Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF
NATIONAL PUBLIC RADIO, INC.

Introduction

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. ("NPR") hereby submits its Reply Comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding proposing to require all radio and television broadcast stations to record their broadcast programming and retain copies of those recordings.[1]

I. Based on the Overwhelming Consensus Among Initial Commenters, The Commission Should Withdraw Its Program Recording and Retention Proposal

In its initial comments, NPR demonstrated both the Constitutional infirmity and poor public policy of a program recording and retention requirement. In particular, we highlighted the absence of any demonstrated need for such a requirement, the substantial compliance costs that would be involved, and the utter lack of any tailoring of such a requirement to the asserted objective of enhancing enforcement of the prohibitions on obscene, indecent, and profane

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[1] Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking, MM Docket 04-232, rel. July 7, 2004 [hereinafter "NPRM"].

programming.[2] Indeed, far from satisfying the rigorous First Amendment standard that would apply, the proposed recording and retention regime would fail even the lesser standard of review under the Administrative Procedures Act.[3] Accordingly, we urged the Commission to withdraw its proposal or, failing that, to exempt or otherwise accommodate noncommercial educational ("NCE") radio stations on the grounds that there is no history of obscene, indecent, or profane broadcasts to justify the substantial burden such stations would otherwise have to bear.[4]

The initial commenters overwhelmingly agreed that the recording and retention proposal is deeply flawed and should be withdrawn. As many commenters pointed out, there is simply no need for a mandatory recording and retention requirement. Given the Commission's own data[5] as well as the Commission's evidentiary standards, the existence of broadcaster created and maintained program recordings would make little, if any, difference to the Commission's enforcement of the indecency, profanity, and obscenity proscriptions.[6]

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[2] Comments of National Public Radio, Inc., MM Docket No. 04-232, at 2-10 (filed Aug. 26, 2004) [hereinafter "NPR Comments"]. Unless otherwise indicated, all citations to comments are to comments filed in this proceeding in response to the NPRM.

[3] Id. at 7-10.

[4] Id. at 11-13.

[5] As numerous commenters noted, only 1% of the complaints filed during the period 2000-2002 were dismissed due to the absence of a tape, transcript, or significant excerpt. E.g. Comments of the Arizona Broadcasters Association at 2 (filed Aug. 27, 2004); Comments of KIFI-TV at 3 (filed Aug. 27, 2004).

[6] As Salem Communications aptly noted, "if a station cannot deny the indecency allegations, the Commission will accept them as true, [so] there is no reason whatsoever to require stations to record programming simply to confirm what the Commission would otherwise conclude in the absence of those records." Comments of Salem Communications Corporation at7 (filed Aug. 27, 2004) (citing NPRM at ¶ 7).

Among other flaws, commenters found the proposal to be overly broad by, for instance, targeting stations with no history of indecency, profanity, or obscenity violations[7] and stations that broadcast programming, such as classical music, that is extremely unlikely to violate the content prohibitions.[8] Many commenters recounted the myriad costs involved in complying with any program recording and retention requirement, including the expense of purchasing, installing, and maintaining program recording and retention equipment,[9] the chilling of protected First Amendment activity,[10] and the diversion of resources away from local broadcast service.[11] The proposal also raises contractual and copyright issues, according to numerous commenters.[12]

Against this broad opposition, there were only a few commenters who supported the Commission's proposal. One commenter -- a company that produces audio recording software --

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[7] Comments of Tom Godell, General Manager of WUKY(FM), Lexington, KY, at 1 (filed August 20, 2004) (noting that "WUKY . . . has been in existence since 1941 and in that time has never been subject to an indecency complaint.").

[8] E.g. Comments of United Ministries at 2 (filed Aug. 27, 2004) (religious format); NBC Universal at 4-5 (filed Aug. 27, 2004) (broadcast of weather programming).

[9] E.g. Comments of Adventist Radio Broadcasters' Association at 1-2 (Aug. 27, 2004) ("Research by ARBA members indicates that a very low-end compute-based audio logger system would probably cost about $2,500 to $3,000 to purchase and install. Maintenance and replacement would probably cost that much again over three to five years. These estimates include only the tangible, accountable costs.")

