

**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 )

To: The Commission

**COMMENTS OF CLEAR CHANNEL COMMUNICATIONS, INC.**

Clear Channel Communications, Inc. (“Clear Channel”) hereby submits its comments on the *Notice of Proposed Rulemaking* (the “*NPRM*”) in the captioned proceeding,<sup>1</sup> which proposes a rule requiring that broadcasters retain recordings of their programming. For the reasons that follow, Clear Channel believes that the proposed rule is constitutionally suspect and insufficiently beneficial to outweigh the costs involved. Even were the Commission to adopt a recording requirement despite these flaws, the rule as proposed is unduly broad in scope and should either be limited to indecency violators or streamlined to exclude small-market licensees and programming that is available by other means and/or has little potential for indecent content. Finally, a recording and retention rule would necessitate changes in both the threshold showing and the burden of proof required of an indecency complainant.

**I. The Proposed Rule Is Constitutionally Suspect, and the Benefits of Such a Rule Do Not Outweigh Its Burdens**

This is not the first time that program recording and retention requirements for broadcast stations have been explored. In 1975, Congress enacted (and the Commission promulgated rules to implement) Section 399(b) of the Communications Act, which required all noncommercial educational broadcast stations that received federal funding to make and retain audio recordings

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<sup>1</sup> *Notice of Proposed Rulemaking, Retention by Broadcasters of Program Recordings*, FCC 04-145 (Jul. 7, 2004).

of all broadcasts in which “any issue of public importance” was discussed. Three years later, that statutory provision was struck down as unconstitutional by the U.S. Court of Appeals for the D.C. Circuit in *Community Service Broadcasting of Mid-America v. FCC*.<sup>2</sup> While a majority of the court held Section 399(b) to be unconstitutional on equal protection grounds, Judge Wright’s opinion in *Community* also found the statute to violate the First Amendment. It concluded that Section 399(b) “places substantial burdens on noncommercial educational broadcasters and presents the risk of direct governmental interference in program content.”<sup>3</sup> According to Judge Wright, Section 399(b)’s taping requirement served to “facilitate the exercise of ‘raised eyebrow’ regulation” and thus imposed a “chilling effect” on the exercise of licensees’ First Amendment freedoms.<sup>4</sup> As the *Community* decision observed:

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>5</sup>

Moreover, found the opinion, “no substantial interest ha[d] been shown on the other side of the constitutional balance.”<sup>6</sup> Indeed, even the Commission had “conceded that there is no compelling government objective which can be invoked in support of the statute.”<sup>7</sup> The

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<sup>2</sup> 593 F.2d 1102 (D.C. Cir. 1978) (“*Community*”).

<sup>3</sup> *Id.* at 1105.

<sup>4</sup> *Id.* at 1114, 1116.

<sup>5</sup> *Id.* at 1123.

<sup>6</sup> *Id.* at 1105.

<sup>7</sup> *Id.* at 1111. In response to a query by the court, “the Commission admitted that ‘it is difficult to identify a compelling governmental interest in the requirements of Section 399(b),’ and offered no suggestions as to any purposes which might be so considered.” *Id.* at 1111 n.22.

*Community* court also observed that the Commission, one year earlier, had declined to adopt a requirement that *all* broadcast licensees (both commercial and non-commercial) make and retain recordings of their news and public affairs programming.<sup>8</sup> In that 1977 decision,<sup>9</sup> the Commission itself stated that “the concern that the proposed rule might have a chilling effect on free speech and press cannot easily be dismissed.”<sup>10</sup> But the Commission found it unnecessary to address the constitutional issue, because it “simply [was] not convinced that the public benefits outweigh the costs imposed.”<sup>11</sup> The Commission determined that

