

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	MM Docket No. 04-233
Broadcast Localism	)	
	)	

**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF BROADCASTERS**  
1771 N Street, N.W.  
Washington, D.C. 20036  
Tel: (202) 429-5430

Marsha MacBride  
Larry Walke

January 3, 2005

## **EXECUTIVE SUMMARY**

The National Association of Broadcasters (“NAB”) respectfully asserts that the tremendous record produced in this proceeding supports the Commission’s long-standing position and NAB’s view that federal regulations are unnecessary to compel broadcasters to make efforts to determine the needs and interests of their local communities, and to meet those demands with locally-relevant news, public affairs, political coverage and entertainment.

As described in NAB’s earlier comments, radio and television stations face greatly expanded competition from a multitude of alternative media outlets, and this increased competition has been more than sufficient to force broadcasters to deliver vast amounts of community-responsive programming. Specifically, parties representing at least 2254 radio licensees, and 637 television licensees, submitted information on the amount and variety of locally-relevant programming they deliver, the valuable coverage that broadcasters devote to politics and civic discourse, as well as their efforts to ascertain the needs and interests of their local communities. And, these are only minimum, estimated figures, as not all commenting broadcasters provided a detailed run-down of their ascertainment efforts or local programming, and instead focused on larger policy concerns. NAB believes that the broadcasters’ filing represents the rule, and not the exception, of broadcasters in the U.S. As the Commission determined over twenty years ago, broadcasters deliver such programming as a matter of survival; thus, no additional federal obligations in this area are warranted.

The comments filed in this proceeding demonstrate that large numbers of radio and television licensees broadcast a plethora of local news, local public affairs, locally relevant political coverage, and locally produced music, such that new, quite possibly unconstitutional federal rules governing broadcasters’ programming are unnecessary. NAB further believes that the assertions of certain media critics that more regulation of broadcasters’ behavior is needed

are incorrect because they: (1) do not necessarily reflect the opinion of the majority of Americans; (2) largely ignore the pressures that today's highly competitive media marketplace imposes on broadcasters to air valuable, attractive programming; (3) disregard the impact of their proposals on smaller, and small market, broadcasters; and (4) encourage the Commission unlawfully to regulate the quality of program content.

NAB also contends that the overwhelming number of comments filed in opposition to recent actions of Sinclair Broadcasting and Pappas Telecasting in the political broadcasting arena, and the ultimate outcomes of those situations, confirm that additional regulation of broadcasters' behavior is unnecessary, especially with respect to political broadcasting. For example, the public's involvement had an obvious affect on Sinclair's eventual decision to change the format in which it broadcast a documentary critical of Senator John Kerry shortly before the Presidential election. In fact, the Commission never had to involve itself in the Sinclair situation. Similarly, the Commission's resolution of the Pappas situation showed that the Commission's current complaint procedures and political broadcasting rules are perfectly adequate mechanisms for affecting broadcasters' content.

Finally, NAB responds to EchoStar's proposal that the Commission adopt a rule that would deny certain television stations of their rights under the "carry one, carry all" provision of the Satellite Home Viewer Improvement Act, if the stations do not satisfy some numerical standard regarding "local content." NAB explains that the Commission simply lacks the authority to strip stations of these statutory rights by administrative fiat, and that EchoStar's proposal misinterprets the remedial provisions of Section 338 of the Act. EchoStar's suggestion also would defeat the underlying purpose of the "carry one, carry all" provision by diminishing the ability of tens of millions of Americans to rely solely on reception of free, over-the-air broadcast stations as their source of television programming.

Accordingly, NAB urges the Commission to refrain from imposing additional, unwarranted public interest obligations on broadcasters.

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The National Association of Broadcasters (“NAB”)<sup>1</sup> hereby submits its reply comments in the above-captioned proceeding concerning broadcast localism.<sup>2</sup> The overwhelming majority of substantive comments in this proceeding demonstrate the wisdom of the Commission’s long-standing policy to permit broadcasters to decide how best to meet the needs and interests of their local communities. The record makes clear that more regulation of broadcasters’ services is unwarranted because radio and television stations already deliver a plethora of community-responsive programming as a matter of survival in an increasingly competitive media marketplace. The record also shows that additional constraints on broadcasters’ services are unnecessary because the Commission’s existing rules already provide an extremely effective mechanism for both the Commission and the American public to ensure that broadcasters continue to serve the public interest. NAB therefore urges the Commission to refrain from imposing unnecessary and potentially unconstitutional additional rules governing broadcasters’ provision of community-responsive programming.

