

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**JOINT COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS**

Richard R. Zaragoza
David D. Oxenford
Paul A. Cicelski

*Counsel for the Named
State Broadcasters Associations*

SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000

Dated: August 27, 2004

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SUMMARY

The Associations appreciate the opportunity to provide their views on the Commission's proposed rule that all commercial and noncommercial AM, FM, and television broadcasters record all of their programming between 6 a.m. and 10 p.m., and perhaps for the entire day. Each of the Associations is chartered to help create and maintain a regulatory and economic environment conducive to the growth of the free, locally based, over-the-air, full service radio and television broadcast industries in their respective states and territories. As such, each Association has a direct interest in this matter because their collective membership includes entities providing thousands of channels of local television and radio broadcast services to their communities. Those efforts will be adversely impacted by the proposed Mandatory Recording/Retention Requirement which is unnecessary, unjustified, arbitrary and capricious, and unconstitutional.

The Associations are strongly opposed to the proposed rules. For more than 70 years broadcasters have been regulated by the FCC without any requirement that they record for later government scrutiny everything broadcast over their airwaves. As the Commission is aware, it has been fully able to effectively enforce its indecency regulations in the absence of the burdensome Mandatory Recording/Retention Requirement proposed here. Indeed, the NPRM suggests that such a regulation is necessary because between 2000 and 2002, 169 complaints, or 1% of the more than 14,379 indecency-based complaints processed, had to be either dismissed or denied "for the lack of a tape, transcript, or significant excerpts." In other words, in 99% of the cases adjudicated during that period the Commission had sufficient information available to it to make an informed judgment to proceed with the indecency complaints before it. Requiring some

16,000 radio and television stations nationwide to record hundreds of thousands of hours of programming and to retain those records is simply not necessary.

Furthermore, the costs associated with implementing the proposed Mandatory Recording/Retention Requirement further highlights the inappropriateness of this unnecessary regulation. The compliance costs will be extremely burdensome for all broadcasters, and will disproportionately burden small market broadcasters. In addition to costs associated with the purchase and installation of new equipment, broadcasters would be further burdened by the substantial costs associated with maintaining the system, ensuring that there is a back-up system available in case the primary system fails, personnel requirements for monitoring of the recording equipment, retention space for the recorded programming, and other costs which would further increase the overall cost of recording and retaining a station's programming. Given the widespread economic burdens likely to be caused by adoption of the proposed Mandatory Recording/Retention Requirement, there is no valid justification for the otherwise unnecessary and overbroad regulation.

Moreover, the Commission's proposed regulations would fail First Amendment scrutiny as a very serious question is raised as to whether the government's interest in this regulation is substantial or even significant. This is particularly true given (1) the FCC's already high closure rate of 99% of indecency complaints as suggested by the 2000-2002 data provided by the FCC in its NPRM, (2) the likelihood that current data will show a virtually 100% closure rate, and (3) a 70 year history of regulating the broadcast industry without such a regulation. Even assuming that the government's interest is somehow significant, the proposed regulations are far more broad and burdensome than is necessary to uphold the indecency standards. As a result, the FCC should not adopt its proposed regulations.

Finally, the NPRM is so vague that it denies the broadcasters and the public adequate notice of what rules the FCC is intending to adopt. While an administrative agency need not provide the full regulations that it is proposing for public comment in a Notice of Proposed Rulemaking, the agency must provide sufficient notice to give the public the opportunity to comment on all aspects of the proposed regulations. Here, the Commission simply has made one proposal and posed a number of vague questions, leaving unaddressed many issues of importance to the resolution of this proceeding. As a result, the subject of this NPRM is more properly the subject of a Notice of Inquiry where the Commission can receive public comment and, with the benefit of that input, focus its consideration and then make proposals for specific regulations.

For all these the reasons, the Associations strongly urge the Commission to decline to adopt the proposed unjustified Mandatory Recording/Retention Requirement that will unnecessarily impose huge out of pocket costs and manpower burdens across the entire broadcast industry, with such costs and burdens falling disproportionately on the shoulders of the small market broadcasters, and will chill broadcast speech. Simply put, there is absolutely no valid reason for this Commission to depart from 70 years of communications regulation by adopting the proposed regulation.

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South

Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the “Associations”), by their attorneys in this matter and pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly submit their comments in response to the Commission’s Notice of Proposed Rulemaking¹ in the above captioned proceeding.