[t]he level of interest of the public in such recordings and the level of governmental need for them do not appear to justify the costs imposed on broadcasters. . . . [P]roduction, retention, retrieval and playback of the recordings would cause almost every station to expend money which is now available for public service programming or other purposes. . . . We are concerned that the burden would fall in a disproportionately heavy manner on very small stations. . . . On the other side of the balance we are told that very little public interest has been shown in the tapes produced by the noncommercial educational stations. While there are differences in terms of size or nature of the audiences, we think it is reasonable to expect a similar low level of public interest in the tapes which would be produced by commercial stations if we adopted the proposed rule. We also do not think that taping news and public affairs programs is necessary to resolve fairness doctrine complaints or other alleged misfeasance on the part of broadcasters.<sup>12</sup>

Now, over 25 years later, the Commission has proposed a recording rule that extends more broadly than any of the requirements adopted or considered before. It would require *all* broadcasters to make and retain recordings not just of their news and public affairs

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<sup>8</sup> *Id.* at 1114 n.26.

<sup>9</sup> *Third Report and Order, Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records*, 64 F.C.C.2d 1100 (1977) (the “1977 Decision”).

<sup>10</sup> *Id.* at 1113.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1113-14.

programming, but of *all* programming that they air, at least between the hours of 6:00 a.m. and 10:00 p.m.<sup>13</sup> And while the *NPRM* proposes this sweeping requirement “in order to increase the effectiveness of the Commission’s process for enforcing restrictions on obscene, indecent and profane broadcast programming,”<sup>14</sup> it also seeks comment on whether the recording requirements “should be crafted so that they can be useful to enforcement of other types of complaints based on program content.”<sup>15</sup> The chilling effect of this proposal on broadcasters’ First Amendment freedoms is equally (if not more) obvious here than when both the judiciary and the Commission recognized it several decades ago. The threat of “raised eyebrow” regulation from a wholesale recording requirement will almost certainly lead broadcasters to alter the content of programs of all types to steer clear of governmental sanction. The proposed rule raises serious First Amendment concerns.

Nor is the cost/benefit calculus of the proposed rule any different now than when the Commission, in 1977, determined that the balance tilted *against* a recording requirement. The *NPRM*’s only stated justification for the rule is to “ensure that the Commission has a complete record” in an indecency/obscenity/profanity investigation:

Because the specifics and context of the broadcast are critical to the determination of whether material is obscene, indecent, or profane, the more information the Commission can have in its possession about a program when it concludes an investigation and decides whether or not to initiate an enforcement proceeding, the more informed a decision it can make.<sup>16</sup>

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<sup>13</sup> The *NPRM* further inquires whether “the benefits of this additional enforcement tool” justify applying it 24 hours a day. *NPRM*, ¶ 7.

<sup>14</sup> *NPRM*, ¶ 1.

<sup>15</sup> *Id.*, ¶ 7.

<sup>16</sup> *Id.*, ¶¶ 6-7.

But at the same time, the *NPRM* acknowledges that, in order for a complaint to be considered, the complainant “must provide sufficient information regarding the content at issue to place it in context.”<sup>17</sup> And it further notes that where the complainant has provided sufficient context, and the licensee cannot confirm or deny the allegations (presumably by means of a tape or transcript it has voluntarily maintained), the Commission will hold that the broadcast occurred.<sup>18</sup> In other words, under existing Commission procedures a complainant must supply the “specifics and context” of an alleged indecent, obscene or profane broadcast in the first instance and, where the complainant has done so, the absence of a recording has not prevented the Commission from taking enforcement action. Under these circumstances, the net benefit to the Commission’s enforcement process of having *mandated* recordings of questioned broadcasts is marginal at best. As noted above, in its *1977 Decision* the Commission found the taping of news and public affairs programming unnecessary to resolve “alleged misfeasance on the part of broadcasters.” The *NPRM* supplies no persuasive explanation why a recording requirement is necessary for the same reason now.

On the other side of the balance, the costs that the Commission last time decided outweighed the benefits of a recording requirement would be just as extreme under the instant proposal. As in 1977, a recording requirement “would cause almost every station to expend money which is now available for public service programming or other purposes.” And as in 1977, the burden of such a rule “would fall in a disproportionately heavy manner” on smaller stations. The *NPRM* proposes that all broadcast stations record and store no less than 16 hours a day of their programming, and possibly more. Developments in digital recording and storage may ease that burden for operators with the resources to employ such technology. But large

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<sup>17</sup> *Id.*, ¶ 4.