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations that serves and represents the American broadcasting industry.

<sup>2</sup> *Broadcast Localism, Notice of Inquiry* in MB Docket No. 04-233, 19 FCC Rcd 12425 (2004) (“*Notice*”).

## **I. The Record Demonstrates Broadcasters' Commitment to Localism**

The record in this proceeding provides the most comprehensive survey of broadcasters' delivery of community-responsive programming ever conducted. The more than 81,000 initial comments filed in this proceeding conclusively show broadcasters' commitment to localism on a quantifiable basis. Parties representing at least 2254 radio licensees, and 637 television licensees, submitted information on the amount and variety of locally-relevant programming they deliver, the valuable coverage that broadcasters devote to politics and civic discourse, as well as their efforts to ascertain the needs and interests of their local communities. And, these are only minimum, estimated figures, as not all commenting broadcasters provided a detailed run-down of their ascertainment efforts or local programming, and instead focused on larger policy concerns or submitted only very brief, non-specific statements. NAB believes that the broadcasters' filing represents the rule, and not the exception, of broadcasters in the U.S.

### **A. Broadcasters Endeavor to Ascertain Community Interests**

As noted in NAB's earlier comments, the Commission substantially deregulated the radio and television industries in the early 1980's, including eliminating the ascertainment rules then in existence.<sup>3</sup> The Commission determined that marketplace forces would continue to assure that broadcasters provide local news, local public affairs, and other non-entertainment programming that responds to the needs and interests of their local communities.<sup>4</sup> The record in this proceeding demonstrates that the Commission's predictions were correct; radio and television stations make on-going, strenuous efforts to determine the needs and interests of their local

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<sup>3</sup> See, e.g., *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ("TV Deregulation Order"); *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981) ("Radio Deregulation Order").

<sup>4</sup> See *TV Deregulation Order*, 98 FCC Rcd at 1077; *Radio Deregulation Order*, 84 FCC 2d at 978.

communities, and to meet those needs with locally-oriented, community-responsive programming. Specifically, NAB's review of the record found that at least 241 television stations and 1383 radio stations filed comments specifically mentioning their efforts to ascertain which local issues are most important, other specific topics audience members would like the broadcaster to cover, and/or what kind of music or other programming is most desired.<sup>5</sup>

Examples of stations' efforts to determine local needs and interests include:

- FOX notes that its stations participate in formal ascertainment meetings sponsored by their state broadcasting associations, often multiple times each year, at which community leaders, local politicians, non-profit executives, representatives of minority groups, and public interest advocates, share with broadcasters the issues that are important to them. In addition, many stations engage in a wide variety of less formal efforts to determine the needs and interests of their local communities, such as inviting community leaders to their studios, telephone and email tip lines, and some stations even employ a public affairs director whose primary function is to liaison with the local community.<sup>6</sup>
- KEYE-TV (Austin) holds monthly meetings with representatives of private industry, non-profit and government entities, community leaders, and the public-at-large, to identify issues that the station should address.<sup>7</sup>
- KTVT-TV (Dallas) News Management and On-Air staff meet several times per month with different community groups to solicit feedback on coverage and to collect editorial ideas. CBS 11 also has an editorial board that meets weekly. Viacom Comments at Attachment 1.
- WXIA-TV (Atlanta) conducts quarterly meetings with a local news advisory board, at which the station shows the participants examples of various newscasts and asks them for feedback. The station also conducts periodic focus groups and annual viewer tracking phone poll, and holds school district representatives and non-profit representatives to solicit their views on the station's coverage.<sup>8</sup>

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<sup>5</sup>NAB recognizes that these figures do not cover the universe of broadcasters submitting comments in the proceeding, but only those that described their ascertainment-like efforts in greater detail.

<sup>6</sup> FOX Comments at 9-10.

<sup>7</sup> Comments of Viacom in MB Docket No. 04-233, at Attachment 1 (filed Nov. 1, 2004).

<sup>8</sup> Comments of Gannett Broadcasting in MB Docket No. 04-233, at 5 (filed Nov. 1, 2004).