[10] Joint Comments of the North Carolina Association of Broadcasters and Virginia Association of Broadcasters at 3-8 (filed Aug. 27, 2004).

[11] See Comments of Heritage Radio Broadcasters at 8 (filed Aug. 27, 2004) ("The cost devoted to mandatory recording will take away from the ability of small broadcasters to produce community service programming elsewhere.")

[12] Comments of Station Resource Group and National Federation of Community Broadcasters at 8-10 (filed Aug. 27, 2004) [hereinafter "SRG/NFCB" Comments].

supported the proposal apparently as a means of advancing its business prospects.[13] While touted as "cost effective," this commenter's software carries a not-insubstantial cost, and any purchaser would also have to purchase, install, support, and periodically replace computer equipment to operate the software.[14] Purchasing audio recording software is far from "cost effective," moreover, for the many broadcasters that operate with limited resources, broadcast programming that is unlikely to generate indecency complaints, and have no business reason to record and store their programming.

Of the few other commenters supporting the Commission's proposal, two wrote to advocate the creation of publicly accessible broadcast station program archives so that, in the words of one, "[a]ctivist organizations and researchers" might better target offending broadcasters for any manner of alleged sins.[15] Significantly, this objective is far broader than the Commission's stated purpose of enhancing enforcement of the indecency, profanity, and obscenity prohibition.[16] As we also noted in our initial comments, requiring public access as part of a program recording and retention requirement would substantially increase the compliance costs and burdens.[17]

Mandating the creation of publicly accessible broadcast program archives for the benefit

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[13] Comments of OMT Technologies.

[14] Id. at 2.

[15] Comments of Alliance for Better Campaigns, Benton Foundation, Campaign Legal Center, Annenberg School for Communication, and The Norman Lear Center, at 1 (filed July 29, 2004). See also Comments of the United States Conference of Catholic Bishops at 2 (filed Aug. 27, 2004) [hereinafter "USCCB Comments"].

[16] NPRM at ¶ 1.

[17] NPR Comments at 5-6.

of national public interest organizations also misconstrues the fundamentally local nature of broadcasting in the United States. As the Commission recently reiterated:

> Broadcasters, who are temporary trustees of the public's airwaves, must use the medium to serve the public interest, and the Commission has consistently interpreted this to mean that licensees must air programming that is responsive to the interests and needs of their communities of license.[18]

In our system of terrestrial broadcasting, in which facilities are allocated among communities across the Nation, it is the local community, rather than media watchdog groups, that should ultimately determine whether a particular broadcast station is meeting its public interest obligations.[19]

The arguments offered in support of what the Commission actually proposed, moreover, are less than compelling. The United States Conference of Catholic Bishops complained that radio listeners and television viewers cannot obtain a tape or transcript from a broadcast station on demand.[20] But, since licensees are licensed only to broadcast, it is unclear why they can or should be required to provide tapes and transcripts to listeners and viewers upon request. This commenter also decries the unfairness to complainants and the Commission that the Commission will render a decision based on a listener's or viewer's memory alone.[21] Given that the Commission will accept the merits of a complaint as true unless the broadcaster proves

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[18] In the Matter of Broadcast Localism, Notice of Inquiry, 19 FCC Rcd. 12425, at ¶ 1 (rel. July 1, 2004) (emphasis added).

[19] See 47 U.S.C. § 307(b).

[20] USCCB Comments at 1.

[21] Id. at 1.

otherwise,[22] and the potentially severe repercussions to broadcasters of a complaint,[23] fairness (not to mention due process) is more properly a concern of broadcasters. While broadcasters may very well decide to record and retain copies of their programming to defend themselves in a Commission inquiry, and for other reasons, that decision should be left to them.