<sup>18</sup> *Id.*, n.9.

numbers of stations will be required to invest in additional digital storage capacity, and virtually every station will need to expend additional resources in hiring and training personnel and developing systems and procedures to implement a recording requirement. Moreover, the burden of the proposed rule will fall most heavily on the stations that lack the resources necessary to acquire digital technology, most of which will be financially marginal stations and/or stations in small markets. The costs the rule would impose on those stations—either to obtain new technology or to record and physically store a minimum of 16 hours of programming a day—are certain to be staggering. In all cases, the costs to broadcasters plainly outweigh the minimal net public interest benefit of a recording requirement.

In short, the Commission’s proposed rule presents serious First Amendment concerns. The benefits of such a rule to the agency’s enforcement process are marginal. But the costs of such a rule—particularly to small-market broadcasters and financially struggling stations—would be inordinate. For all these reasons, the *NPRM*’s recording requirement would disserve the public interest and should not be adopted.<sup>19</sup>

## **II. A Recording Requirement, if Adopted, Must Be Far More Narrowly Tailored Than the Proposed Rule**

Even were the Commission to adopt a recording and retention requirement despite such a rule’s constitutional problems and marginal benefits, the Commission’s proposal sweeps far too broadly. As of June 30, 2004, there were 13,486 radio stations and 1,747 television stations nationwide.<sup>20</sup> Clear Channel’s analysis indicates that since 1996, the Commission has issued a

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<sup>19</sup> Moreover, it is far from clear that broadcasters’ compliance with the proposed rule would comport with copyright law. For instance, 17 U.S.C. § 112(a) permits a station under certain circumstances to make “no more than one copy” of copyrighted sound recordings that it airs, but that copy must be “retained and used solely by the transmitting organization that made it, and no further copies or phonorecords [may be] reproduced from it.” 17 U.S.C. § 112(a)(1)(A). A licensee’s submission to the Commission of recorded programming for review in an investigation, to the extent the recording included copyrighted material, would appear to fall outside this exemption, and it is not settled that such reproduction would qualify for the “fair use” exemption from the copyright laws.

<sup>20</sup> See FCC News Release, “Broadcast Station Totals as of June 30, 2004” (Aug. 20, 2004).

total of 52 notices of apparent liability (NALs) for indecency violations against 44 broadcast stations.<sup>21</sup> That enforcement activity represents a mere 0.29% of the total number of operating stations, and the percentage is infinitesimal when the aggregate duration of the offending broadcasts is calculated against the thousands and thousands of hours of broadcast programming aired by stations nationwide. Given these facts, there is no conceivable justification for imposing the substantial costs of a recording requirement on all stations. If any recording and retention rule is adopted, Clear Channel suggests that it be imposed only on stations that have been issued NALs for indecency violations. Thus, the issuance of an indecency NAL could serve as a trigger for a requirement that the sanctioned station make and retain recordings of programming for a limited period of time (*e.g.*, 60 or 90 days). By applying a recording requirement only to indecency violators—those stations whose conduct arguably has been such as to warrant additional requirements—the Commission at least will have added some degree of rationality to the requirement’s scope.

Should the Commission nonetheless apply a recording and retention requirement more broadly to encompass stations with no history of indecency noncompliance, the rule should at a minimum exclude certain types of programming and stations in smaller markets. With respect to programming, a recording requirement should not apply to news and public affairs programs, which lie at the core of First Amendment protection and pose relatively little risk of indecent, obscene or profane content. Nor should it apply to songs played on radio stations (which are publicly available), to advertisements (which are already in recorded form), or to network and syndicated radio and television programs (which are not produced by the station and in most cases can be obtained from the network or syndicator if necessary in an investigation). Limiting

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<sup>21</sup> The number of stations excludes stations that simulcast the identical programming at issue.

the types of programming to which a recording requirement applies will at least ease the burdens of such a requirement to a degree.