- WFTX-TV uses various techniques to ascertain community input, including spending \$40,000 a year on market research, and belonging to six Chambers of Commerce.<sup>9</sup>
- WGBO-TV (Joliet, IL) conducts 60 to 100 formal ascertainment interviews each year, including with U.S. Congressmen, CEOs, firefighters, school principals and non-profits.<sup>10</sup>
- Clear Channel has launched a program to convene Local Advisory Boards designed to provide community feedback and enhance Clear Channel station's ability to identify community needs and respond appropriately with programming recommendations. In response to issues raised at such meetings, to date, stations in San Antonio and Cleveland have led voter registration campaigns, and in Sarasota, have established an online community volunteer job board.<sup>11</sup>

NAB submits that its quantifiable research, along with the hundreds of specific examples provided in the record, illustrate the broadcasting industry's commitment to determining the needs and interests of their local communities. Given the explosion in competition to radio and television broadcasting, the Commission's finding in 1984 that it will be in a broadcaster's "economic best interest . . . to stay informed about the needs and interests of its community" has never been more true.<sup>12</sup> The pressures of this competition essentially force broadcasters, even in the absence of regulations, to differentiate themselves, and the best way for broadcasters to do so is to provide uniquely local content. Thus, any Commission effort to create new rules that force radio and television stations into a "one size fits all" approach to ascertaining the interests of their local communities will simply impose an unnecessary intrusion into broadcasters' discretion and most likely will do more harm than good.

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<sup>9</sup> Comments of WFTX-TV (Myers/Naples) in MB Docket No. 04-233, at 1 (filed October 2004).

<sup>10</sup> Comments of Univision in MB Docket No. 04-233, at 4 (filed Nov. 1, 2004).

<sup>11</sup> Comments of Clear Channel in MB Docket No. 04-233, at 8 (filed Nov. 1, 2004).

<sup>12</sup> *TV Deregulation Order*, 98 FCC Rcd at 1101.

## **B. Broadcasters Deliver Local News**

The record in this proceeding shows that, despite the relatively high production costs,<sup>13</sup> most broadcasters provide many hours of local news as part of their programming schedule. Specifically, parties representing no less than 1773 radio licensees and 454 television licensees specifically indicated in their initial comments that they deliver local news. Of these, large numbers of stations also specifically mentioned the various categories of local news they provide, such as weather and weather emergencies, crime, investigative and consumer advocacy issues, and segments regarding politics, family matters, local sports, community events, and the like.

Other information underscores these figures. For example, many commenting broadcasters described the number of hours of local news they air on a weekly basis. Of the 454 or more television stations commenting in this area, approximately 139 discussed how many hours they devote to news. Of these, approximately 120 television stations air at least 20 hours of news per week, with the majority of these airing between 25 to 40 hours of news per week. These stations typically broadcast multiple blocks of half-hour or hour-long newscasts throughout the day and evening, plus numerous “news breaks” that appear in between regularly scheduled programming, as well as periodic news specials. The amount of local news aired by radio stations – not including the 1300 stations that program an all-news format – typically broadcast as many as 18 newscasts of shorter lengths that focus primarily on local events. For example, Disney-owned WMAL-AM (Washington, DC) states that its morning news program is broadcast from 5:00AM to 9:00AM weekdays, 6:00AM to 9:00AM on Saturdays, and 8:00AM to 9:00AM on Sundays, but that it also airs at least four minutes of local news each hour, 24

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<sup>13</sup> NAB Comments at 30-34.

hours a day, 7 days a week, along with traffic and weather reports and breaking local news segments.<sup>14</sup>

Numerous examples of television broadcasters' commitment to local news can be found in the record in this proceeding:

- An internal study conducted by Belo in November 2003 revealed that almost half of Belo's major network-affiliated stations air at least 70 hours of non-entertainment programming per week, and that, on average, such stations broadcast over 65 hours per week of such programming. This 65-hour figure represents almost 40% of those stations' total broadcast week. Belo's study also showed that Belo is not alone in its commitment to public interest programming, as the network affiliates in each of the surveyed markets devoted approximately 41% or more of their total broadcast hours to non-entertainment programming. Belo also broke its programming down by category, and found that "newscasts and news-related programming" comprised more than 33% of the total programming of these Belo stations, with a significant portion of that programming locally produced and locally oriented.<sup>15</sup>
- Disney's ten television stations air between 28.5 and 39 hours per week of local news and local public affairs programming, for an average of 31.9 hours per week,<sup>16</sup> including 15 hours of commercial-free coverage of 9/11 Commission hearings broadcast on WABC-TV (New York)
- WTVT-TV (Tampa) airs 48 hours of local news each week, and notes that during nearly 40% of the time during which its newscasts air, WTVT is the only local broadcast news provider.<sup>17</sup>
- WAGA-TV (Atlanta) airs 41 hours of local news each week, plus 7 hours of local news repeats each week to provide its audience with a flexible viewing schedule.<sup>18</sup>
- FOX states that its 35 stations deliver an average of 25.1 hours of news each week, which translates to an average 69.5% increase in the number of news hours aired by these stations before FOX assumed management. This includes 49 hours of news per week on

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<sup>14</sup> Comments of the Walt Disney Company in MB Docket 04-233, at Attachment C (filed Nov. 1, 2004).

