

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

The Commission received approximately 542 comments in response to its *Notice of Proposed Rulemaking*, which proposed a new rule requiring broadcasters to retain a recording of virtually their entire broadcast day. The Commission’s asserted purpose for the proposed rule is to improve the Commission’s indecency enforcement regime—a regime that the Commission recently pledged would be “the most aggressive” in decades.¹ A summary and analysis of the comments submitted in this proceeding to date confirms the position advocated by the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters (the “Associations”)—the proposed rule is unnecessary, overly broad, unduly burdensome, and constitutionally suspect.

A. Comments in Opposition to the Proposed Rule

Virtually all of the commenters assert that the proposed rule is a bridge too far. To be fair, most of the comments in opposition to the proposed rule were submitted by broadcasters. But they are broadcasters from all corners of the spectrum—television networks, college radio broadcasters,

¹ Comments of Broadcasters’ Coalition at 2 (citing testimony of Chairman Powell at the House and Senate hearings on the Broadcast Decency Enforcement Act of 2004).

public radio broadcasters, small market broadcasters, and religious broadcasters. And, almost to a person, they assert the same valid objections:

1. *The proposal is not necessary.* Many commenters cited the Commission’s own enforcement data to point out that the Commission only dismissed 1.18% of its indecency complaints for lack of a recording.² Commenters also noted that the burden of proof in indecency enforcement actions already requires a broadcaster to present a recording to rebut an allegation that an indecent broadcast occurred.³ One commenter aptly characterized this existing procedural burden as an “unwritten obligation to record broadcasts and retain the recordings to defend against future investigations.”⁴ Another contends, with some force, that even this procedural burden poses constitutional problems because the Commission “seeks to impose on [a speaker] the burden of proving his speech is not unlawful.”⁵

2. *The proposal is overbroad.* NAB and the Broadcasters’ Coalition each provide sound data to describe the enormous gap between the number of programs and stations subject to the proposed rule and the number of programs and stations that allegedly air indecent material. NAB’s data shows that in 2003 only 15 of all 13,563 radio stations (.111%) were cited in Notices of Apparently Liability (NALs) issued by the Commission, and *none* of the 1,733 television stations were cited. In 2004, only 17 of all 13,486 radio stations (.126%) were cited in NALs, while 1 of the

² Notice at ¶ 6.

³ Joint Comments of the Named State Broadcasters Associations at 4; Comments of Bonneville International Corp. at 3-4; Comments of Heritage Radio Broadcasters at 5-6.

⁴ Joint Comments of Cosmos Broadcasting Corp., Cocola Broadcasting Corp., Independence Television Company, Meredith Corp., and Paxson Communications Corp. at 3.

⁵ Comments of Broadcasters’ Coalition at 13 (citations omitted).

1,747 television stations (.057%) were cited.⁶ Yet the more than 99.8% of all broadcasters who were not cited in NALs during this time—including gospel music stations, news/talk stations, and small local broadcasters that are nowhere near the line on indecency—still would be forced to shoulder the costs and burdens of the proposed rule.⁷

Perhaps more tellingly, the Broadcasters' Coalition explains that the number of programs subject to indecency complaints appears to be *decreasing* over the past several years. In 2002, there were 345 programs named in indecency complaints.⁸ Yet in 2003, there were 318 programs named in complaints (and most of those complaints focused on just 9 programs).⁹ And in 2004—a year in which indecency has moved into the center of a political firestorm—there had been only 23 programs named in complaints as of March.¹⁰ What **has** increased is the number of complaints filed in response to the same program. For example, all but 57 of the 530,885 complaints filed in 2004 were filed in response to a single program—the Super Bowl Halftime Show.¹¹ The sheer *number* of complaints, of course, has little or nothing to do with determining the number of programs and stations that have been the subject of these complaints.

⁶ Comments of NAB at 6.

⁷ Comments of NAB at 6.

⁸ Comments of Broadcasters' Coalition at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

One commenter also crystallized the concern that the proposed rule could lend itself to abuse—putting stations with little or no track record of indecency through meaningless recordkeeping and retrieval exercises:

[H]aving an enforcement policy and program recording and retention rules that permit anyone to complain about the content of any program, however flimsy and undocumented the complaint, and then routinely require the broadcaster to dig out a tape or create a transcript of the offending program, can and will result in abuse of the complaint process. If the guaranteed existence of program recordings permits a listener or viewer to say “I think I heard someone say something offensive on station such and such, and I’m not sure exactly what was said, but I sure was offended by it” and the FCC finds that complaint to be sufficient to require the station to go look for what was purportedly said, provide the tape or transcript to the FCC and/or the complainant, then defend it, an unrealistic, unnecessary and onerous burden will be placed on stations.¹²

Finally, several commenters echo the Associations’ argument that the proposed rule would be duplicative and redundant in that it would require all stations to record and retain all broadcasts of the same network and syndicated program. If necessary, a recording of the program need only be available from a single source (most likely the network or syndicator).

3. *The proposal is overly burdensome.* Many commenters, especially small stations and noncommercial stations that operate on tight budgets, described the costs and burdens the proposed rule will have on their station’s operations. The Associations’ estimation that recording and retention costs may range from \$5,000-\$15,000 is corroborated by the estimates of other commenters.¹³ Indeed, some estimates range even higher. For instance, the Association of Public

¹² Joint Comments of NCE Broadcasters at 5-6.

¹³ Comments of Collegiate Broadcasters Incorporated ¶ 6 (costs estimates range from \$400 to \$15,000); Comments of Illini Media Company at 5 (combined costs up to almost \$7,000);
(continued...)