The comments of Morality in Media ("MIM") are equally unpersuasive.[24] It claims, for instance, that indecent speech is not Constitutionally protected, except that it clearly is.[25] MIM also offers no response to the financial and First Amendment costs that broadcasters would inevitably bear. To its credit, MIM recognizes the need to tailor the recording and retention requirement, but would do so based on the content of a station's programming in relation to a list of 39 sexual, excretory, and other activities or organs. MIM apparently would require that stations only record potentially indecent, profane, or obscene programming, even though potentially objectionable program matter, in context, may not in fact be indecent, profane, or obscene.[26] In addition, compared to a general program recording and retention requirement, such a content-based requirement would have as much, if not more, of a chilling effect.

In sum, and even assuming the Commission's best intentions, the proposal to enhance

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[22] NPRM at 3 n.9.

[23] See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability, File No. EB-04-IH-0011, rel. Sept. 22, 2004 (proposing a $550,000 fine).

[24] Comments of Morality in Media (filed Aug. 23, 2004).

[25] Id. at 1-2. Compare NPRM at ¶ 3 ("Indecent speech is protected by the First Amendment").

[26] See NPRM at ¶ 6 (noting that "the specifics and context of the broadcast are critical to the determination of whether material is obscene, indecent, or profane").

enforcement of the statutory prohibitions against obscene, indecent, and profane programming through a program recording and retention requirement sweeps far too broadly to serve the asserted interest in a meaningful way. The Commission therefore should withdraw the proposal as contrary to the First Amendment and sound public policy.

II. If the Commission Proceeds With Its Program Recording and Retention Proposal, It Should Tailor The Proposal To The Commission's Asserted Objective, Including By Exempting Noncommercial Educational Radio Stations

In NPR's initial comments, we urged the Commission to exempt, or otherwise accommodate, NCE radio stations if it proceeds with a program recording and retention requirement. We cited a comparable exemption the Commission adopted in implementing the Children's Television Act, noting that, like that exemption, a program recording and retention requirement would impose costs on NCE stations that are largely unnecessary and that would outweigh any potential benefits.[27] In the alternative, we also asked the Commission to exempt substantially duplicative programming broadcast over statewide or other networks, including networks of commonly owned or operated stations, particularly given the historic role of statewide and other networks in public broadcasting.[28]

Among the initial commenters, there was significant support for an NCE radio exemption or other accommodation of NCE stations.[29] As noted by the University of Missouri, the "financial and other burdens could overwhelm the small budgets and staff of noncommercial

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[27] NPR Comments at 11-12.

[28] See id. at 5 n.14.

[29] See Comments of SRG/NFCB at 11. See also Comments of Intercollegiate Broadcasting System, Inc. at 7 (filed Aug. 27, 2004) ("There is no need to impose such requirements on educationally affiliated stations.").

educational stations."[30] According to another commenter, given the paucity of indecency, profanity, and obscenity forfeitures imposed on NCE stations, "[e]xtending the rule to NCE stations imposes a particularly burdensome regulatory duty without advancing substantially a legitimate regulatory goal."[31] Finally, governmental NCE licensees, in particular, could be especially burdened to the extent program recordings are considered public records under the laws of the states in which such licensees govern.[32]

Accordingly, to the extent the Commission proceeds with its program recording and retention proposal, it should exempt NCE licensees generally or, at a minimum, NCE stations that substantially retransmit the programming of another commonly owned or operated station.[33] In addition, the Commission should allow licensees to rely on program producers to supply copies of programming independently produced for broadcast.[34]

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[30] Comments of The Curators of the University of Missouri at 3 (filed Aug. 27, 2004).

[31] SRG/NFCB Comments at 11.

[32] See Comments of Western States Public Radio, Southern Public Radio, and California Public Radio at 16 (filed Aug. 27, 2004); Comments of Collegiate Broadcasters, Incorporated at 5 (filed Aug. 27, 2004).

[33] NPR Comments at 12.

[34] Id. at 12-13.

Conclusion

For reasons set forth above and in NPR's initial comments, the Commission should withdraw its program recording and retention proposal but, at a minimum, exempt or otherwise accommodate NCE stations.

Respectfully Submitted,

Gregory A. Lewis /s/

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