<sup>15</sup> Comments of Belo Corp. in MB Docket No. 04-233, at 3-4 (filed Nov. 1, 2004).

<sup>16</sup> Disney Comments, at Attachment A.

<sup>17</sup> Comments of WTVT-TV (Tampa) in MB Docket No. 04-244, at 1 (filed Nov. 1, 2004).

<sup>18</sup> Comments of WAGA-TV (Atlanta) in MB Docket No. 04-233, at 1 (filed Nov. 1, 2004).

WDAF-TV (Kansas City), 43.5 hours on both KDFW-TV (Dallas) and WITI-TV (Milwaukee), and 42 hours on KTVI (St. Louis).<sup>19</sup>

- Post-Newsweek's six stations air an average of 27 hours of local news per week, including WJXT-TV, which broadcasts 47 hours per week.<sup>20</sup>
- Viacom-owned stations air the following number of news per week: WFRV-TV (Green Bay) 46.5 hours; KDKA-TV (Pittsburgh) 40 hours; WJZ-TV (Baltimore) 35 hours; KUTV-TV (Salt Lake City) 38 hours; and KYW-TV (CBS) and WPSG (UPN) together air 47 hours per week to Philadelphia viewers.<sup>21</sup>
- WJTV-TV (Jackson, MS) devotes 9.5 hours of each weekday to news programming, and that more than half of this airtime focuses on local news.<sup>22</sup>
- WDEF-TV (Chattanooga, TN) states it has almost 50 employees dedicated to local newsgathering and production on a daily basis. WDEF airs 24.5 hours of local news every week.<sup>23</sup>
- WSLs-TV/Newschannel 10 (Roanoke, VA) demonstrated its strong commitment to local news with the recent additions of local newscasts at both 5:30AM and 5:30PM each weekday, for a total of 22 hours of local news each week.<sup>24</sup>
- Gannett-owned WUSA-TV (Washington, DC) devotes 35.5 hours to local news each week, or about 21% of its total airtime, including a recently added 7:00PM newscast to accommodate the relatively late work schedules of Washington-area viewers. Other commenting Gannett stations include: KPNX-TV (Phoenix), which airs 28.5 hours of local news per week; KUSA-TV (Denver), which devotes about 20% of its total airtime to local newscasts; and KTHV-TV (Little Rock), which airs more than 22 hours per week of local news.<sup>25</sup>

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<sup>19</sup> Comments of Fox Television Stations, Inc. and Fox Television Holdings, Inc. in MB Docket No. 04-233, at Exhibit No. 1 (filed Nov. 1, 2004).

<sup>20</sup> Comments of Post-Newsweek in MB Docket No. 04-233 (filed Nov. 1, 2004).

<sup>21</sup> Viacom Comments in MB Docket No. 04-233, at 3 (filed Nov. 1, 2004).

<sup>22</sup> Comments of WJTV-TV (Jackson, MS) in MB Docket No. 04-233, at 1 (filed October 2004).

<sup>23</sup> Comments of WDEF-TV (Chattanooga, TN) in MB Docket No. 04-233, at 1 (filed October 2004).

<sup>24</sup> Comments of WSLs-TV/Newschannel 10 (Roanoke, VA) in MB Docket No. 04-233, at 1 (filed October 2004).

<sup>25</sup> Gannett Comments at 1-3.

- KDKA-TV (Pittsburgh) airs nearly 40 hours of local news each week, more than any other Pittsburgh station and representing about 30% of its programming schedule.<sup>26</sup>
- WFRV-TV (Green Bay) devotes more than 25% of its operational expenses to local news product, and airs 46.5 hours of local news each week. *Id.* at 2.

Many radio stations also submitted evidence of their commitment to local news.