Television Stations cites an estimate of \$25,000, plus a \$2,500 annual support fee.¹⁴ NAB estimates the proposed rule could cost the entire broadcasting industry upwards of \$36 million (not including the equipment necessary to record multicast channels).¹⁵ One wonders whether the Commission would consider requesting an outlay of that magnitude from Congress simply to avoid having to dismiss less than 2% of all indecency complaints filed against less than 1% of all broadcasters.

4. *The proposal raises serious constitutional problems.* Most commenters confronting the question whether the proposed rule violates the First Amendment drew appropriate parallels between the proposed rule and a 1978 recording and retention law struck down by the D.C. Circuit in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*.¹⁶ In that case the Court held that a law requiring public broadcasters to record and retain programs was unconstitutional because it impermissibly “chilled” the ability of broadcasters to determine program content. One commenter noted the Commission’s proposed rule has an even greater potential to chill speech “because of the potential for substantial, even crippling, fines that were not present in the 1978 law.”¹⁷

Commenters also argue the Commission’s proposed rule does not meet the intermediate scrutiny test applied to restrictions on broadcast speech because (1) the Commission’s stated goal

¹³(...continued)

Comments of Crawford Broadcasting at 5-6 (total costs up to \$7,200); Comments of NAB at 13-14, 17 (cost estimates range from \$1,350 to \$10,000 for radio and approximately \$5,000 for television, not including multicasting).

¹⁴ Comments of Association of Public Television Stations at 4.

¹⁵ Comments of NAB at 13-15.

¹⁶ 593 F.2d 1102 (D.C. Cir. 1978).

¹⁷ Comments of APTS at 9.

of improving its enforcement process is not a substantial governmental interest¹⁸ and (2) the rule is not narrowly tailored to further any such interest. Because the requirement would apply to more than 99% of broadcasters whose programming does not trigger indecency complaints, it is not tailored—or even relevant—to the Commission’s stated goal of improving indecency enforcement.¹⁹

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Given the cost of the recording and retaining programs—conservatively estimated at more than \$36 million (not including physical storage and labor costs that fall disproportionately upon small broadcasters)—the proposed rule also raises the possibility that it may not comport with the Paperwork Reduction Act (PRA). That Act requires the Commission to certify to the Office of Management and Budget (OMB) that the information to be collected is, among other things, (1) necessary for the proper performance of the functions of the agency, (2) not unnecessarily duplicative of information otherwise reasonably accessible to the agency, and (3) tailored to take into account the resources available to those affected by the rule.²⁰

At least one commenter specifically filed comments in response to the Commission’s request for comments regarding compliance with the PRA. A coalition of regional public radio stations argue that the recording and retention requirement is “vastly disproportionate” to any need for the retention of program recordings, that the Commission has failed to estimate the burden of the requirement on small stations or the justification of need for the requirement, and that the best way

¹⁸ Comments of Broadcasters’ Coalition at 25 (“the fact that the FCC is empowered to enforce broadcast indecency rules as a general matter does not alone demonstrate an interest sufficient to require all broadcasters to record and retain all their programming”).

¹⁹ Comments of NAB at 24.

²⁰ 44 U.S.C. § 3506(c)(3).

to minimize the burden of the proposed rule is to eliminate it altogether since only 1% of all indecency complaints have been dismissed for lack of a recording.²¹ Ultimately it is OMB that must ensure that any final rule comports with the PRA.²² But the points raised by the Coalition are sound and should serve as a stark reminder to the Commission that, in its haste to act, it has proposed an overinclusive rule whose sheer breadth may not pass muster under the PRA.²³

B. Comments in Support of the Proposed Rule

A few public advocacy groups filed comments in support of the rule. But not every supporter confined their comments to the proposal at hand. The Alliance for Better Campaigns argues that the proposal would aid “[a]ctivist organizations and researchers whose mission it is to investigate whether the media are living up to their public interest obligation[s].” And the U.S. Conference of Catholic Bishops believes the proposed rule will help citizens file petitions against broadcasters in contexts other than indecency—*i.e.*, petitions to deny in license proceedings and rulemakings regarding media consolidation. But surely it is not the intent of the Commission to allow any member of the public to comb through a station’s program archives for the sole purpose of building a case against the station. While it may be “useful” for a station’s opponent to have access to such information to serve its own agenda—certainly it should not be incumbent on the station to

²¹ Comments of Western States Public Radio, Southern Public Radio, and California Public Radio at 35-37; 44 U.S.C. § 3506(c)(2).

²² 44 U.S.C. § 3507(d).

²³ The coalition also filed comments in response to the Commission’s Initial Regulatory Flexibility Analysis, arguing that the Commission “has given no more than lip service to the requirements of the Regulatory Flexibility Act and the Small Business Act” that require the Commission to analyze the impact of the proposed rule on small entities. Comments at 29-34.

underwrite that endeavor, especially in the absence of any indication that a station is not living up to its public interest obligations.

Morality in Media confesses that in order to comport with due process the proposed rule should apply only to programming that contains sexually suggestive or violent material. It also argues there is no First Amendment barrier to the proposed rule, that the rule should apply 24 hours a day, that the rule should apply to cable television, and that the making of recordings may constitute a “fair use” exemption to the copyright laws.

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The easy “take away” from the sum of these comments is that the proposed rule threatens broadcasters with both sides of the Commission’s sharpened “enforcement blade”—the eerie encroachment of the government into program content on one side and new recordkeeping requirements that bear no relation to indecency enforcement on the other. Equally as important, as the Associations explained in their opening comments, the Commission should not consider the proposed rule until it resolves its present paradox of urging broadcasters to improve their commitment to “localism” while simultaneously saddling them with strict liability for any indecent utterance that may unexpectedly occur on live and unscripted local news, information or public affairs programs.

The Associations respectfully submit that the Commission should decline to adopt the proposed rule.

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This the 27th day of September, 2004.

**NORTH CAROLINA ASSOCIATION
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