I. INTRODUCTION

The Associations appreciate the opportunity to provide their views on the Commission’s proposed rule that all commercial and noncommercial AM, FM, and television broadcasters record all of their programming between 6 a.m. and 10 p.m., and perhaps for the entire day (the “Mandatory Recording/Retention Requirement”). Each of the Associations is chartered to help create and maintain a regulatory and economic environment conducive to the growth of the free, locally based, over-the-air, full service radio and television broadcast industries in their respective states and territories. As such, each Association has a direct interest in this matter because their collective membership includes entities providing thousands of channels of local television and radio broadcast services to their communities. Those efforts will be adversely impacted by the proposed Mandatory Recording/Retention Requirement which is unnecessary, unjustified, arbitrary and capricious, and unconstitutional.

The Associations are strongly opposed to the proposed rules. For more than 70 years broadcasters have been regulated by the FCC without any requirement that they record for later

¹ *Retention by Broadcasters of Program Recordings*, Notice of Proposed Rulemaking, MB Docket No. 04-232, 19 FCC Rcd 13323 (2004) (“NPRM”).

government scrutiny everything broadcast over their airwaves. The overly broad and burdensome nature of the proposed Mandatory Recording/Retention Requirement is readily apparent. It is only the justification for such a requirement that is not apparent. Only 1% of the more than 14,000 indecency cases disposed of by the FCC during a two year period could not be pursued because there was insufficient evidence upon which the Commission could determine whether a violation of the indecency rules had occurred. This minute fraction of more than 14,000 indecency cases adjudicated by the Commission during this period alone is an inadequate basis for the proposed Mandatory Recording/Retention Requirement. Furthermore, as shown below, the Associations oppose the Commission's proposal on four separate but interrelated grounds.

II. DISCUSSION

A. The Need for the Mandatory Recording/Retention Requirement is Unjustified and Unsupportable

This is the first time in the FCC's history that it has proposed a mandatory recording and retention requirement for all broadcast stations, of every type, covering the bulk and perhaps all of the broadcast day. The NPRM suggests that such a regulation is necessary because between 2000 and 2002, 169 complaints, or 1% of the more than 14,379 indecency-based complaints processed, had to be either dismissed or denied "for the lack of a tape, transcript, or significant excerpts."² In other words, in 99% of the cases adjudicated during that period the Commission had sufficient information available to it to make an informed judgment to proceed with the indecency complaints before it. Requiring some 16,000 radio and television stations nationwide to record hundreds of thousands of hours of programming and to retain those records, simply in

² NPRM, n.8.

order to insure a perfect record 100% of time, is unnecessary, overbroad, and arbitrary and capricious.

The arbitrary and capricious nature of the proposed requirement is obvious when one considers that the factual record on which this NPRM is based is already two to four years old. Furthermore, the FCC has not provided its “closure” data for 2003 or later. In addition, the FCC’s “closure” rate since 2000-2002 has surely risen to essentially 100%. In a series of decisions beginning in early 2004, the Commission itself closed the very “loophole” that is the apparent basis for this rule making by holding that a particular broadcast was deemed to have occurred where the “licensee can neither confirm nor deny the allegations of indecent broadcasts in a complaint....”³ The general public, including advocacy groups, are well aware of the role that they play in bringing specific indecency complaints to the attention of the FCC. The general public and the broadcast industry know that their indecency complaints will be taken seriously by the FCC. The FCC has not hesitated to impose heavy fines on a small handful of individual broadcast licenses which have violated the indecency regulations. Congressional legislation to drastically increase the fines for indecency violations and the threat of license revocation proceedings have placed broadcasters on notice that the airing of obscene, indecent, or profane material raises very serious issues before the FCC. There is no suggestion that the currently filed complaints lack the kind of information that the Commission needs to make informed decisions whether to proceed with letters of inquiry to stations. In short, this rule making cannot logically or legally proceed based on 2000-2002 data which is both inadequate on its face, and clearly outdated.

³ NPRM, n.9.

