed, several networks have affiliation agreements with local television stations that forbid stations from making copies of broadcast programs. Complying with the proposed rule, therefore, would place many broadcasters in a perilous predicament—either negotiate for a separate copyright to record radio and television programs (which would entail a series of both practical and monetary burdens) or face potential exposure for copyright liability.⁴²

⁴¹ See 17 U.S.C. § 106 (grant of exclusive rights); *id.* §§ 107-122 (statutory exceptions to exclusive rights).

⁴² To the extent the Commission's proposed rule arguably attempts to create a compulsory license by requiring stations to make and retain copies of a copyrighted work without the copyright (continued...)

Requiring the recording of entire broadcast programs for the benefit of a regulatory agency may not qualify as a “fair use” exception to the copyright law. The fair use exception contemplates the judicious use of a copyrighted work for “purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research,”⁴³ focusing specifically on “nonprofit educational” purposes.⁴⁴ But there is no precedent for the proposition that this exception extends to deprive copyright holders of their exclusive rights for the convenience of a federal regulatory agency. Moreover, whether a use is “fair” depends in part on the “amount and substantiality of the portion used in relation to the copyrighted work as a whole[.]”⁴⁵ The wholesale copying of entire works, not by just one but by hundreds of licensees, likely exceeds reasonable conceptions and existing understandings of the amount of use that is “fair.” Finally, whether a use is fair depends in part on “the effect of the use upon the potential market for or value of the copyrighted work.”⁴⁶ The Commission’s proposed “use” is nothing more than requiring a broadcaster to tape and to store programs, at significant expense, so that these very tapes can be used as evidence against the broadcaster in potential criminal prosecutions⁴⁷ or Commission proceedings that could result in forfeitures or even license revocation

⁴²(...continued)

owner’s consent, the Commission lacks such authority. It is Congress, not the Commission, that “has been assigned the task of defining the scope of [rights] that should be granted to authors or inventors[.]” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

⁴³ 17 U.S.C. § 107.

⁴⁴ *Id.* § 107(1).

⁴⁵ 17 U.S.C. § 107(3).

⁴⁶ 17 U.S.C. § 107(4).

⁴⁷ 18 U.S.C. § 1464.

or nonrenewal.⁴⁸ When the “price” of broadcasting a copyrighted work includes these considerable burdens and onerous consequences, this can have only deleterious effects on the potential market for or value of the work.⁴⁹

Conclusion

For the reasons discussed above, the Commission should not adopt any rule requiring the recording and retention of broadcast programming.

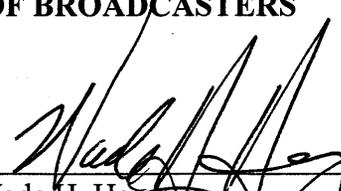
⁴⁸ See 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D).

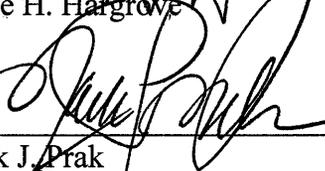
⁴⁹ Nor does the proposed records retention rule fit within the exception allowing broadcast licensees to make “ephemeral recordings.” See 17 U.S.C. § 112. This statutory provision applies only to nonsubscription transmission of digital, not analog, recordings, and the Commission’s proposed rule applies to all programming.

Respectfully submitted this 27th day of August.

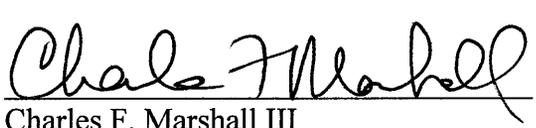
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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)	
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Retention by Broadcasters of)	MB Docket No. 04-232
Program Recordings)	
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DECLARATION OF HOWARD McLAURIN, JR.

1. My name is Howard McLaurin, Jr. I am the General Manager of WKDX AM ("WKDX"). My business address is P.O. Box 827, Hamlet, NC 28345.

2. The purpose of this Declaration is to provide information in opposition to the Commission's proposal to require broadcasters to tape all programming aired between 6:00 a.m. and 10:00 p.m. and to maintain these tapes for a period of sixty (60) to ninety (90) days.

3. WKDX is a small broadcasting operation. If the Commission's proposal were to be implemented, the station would have to purchase new equipment to record and archive our broadcasting. The station has estimated this total cost of equipment at between \$10,000 and \$12,000 in initial capital investment. This does not include the cost of equipment maintenance or replacement. WKDX does not have the financial capability to purchase this new equipment.

4. In addition, the Commission's proposal would have a tremendous impact on the WKDX's labor costs. Currently, the station employs eight (8) people, who are responsible for all aspects of station operations. If the Commission's proposal were to be implemented, the station would be forced to hire at least one (1) additional person to be responsible for the operation and maintenance of the recording equipment, to ensure that the station is properly complying with the regulation. In addition to the cost of an additional employee or additional employees, the station

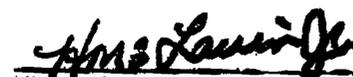
would also have to invest in training these new employees on proper operation and maintenance of the equipment. WKDX does not have the financial capability to retain this additional staff.

5. Finally, the Commission's proposal would create a serious challenge for WKDX on the issue of housing the new equipment and storing the recording devices. The station operates out of a fifteen (15) by eighteen (18) foot studio. Presently, we have too little room in this small facility for our broadcasting equipment and employees. If the Commission's proposal were to be implemented, I am unsure where the station would find room to install the new recording equipment. Further, assuming the proposal requires retention of the recordings, there is no space in the studio in which to house the excess tapes and/or other recording devices.