- Three Eagles Communications' five stations employ one full-time News Director and two part-time reporters that report news within a 75-mile radius of Eagle's facilities in Columbus, Nebraska. Eagle provides 50 full local newscasts each weekday and 7 newscasts each weekend day.<sup>27</sup>
- WIBC-AM has 14 local news reporters and anchors, and airs local newscasts at the top and the bottom of every hour 24 hours a day, 365 days a year. WIBC also operates Network Indiana that focuses on locally relevant news and supplies original hourly newscasts and a wire service to more than 70 stations across Indiana.<sup>28</sup>
- KNSS-AM (Wichita, KS) produces a three-hour block of local news each weekday entitled "The Morning Newswatch," that the Kansas Broadcasters Association recently named best Newscast in the State of Kansas. KNSS also produces a six-minute news update which airs five times day, and updates the weather twice every hour.<sup>29</sup>
- KTHS-FM (Berryville, AR) devotes 30% of its broadcast day to news and information programming, including news and community bulletin board features.<sup>30</sup>

This evidence, as well as the discussions provided by numerous other broadcasters concerning their delivery of local news content, illustrate that, rather than a rare occurrence, as

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<sup>26</sup> Viacom Comments at 2.

<sup>27</sup> Comments of Eagles Communications in MB Docket No. 04-233, at 1 (filed Nov. 1, 2004).

<sup>28</sup> Comments of WIBC-AM (Indianapolis) in MB Docket No. 04-233, at 1 (filed October 2004).

<sup>29</sup> Comments of Entercom Wichita License, LLC in M Docket No. 04-233, at Attachment A (filed Nov. 1, 2004).

<sup>30</sup> Comments of the Arkansas Broadcasters Association in MB Docket No. 04-233, at 6 (filed Nov. 1, 2004).

the Consumer Federation of America or others would have the Commission believe,<sup>31</sup> broadcasters can and do provide as much local news as possible.

Moreover, broadcasters do much more than just report on current events within their newscasts. As described in the record, their efforts encompass a variety of matters that are important to a community's well-being, including investigative reports, health advice, crime reports, weather, local sporting events, consumer advocacy, family issues, local cultural events, business issues, the environment, topics of importance to minorities and other historically underserved segments, and a host of others. These kinds of news segments serve to inform, update and educate audience members regarding on-going circumstances and situations even where no recent triggering event may have occurred. As FOX states, only by participating in the everyday life of its community, and engaging in an on-going dialog, can a broadcaster maintain its most important asset – the local audience. FOX Comments at 3. A few of the hundreds of examples of locally relevant news segments provided in the record include:

- Belo's WCNC-TV (Charlotte) investigated a local resident's complaint about a Medicaid dentist; the station spent six months talking to local patients, poring over dental records, and tracking tens of millions of dollars in Medicaid payments. Eventually, the station's investigation revealed how one local group of dentists was taking advantage of the system, which led to an FBI investigation. WCNC won a Peabody Award for its efforts.<sup>32</sup>
- KTBC-TV (Austin, TX) recently aired a news segment explaining that African Americans and Hispanics driving in Austin are more likely than white drivers to be stopped by police, according to a study commissioned by several civil rights groups. The station explained that black drivers are almost twice as likely to be searched, and that Hispanic drivers are one and one-half times as likely to be searched. The news coverage lent support to civil rights groups' call for a series of town hall meetings and to lobby the city council for changes within the Austin police department.<sup>33</sup>

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<sup>31</sup> Comments of the Consumer Federation of America and Consumers Union in MB Docket No. 04-233, at Attachment B (filed Nov. 1, 2004).

<sup>32</sup> Belo Comments at 6.

<sup>33</sup> Comments of KTBC-TV (Austin, TX) in MB Docket No. 04-233 (filed Nov. 1, 2004).

- KDFW-TV (Dallas) airs locally produced stories on health and medical issues every day during its newscasts between 5:00AM and 9:00AM and during its 5:00PM and 9:00PM newscasts, for a total of about two and one-half hours of segments each month. Topics have included local medical breakthroughs, public health alerts, and stories about individuals' situations designed to raise public awareness.<sup>34</sup>
- WGHP-TV (High Point, NC) regularly airs local business-related news segments, such as the recent movement of High Point's economy away from its manufacturing past and towards a biotech future. The station recently aired news segments on the High Point City Council hearings to consider giving \$175,000 of incentives to three biotech companies that are considering expanding their operations in the city.<sup>35</sup>
- WRCB-TV (Chattanooga, TN) airs a series of news segments that deal with issues of importance to children and families. These reports air three times a week in local newscasts between 6:00AM and 7:00AM. The reports are produced weekly so the reports always deal with current topics.<sup>36</sup>

Thus, broadcasters provide a plethora of local news, including coverage of both current events and on-going situations that can impact the lives of broadcasters' local audiences.