In addition (or at least alternatively), stations in smaller markets should be exempt from any recording requirement. As is discussed in Section I above, the costs of a recording and retention rule will hit small-market broadcasters hardest, as such owners are most likely the least able to afford the expenses necessary to record and retain substantial amounts of programming. Moreover, Clear Channel's analysis indicates that 75% of the indecency NALs from 1996 to the present were issued to stations in top 50 markets. Thus, not only will small-market broadcasters disproportionately bear the burden of a recording requirement, but historical data shows that indecency violations are far less likely to occur in markets below the top 50. There is ample justification for excluding small-market broadcasters from any recording requirement.

Finally, Clear Channel concurs with the *NPRM* that any recording and retention rule should permit low bit-rate recording to conserve expenses and storage space. This is particularly important for television stations, given the large size of digital video files. Also, digital equipment for archival of recordings is far from perfect, and in a digital context, equipment failure often results in a total loss of recorded material (as contrasted with analog recording, where equipment failure just as often results in a recording of poor quality). Should it adopt a recording requirement, the Commission should be aware that there will be cases in which recordings will prove to be unavailable due to equipment or computer failure despite the broadcaster's best compliance efforts.

### **III. Any Imposition of a Recording and Retention Requirement Necessitates Changes in The Commission's Indecency Complaint Procedures**

Regardless of its scope, any program recording and retention requirement that the Commission adopts must require conforming changes in the agency's procedures for handling indecency complaints. First, the Commission must enforce stringent requirements for an

actionable complaint in order to deter “fishing” reviews of large amounts of recorded station programming without cause for investigation. A complainant must be required to state with specificity (1) the call sign or other specific identification of the station; (2) the date of the cited broadcast; and (3) the time of the cited broadcast or, at a minimum, an approximation of the time within one hour.<sup>22</sup> Moreover, even in the presence of a recording requirement, a complainant must be required to provide information about the nature of the broadcast that is sufficiently specific to establish, if true, a violation of a Commission rule. For instance, a complainant’s allegation that he/she heard a “bad word” or a “sexual discussion” should not justify a request for a recording. The Commission must enforce these specificity requirements rigorously. A recording and retention mandate should not be allowed to serve as a path to wholesale review of licensee programming based on vague complaints. Allowing such “fishing” by complainants would waste scarce Commission enforcement resources in undertaking prolonged and unfocused reviews of vast amounts of recorded programming, and would divert licensee time and resources (particularly those of station programmers) from serving their listening and viewing audiences while responding to such reviews.

Second, the expiration of any recording requirement’s retention period (whether 60 or 90 days, as the *NPRM* proposes) must shift to the complainant the burden of proof to provide a tape or transcript of the questioned programming. It would be fundamentally unfair for a licensee to make its required recordings, retain those recordings for the prescribed period, discard the recordings afterward, but nonetheless remain subject to investigation and sanctions based on a complaint submitted without a tape. Thus, upon the expiration of the recording retention period,

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<sup>22</sup> For example, a complainant’s allegation that a broadcast occurred “this morning” should be rejected as insufficiently specific, since such an allegation could conceivably lead to review of six or more hours of recorded programming.

the Commission must require any complainant to submit a full tape or transcript of the broadcast at issue and dismiss any complaint that supplies anything less.

**Conclusion**

A program recording and retention rule raises serious First Amendment concerns. The Commission and the judiciary have previously acknowledged the chilling effect on broadcasters' programming decisions that mandatory recording—and the associated threat of government review and sanction—present. In addition, the Commission has determined once before that a program recording rule was insufficiently beneficial to outweigh the costs involved to broadcasters. That balance is no different today, particularly in view of the *NPRM*'s sweeping proposal to mandate wholesale taping of 16 hours or more per day of a station's programming.

If the Commission nonetheless decides to adopt a program recording requirement despite these problems, it must at a minimum narrow the rule's applicability to adjudicated indecency violators, or at least limit the rule to certain types of programming and/or stations in larger markets. And if any recording requirement is adopted, the Commission must alter its complaint procedures to protect licensees from wholesale "fishing expeditions" into their program recordings.

Respectfully submitted,

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August 27, 2004