The broadcast industry has responded constructively in this area of FCC regulation. Those stations which have been the subject of indecency complaints and substantial fines, as well as other broadcasters, have re-emphasized their “zero tolerance” in this area of on-air policies and practices. They have instituted specialized training for on-air personnel and others involved in programming decisions. They have terminated employees and program vendors. The National Association of Broadcasters has held a summit on the issue and continues to strongly encourage all members of the broadcast industry to make full compliance with indecency regulations one of their highest priorities. In these circumstances, it would be arbitrary and capricious for the FCC to impose unnecessary, overbroad, and costly recording and retention regulations on all stations, especially given the fact that indecency-based complaints have involved only a minute number of broadcasters. For example, what is the purpose of burdening religious broadcasters, or broadcasters whose stations are devoted to the airing of children’s programming, with the proposed regulations? And what is the public interest justification for chilling speech and burdening all broadcasters irrespective of their previous history of compliance? The Associations submit that there is none.

Under its enforcement authority, the Commission has the inherent power, in appropriate circumstances and on a case by case basis, to require a particular station to record certain programming and to make the recordings available to the FCC upon request. For example, where there is a history of repeated indecency noncompliance by a licensee, the Commission may, in addition to fining the licensee, impose a going forward record/retention requirement targeting the station’s program or day-part which was the subject of the indecency complaint in order to monitor for future indecency violations for a limited period of time. Accordingly, in this rule making, the most the Commission should do is remind broadcasters of its discretion to

require recording and retention in appropriate circumstances on a case-by-case basis. That way every station would be on notice that their best defense against indecency complaints would be to initiate their own recording and retention program on a voluntary basis so that they can defend themselves on the facts.

In sum, the record in this proceeding does not evidence any need or valid justification for the Commission's proposed Mandatory Recording/Retention Requirement.

B. The Regulation Will Impose Unjustified Financial Burdens on all Stations and Will Disproportionately Impact Small Broadcasters

The cost of implementing the proposed Mandatory Recording/Retention Requirement further highlights the inappropriateness of this unnecessary regulation. To date, virtually all of the comments filed in this proceeding strenuously oppose the implementation of the NPRM's proposals based on the high cost of implementation of a recording and retention system. Estimates range from \$1,500 per station, merely to install the necessary equipment,⁴ to in excess of \$5,000 for purchase and installation fees.⁵ These cost analyses do not take into account the cost of maintaining the system, ensuring that there is a back-up system available in case the primary system fails, personnel requirements for monitoring of the recording equipment, retention space for the recorded programming, and other costs which would substantially increase the overall cost of recording and retaining a station's programming.

Few, if any, of the recent indecency complaints have been lodged against small market stations, yet these are the stations for which the cost of compliance with the Mandatory Recording/Retention Requirement will be especially onerous. The cost of equipment to record and retain a station's programming is the same whether the equipment is purchased in

⁴ See Comment filed on behalf of Burbach of DE, LLC (July 21, 2004) and Comment filed on behalf of Keymarket Licenses, LLC (July 21, 2004).

⁵ See Comment filed on behalf of Bruce Goldsen (July 14, 2004).

Washington, D.C. or Omaha, Nebraska. Small market stations have only a fraction of the advertising revenue generated by large market stations. Small market stations would have to divert scarce resources to purchase, install, and operate recording/retention equipment, resources that could be put to better use covering local news, emergencies, high school sports, or city council meetings, and helping the station make the transition to digital. Requiring all small market broadcasters to bear this burden, when they are the least likely to become the subject of indecency complaints and when the FCC is already at a 99% or higher “closure” rate, is entirely unjustified.

The costs would be even greater for television broadcasters, and, again, small market television broadcasters would be the hardest hit. The recording of video programming requires far greater storage capacity than does the recording of audio programming. This recording, for the vast majority of stations, would create redundant, duplicate recordings of identical programming supplied to multiple stations by networks and syndicators. For example, the proposed Mandatory Recording/Retention Requirement would require every station affiliated with one of the television networks to record the same programming each affiliate of the same network would be recording. For digital television broadcasters, especially those that are multicasting, the burden is multiplied, although there has been no showing as to the need for this recording.⁶ Since 1993, the FCC has fined only three television broadcasters for indecency violations, and in all three cases recordings existed without being mandated. *See Young*

Broadcasting of San Francisco, Inc. (KRON-TV), 19 FCC Rcd 1751 (2004) (licensee submitted a

⁶ The Commission even goes so far as to ask if subscription programming broadcast on a digital channel should be recorded. This, despite the fact that the Courts have ruled that the government’s ability to regulate indecent programming on a subscription channel, where viewers have chosen to receive a particular program channel, is limited. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); *Nat’l Ass’n For Better Broadcasting v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988).