### **C. Broadcasters Deliver Local Public Affairs Programming**

In the *Notice*, the Commission also requested information on the amount and types of locally relevant public affairs programming provided by broadcasters. The record provides ample evidence that broadcasters air vast amounts of programming concerning local public affairs. As noted above, commenters representing at least 1904 radio licensees, and 287 television licensees, specifically stated that they broadcast such programming. Many of these stations also note what type of public affairs issues they typically address, including: education (95 television stations, 49 radio stations); minority issues (45 television, 1278 radio); and, health matters (65 television, 22 radio), among numerous other categories. Examples include:

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<sup>34</sup> Comments of KDFW & KDFL, Dallas/Ft. Worth, TX in MB Docket No. 04-233 (filed Nov. 1, 2004).

<sup>35</sup> Comments of WGHP-TV (High Point, NC) in MB Docket No. 04-233 (filed Nov. 1, 2004).

<sup>36</sup> Comments of WRCB-TV (Chattanooga TN) in MB Docket No. 04-233 (filed Nov. 1, 2004).

- WLWC-TV's (Providence) *The Real Deal* is an alternative public affairs program hosted by political consultant Guy Default, who aims to help viewers understand how the political process affects their lives. Each episode consists of a discussion between high-profile, local guests, a debate between Democrat and Republic representatives, a discussion featuring a Rhode Island "local hero," and Mr. Default's commentary on current local news events.<sup>37</sup>
- In addition to locally produced content, WCBS-TV (Chicago) airs syndicated public affairs programming that may not be produced locally, but still impacts local citizens, such as *Every Woman*, which features inspirational and motivational women from all walks of life, and focuses on their unique stories and uplifting courage to overcome adversity; or *Different Drummers*, which features discussions aimed at teenagers regarding the practice of religion in everyday life. The purpose of the latter is to create understanding between groups with widely varying backgrounds.<sup>38</sup>
- In addition to weekly public affairs programming, most broadcasters air public affairs segments within local newscasts. For example, KTVT-TV (Dallas) provides an extensive list of local public affairs issues that are routinely covered within its newscasts, including segments entitled *Ask The Experts* which focuses on health issues, and *Connect With Kids*, which covers character building topics featuring children and teens.<sup>39</sup>
- WTLV-TV (Jacksonville) also specifically mentions its broadcast of public affairs segments within local newscasts. Routine segments cover crime, gun violence, education, diversity, obesity and others.<sup>40</sup>
- WTSP-TV (Tampa Bay) airs *Life Around the Bay*, a daily hour local public affairs show targeted to women in the Tampa Bay community an which features daily educational stories designed to keep women informed of local school issues and other community news of interests to women.<sup>41</sup>
- WHBQ-TV (Memphis) airs several public features within regularly scheduled newscasts, including *Building Better Minds*, a weekly feature that highlights positive stories of success in education, and *Fight the Blight*, an ongoing series of reports about abandoned property that threaten neighborhoods.<sup>42</sup>

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<sup>37</sup> Comments of Viacom in MB Docket No. 04-233, at Attachment 1 (filed Nov. 1, 2004)

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Comments of Gannett Broadcasting in MB Docket No. 04-233, at 68 (filed Nov. 1, 2004).

<sup>41</sup> *Id.* at 16.

<sup>42</sup> Comments of WHBQ-TV (Memphis) in MB Docket No. 04-233 at 2 (filed Nov. 1, 2004)

- Seven Clear Channel stations in Albany, New York air *Clear View*, a weekly half-hour public affairs program every Sunday. This program is designed to highlight community organizations and their positive impact on the Albany community.<sup>43</sup>

As noted above, the categories and variety of public affairs broadcast by radio and television stations nationwide are limitless. Coverage of local public affairs is quite possibly the best way for broadcasters to connect with their local audience. Issues to be addressed often are suggested by viewers and listeners, or generated by a station's research or involvement in the local community. The record also demonstrates that broadcasters air many hours of local public affairs on a weekly basis. For example, NAB noted in its earlier comments that local public affairs programs of at least 30 minutes in length ran on 60% of all radio stations, and 43% of all television stations, represented by broadcaster-respondents to NAB's *2004 Community Service Report*. NAB Comments at 13. NAB also explained that stations routinely utilized multiple avenues for addressing the many issues of importance to local communities, including within local newscasts, as well as during separate and distinct public affairs shows. By way of example, 43% of television stations and 62% of radio stations covered anti-crime issues in separate public affairs programs, 50% of television stations and 68% of radio stations addressed children's matters in such programs, and 45% of television stations and 57% of radio stations focused on hunger and poverty issues in public affairs programs. *Id.* at 14.