6. In short, the Commission's proposal would create serious financial problems for WKDX. The cost of equipment, labor, and storage would place a burden on the station that I am not certain it could bear.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 26, 2004.



Howard McLaurin, Jr.
General Manager
WKDX AM

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:

Retention by Broadcasters of
Program Recordings

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MB Docket No. 04-232

DECLARATION OF HOWARD KELLER

1. My name is Howard Keller. I am the Director of Operations for ESPN Radio WXGI 850 AM ("WXGI"). My business address is 701 German School Road, Richmond, VA 23225.

2. The purpose of this Declaration is to provide information in opposition to the Commission's proposal to require broadcasters to tape all programming aired between 6:00 a.m. and 10:00 p.m. and to maintain these tapes for a period of sixty (60) to ninety (90) days.

3. The Commission's proposal would place a financial burden on WXGI that is insurmountable. In order for WXGI to have the capability to record the programming required by the proposed regulation, the station would have to invest approximately \$15,000 in equipment alone. This figure does not include labor costs, which would be substantial.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 26, 2004.


Howard Keller
Director of Operations
ESPN Radio WXGI 850 AM

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:

Retention by Broadcasters of
Program Recordings

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MB Docket No. 04-232

DECLARATION OF DAVID PAULUS

1. My name is David Paulus. I am the General Manager of WAFX (FM), WNOR (FM), and WJOI (AM) in the Norfolk, Virginia area. My business address is 870 Greenbrier Circle, Chesapeake, VA 23320. I am also the President of the Virginia Association of Broadcasters.

2. The purpose of this Declaration is to provide information in opposition to the Commission's proposal to require broadcasters to tape all programming aired between 6:00 a.m. and 10:00 p.m. and to maintain these tapes for a period of sixty (60) to ninety (90) days.

3. If the Commission were to adopt this proposal, the stations would most likely purchase a "media logger" computer system. This system would require constant monitoring by a station employee, either an engineer or some other person designated to do that function. The system itself would cost approximately \$5,000. As the system is computer-based, it would most likely need replacing every four to five years, if not sooner, in response to changes in operating systems and deterioration of the system.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 27, 2004.



David Paulus
General Manager
WAFX (FM) , WNOR (FM),
and WJOI (AM).

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:

Retention by Broadcasters of
Program Recordings

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MB Docket No. 04-232

DECLARATION OF WILLIAM D. FAWCETT

1. My name is William D. Fawcett. I am the Director of Engineering for WMRA Public Radio Network ("WMRA"), consisting of four FM broadcast stations licensed to the James Madison University Board of Visitors. My business address is 821 South Main Street, Harrisonburg, Virginia, 22807.

2. The purpose of this Declaration is to provide information in opposition to the Commission's proposal to require broadcasters to tape all programming aired between 6:00 a.m. and 10:00 p.m. and to maintain these tapes for a period of sixty (60) to ninety (90) days.

3. The Commission's proposal would place a difficult burden on WMRA. The station recently installed reasonably-priced computer software on a computer that was not being used for any other purposes to record the station's broadcasting. While the system worked successfully for a few months, it recently experienced a ten-day shutdown that led to a ten-day "gap" in the recording and archiving of station broadcasts. In order to conclusively protect against this type of technical failure, WMRA likely would have to take expensive steps, such as installing and operating multiple redundant computers with program recording software. Further, employees of the station would have to operate and maintain this system. The present

proposal would place a heavy burden on my stations' limited budget and our station employees' already limited time and, thus, compliance would create a substantial hardship on our station.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 24, 2004.



William D. Fawcett
Director of Engineering
WMRA Public Radio Network

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Retention by Broadcasters of
Program Recordings

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MB Docket No. 04-232

DECLARATION OF ROBERT G. LEE

1. My name is Robert G. ("Bob") Lee. I am the President and General Manager of WDBJ Television, Inc. ("WDBJ"). My business address is 2807 Hershberger Road NW, Roanoke, VA 24017.

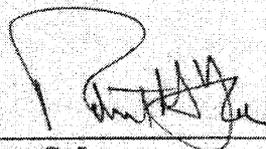
2. The purpose of this Declaration is to provide information in opposition to the Commission's proposal to require broadcasters to tape all programming aired between 6:00 a.m. and 10:00 p.m. and to maintain these tapes for a period of sixty (60) to ninety (90) days.

3. The Commission's proposed requirement would be a particularly burdensome task for local television stations. Assuming the new requirement would allow recording on a consumer-type videotape (such as VHS cassettes), each such tape can hold, at most, four (4) hours of broadcasting. Recording twenty-four (24) hours of broadcasting per day would generate five-hundred and forty (540) cassettes per ninety (90) days. Further, WDBJ broadcasts three (3) distinct program streams on its digital channel, which generates an additional sixteen-hundred and twenty (1,620) cassettes per ninety (90) days.

4. I believe that the burden this proposed requirement would place on broadcasters is disproportionate to any public benefit.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 24, 2004.

A handwritten signature in black ink, appearing to read "Robert G. Lee", written over a horizontal line.

Robert G. Lee
President & General Manager
WDBJ Television, Inc.