videotape in response to letter of inquiry); *Telemundo of Puerto Rico License Corp., (WKAQ-TV)*, 16 FCC Rcd 7157 (EB 2001) (a videotape was submitted by the complainant and the licensee submitted a transcript in response); and *Grant Broadcasting System II, Inc. (WJPR-TV)*, 12 FCC Rcd 8277 (MMB 1997) (a videotape was submitted by the complainant). Given the widespread economic burdens likely to be caused by adoption of the proposed Mandatory Recording/Retention Requirement, there is no valid justification for the otherwise unnecessary and overbroad regulation.

The industry-wide burden which would be caused by the adoption of the proposed Mandatory Recording/Retention Requirement is even greater than the burden recognized by the United States Court of Appeals Court for the D.C. Circuit in connection with its reversal of a Commission regulation imposing a mandatory recording requirement on noncommercial broadcasters in 1978. Section 399(b) of the Communications Act required the FCC in 1978 to enact a mandatory recording requirement applicable to certain broadcasters.⁷ The rule required all “noncommercial educational broadcasting stations obtaining financial support from the Corporation for Public Broadcasting to make and retain an audio recording of broadcast programs in which any issue of public importance is discussed.”⁸ The Court held the regulation was unconstitutional because it violated the First Amendment and Equal Protection Clause of the United States Constitution.⁹

⁷ 47 U.S.C. §399(b).

⁸ *In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records*, Third Report and Order, 64 FCC2d 1100, 1110-11 (1977) (“Third Report and Order”).

⁹ *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (“*Community Service Broadcasting*”).

When discussing the financial burden created by the proposed mandatory recording rule, the Court stated: “[c]ompliance with §399(b) may entail some financial burden for those stations which would not otherwise record all of their public affairs programming; they are required by §399(b) to purchase equipment and devote staff time sufficient to record all such programming.”¹⁰ As shown above, even greater cost burdens would be caused by the proposed Mandatory Recording/Retention Requirement because the requirement would apply to significantly more programming and would apply industry wide.

It is important to note also that in proposing the Section 399 rule, the FCC refused to extend the recording retention rule promulgated under Section 399 to commercial stations, citing both general economic impracticability as well as the disparate effect of that economic burden on small broadcasters. According to the Commission:

Opinions may vary as to the amount of those costs, but there is no doubt that production, retention, retrieval, and playback of the recordings would cause almost every station to expend money which is not available for public service programming or other purposes. No public funds or equipment grants ... would be available to help the commercial broadcaster ... meet the present taping requirement. We are concerned that the burden would fall in a disproportionately heavy manner on very small stations which frequently net less than \$5,000 per year.¹¹

The new requirement proposed in this NPRM will cause an even greater financial burden on broadcasters as the Section 399 rule would have required the recording of only those programs that involved a matter of public interest. Given these facts and precedent, the proposed regulations may not be lawfully adopted.

¹⁰ *Id.* at 1114, n.26.

¹¹ *Id.* at 1113-14.

C. The Regulation Will Chill Speech in Violation of the First Amendment

Where, as here, a regulation has the potential to affect speech that is otherwise protected under the First Amendment, it must be examined under the guidelines laid out in *United States v. O'Brien*.¹² The *O'Brien* test holds that a potentially offensive regulation can be upheld only “(1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial government interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”¹³ The proposed Mandatory Recording/Retention Requirement falls far short of meeting this standard.

According to the D.C. Circuit, “The threshold for applying the O’Brien test is, of course, that a statute does impose a restraint on First Amendment freedoms.”¹⁴ The proposed regulations do so in at least two major ways. First, by requiring every station to record its programming, retain the recordings, and provide copies of such recordings to the government upon request, the regulation makes all stations subject to the “raised eyebrow” regulation of the Commission. “Noncommercial licensees, like their commercial counterparts, are subject to regulation and license renewal proceedings by the FCC. This renders them subject as well to a variety of sub silentio pressures and ‘raised eyebrow’ regulation of program content.”¹⁵ The NPRM actually heightens these legitimate concerns about “raised eyebrow” regulation: “We also seek comment on whether the proposed record retention requirements should be crafted so that

¹² *United States v. O'Brien*, 391 U.S. 367 (1968).

¹³ *Id.* at 377.