NAB's review of the record disclosed that most television licensees broadcast, at a minimum, a distinct local public affairs of at least 30 minutes in length each week, although as well as other programs throughout the week, and almost all licensees address local public affairs issues during local newscasts. Radio stations often deliver even more local public affairs coverage, although typically in more numerous, shorter segments. Examples include:

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<sup>43</sup> Clear Channel Comments at 11.

- WZZM-TV (Grand Rapids, MI) produces and airs *Take Five Grand Rapids*, a live, local talk show that covers community news and local public affairs for 30 minutes each weekday at 5:00PM. Gannett Comments at 53.
- KRNV-TV (Reno) airs *Nevada Newsmakers*, a daily 30 minute show featuring local politicians and community figures, *Community Update*, a 30 minute program that airs once a day between the hours of 10:00AM and 5:00PM, and *Lifelong Learning*, a 30 minute weekly show.<sup>44</sup>
- KTNQ-AM (Los Angeles) averages 16.5 hours of public affairs per week, and WADO-AM (New York) airs *Primera Plana*, a one-hour public affairs program every day. Univision Comments at 11.
- Each Monday through Friday, KQBZ-FM (Seattle) airs nine consecutive hours of programming focused on issues of importance to Seattle viewers, including interviews with local politicians and civic leaders.<sup>45</sup>
- KCFX-FM (Kansas City) airs two half-hour weekly programs focusing on local issues of importance to Kansas City listeners.<sup>46</sup>
- Five days a week during drive-time hours, the superintendent of the Dallas County School System appears on WHBB-AM and WDXX-FM (Selma, AL) to discuss issues facing the 12,000 students school system.<sup>47</sup>

These sample programs demonstrate that local public affairs programming is a vital, valuable product. Indeed, perhaps even more so than local news, airing public affairs programs enable broadcasters to distinguish themselves from the many alternative media outlets available today.<sup>48</sup> These examples illustrate the continuous efforts of radio and television stations to remain relevant to their local communities. Unlike cable television, satellite video providers,

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<sup>44</sup> Comments of KRNV-TV (Reno) in MB Docket No. 04-233 at 1 (filed October 2004).

<sup>45</sup> Comments of Entercom Seattle License, LLC in MB Docket No. 04-233, at 2 (filed Nov. 1, 2004).

<sup>46</sup> Comments of KCFX-FM (Kansas City) in MB Docket No. 04-233, at 1 (filed October 2004).

<sup>47</sup> Comments of Named State Broadcasters Associations in MB Docket No. 04-233, at Attachment 1 (filed Nov. 1, 2004).

<sup>48</sup> See NAB Comments at 7-8 for discussion of growth of broadcast competitors since the early 1980's.

satellite radio providers, and certainly the Internet, local broadcasters can and do provide programming that address the most local of issues.

#### **D. Broadcasters Deliver Political Coverage**

As noted above, parties representing at least 1472 radio stations and 255 television stations specifically discussed their coverage of political issues in comments in the record. NAB explained in its earlier comments that new obligations in the area of political broadcasting are unnecessary. For instance, we noted that television broadcasters increasingly are launching or continuing efforts to produce daily segments of five minutes or more in length on relevant political issues. These segments typically air during a station's evening local newscasts for the 30 to 45 days prior to a primary and/or general election, and are designed to provide a fair-minded, in-depth analysis of the important campaign issues. Companies delivering this and similar programming include Hearst-Argyle, Capitol Broadcasting, Pappas, New York Times, Post-Newsweek, and Belo, among others. NAB Comments at 45-46.

The reply comment record supports NAB's view, as well as demonstrates the long-standing commitment of broadcasters to producing and airing political debates, candidate interviews, and discussions of relevant political issues. For example:

- In 1996, Belo launched a show called "It's Your Turn" which offers free time to candidates to tell the audience why they should be elected and to answer questions. In 2002, 104 federal and state candidates participated in this program; in 2004 that number rose to 159. Belo also aired at least one hour per week of coverage focused on candidates or issues for the six weeks leading up to Election Day, including interviews, debates, issue-watch programs and ad-watch programs.<sup>49</sup>
- WSLs/Newchannel 10 (Roanoke, VA) states that it has a full-time political reporter/anchor, and notes that in April 2004, WSLs produced and aired a live Mayoral debate, and also held a City Council debate, as well as produced two 30-minute specials to help inform viewers and prepare viewers for local critical elections.<sup>50</sup>

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<sup>49</sup> Belo Comments at 9.