¹⁴ *Community Service Broadcasting*, at 1114 (emphasis in original).

¹⁵ *Id.* at 1116.

they can be useful to enforcements of other types of complaints based on program content.”¹⁶

Merely by asking the question, the Commission has broadened the chilling effect of this proposal on broadcaster speech. In *Community Service Broadcasting* the court held that the actual likely effects of a statute should be considered when determining whether the statute will raise First Amendment concerns:

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 ... 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.¹⁷

In light of the Commission’s suggestion that its proposed rule could be used to assess other types of program content, it is not unreasonable that a broadcaster would expect that the record retention requirement will open the door to a minute by minute critique of programming choices and editorial judgments, looking for any “content” that in any way has or may offend anyone, thereby chilling speech through “raised eyebrow” regulation on a grand scale.¹⁸

The elements of the test must be evaluated because the Mandatory Recording/Retention Requirement triggers the *O’Brien* test. *O’Brien* requires that the “incidental restriction on First Amendment freedoms is not greater than is essential to the furtherance of [a substantial government] interest.”¹⁹ Given (1) the FCC’s already high closure rate of 99% of indecency complaints as suggested by the 2000-2002 data provided by the FCC in its NPRM, (2) the

¹⁶ NPRM, at ¶7.

¹⁷ *Community Service Broadcasting*, at 1116-17.

¹⁸ Indeed, comments filed with the Commission by Michael Askins have cited this as a potential concern, saying that knowing that their programming is recorded will require them to be “hypercritical of their own on air speech and there for [sic] stifle their own speech because of the threat of government review.”

¹⁹ *Id.* at 1114.

likelihood that current data will show a virtually 100% closure rate, and (3) a 70 year history of regulating the broadcast industry without such a regulation, a very serious question is raised as to whether the government's interest in this regulation is substantial or even significant. Even assuming that the government's interest is somehow significant, the proposed regulations are far more broad and burdensome than is necessary to uphold the indecency standards. Indeed, the Commission has previously recognized that similar industry-wide recording and retention regulations were not required in order to uphold Commission regulations. In the context of the rule proposed under Section 399(b), the Commission stated, "We also do not think that taping news and public affairs programs is necessary to resolve ... alleged misfeasance on the part of broadcasters."²⁰ The recording and retention requirement, if imposed on *all* broadcasters, rather than in a measured and reasonable fashion where a station has shown a propensity for violations, is clearly greater than necessary to achieve any legitimate governmental interest, and thus would be in violation of the *O'Brien* test.

D. The FCC's NPRM is so Vague as to Deny the Public Adequate Notice of What the FCC may Actually Adopt

The NPRM simply asks whether broadcast stations should be required to record their programming for purposes of enforcing indecency regulations. The NPRM then raises a series of issues to be addressed, but offers no specific proposals on which the public can comment. For example, the FCC asks whether the recordings should be used for more than indecency enforcement, but does not propose regulations as to what use the recordings would be made. The Commission then offers no clarification as to whether the recordings would be public documents, or simply used where complaints are filed. The FCC does not even state how the recordings would be submitted to the FCC. Would the filing of a complaint automatically require the

²⁰ *Third Report and Order*, at 1114.

submission of recordings to the FCC, or would the complaining party need to meet some burden of proof before the recordings would be submitted? How quickly would the FCC be able to process such complaints so that the station would not need to retain the recordings for long periods while the complaints are processed? Would the recordings be station documents that would be subject to field inspections and penalties if they were not available, even in the absence of a complaint? If so, what penalties would attach to the failure of a broadcaster to keep the recordings? Would any malfunction of the recording system result in a presumption that the broadcaster engaged in the conduct complained of, or give rise to a separate fine or other sanction?

While an administrative agency need not provide the full regulations that it is proposing for public comment in a Notice of Proposed Rulemaking, the agency must provide sufficient notice to give the public the opportunity to comment on all aspects of the proposed regulations. *See* 5 U.S.C. Sec. 553. *See also Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1045 (1989)(an agency must provide “sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully”). Here, the Commission simply has made one proposal and posed a number of vague questions, leaving unaddressed many issues of importance to the resolution of this proceeding. As a result, the subject of this NPRM is more properly the subject of a Notice of Inquiry where the Commission can receive public comment and, with the benefit of that input, focus its consideration and then make proposals for specific regulations.