<sup>50</sup> Comments of WSLs/Newschannel 10 in MB Docket No. 04-233 (filed October 2004).

- WXOW-TV (La Crosse, WI) provided extensive coverage of the issue of a north-south highway corridor through the city of La Crosse. The station aired a live Town Hall meeting in primetime. The corridor issue was decided by a referendum vote.<sup>51</sup>
- During the past year, KTTV-TV (Los Angeles) aired pieces on the presidential election, local council elections, the debate over immigrant licenses, a vote on greenhouse emission regulation and the one of the most local issues around, the Long Beach vote on dog zones.<sup>52</sup>
- WZZM-TV (Grand Rapids) states that in 2000 it offered to host and produce a debate among the candidates for U.S. Senate, but the candidates rejected their offer. The same result occurred in 2002 in response to the station's offer to host and produce a debate among the candidates for Governor in 2002. During the 2004, the station offered all State House candidates in its DMA the opportunity to present their platform during an edition of its evening newscast in the weeks before the election. Only 20 of the 30 candidates accepted the station's offer. Gannett Broadcasting Comments at 55.
- KSFO-FM (San Francisco) notes that, like many radio stations, political issues are discussed at length during its weekday talk shows in both the AM and PM drive-time hours. During these shows, hosts often interview local politicians and candidates, discuss the local issues, propositions and ballot initiatives. Radio stations also often publicize and stage voter registration initiatives. Disney Comments at Attachment D.

These are just a few of the hundreds of examples in the record that illustrate the effort of broadcasters to address local political issues. It is clear from the record that most, if not all, broadcasters provide extensive coverage of candidates and important local issues, and that many also endeavor to produce debates, if the candidates will consent. As NAB stated in its initial comments, broadcasters routinely conduct candidate interviews, including valuable airtime during stations' evening newscasts.

The Commission should reject the premise that political candidates have too few opportunities to access the nation's airwaves. First, there is just too much evidence of candidates who refuse free opportunity to appear on radio and television broadcasts. NAB Comments at 47-

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<sup>51</sup> Comments of WXOW-TV (La Crosse, WI) in MB Docket No. 04-233 (October 2004).

<sup>52</sup> Comments of KTTV-TV (Los Angeles) in MB Docket No. 04-233, at 2 (filed October 2004).

48. Second, there is persuasive evidence that viewers and listeners are more than satisfied with the political coverage they now receive. For example, for the most recent election cycle, a Wirthlin Worldwide poll (released October 29, 2004) revealed that only 10% of voters believed that broadcasters provided “too little time” covering elections. Indeed, 42% of voters believed that local broadcasters provided “too much time” covering the elections, while 47% said that local stations provided “about the right amount” of coverage. Also, 48% of Americans viewed local broadcast coverage of elections as the “most helpful” factor in selecting a candidate, compared to 25% who picked cable TV news coverage and 9% who picked newspaper coverage. *Id.* at 48-50.

#### **E. Broadcasters Deliver Local Music**

In the *Notice*, the Commission seeks comment on the use of “national playlists” and “voice-tracking” systems, and implies that local music artists need enhanced access to radio airtime. *Notice*, 19 FCC Rcd at 12440. NAB believes that the record in this proceeding illustrates that most radio stations already broadcast ample amounts of locally-produced music, such that no further regulation is necessary in this area. Specifically, of the more than 2254 radio stations represented in comments, at least 1542 specifically discussed their broadcasting of local music artists. While this may not rise to the level of scientific proof that all radio stations do so, NAB asserts that these figures demonstrate that radio stations generally devote at least a portion of their weekly programming schedule to promoting local music artists. Among the hundreds of examples found in the record:

- WBEB-FM (Philadelphia) states that its music choices are based on extensive listener feedback from monthly interviews, ongoing telephone callout research and an online music panel.<sup>53</sup>

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<sup>53</sup> Comments of WBEB-FM (Philadelphia) in MB Docket No. 04-233 (filed October 2004).

- WAMR-FM (Miami) plays at least three local music artists each day, and 15% of the playlist of WRTO-FM (Goulds, FL) is comprised of local talent. WQBA-AM (Miami) has a one-hour weekly show every Sunday that is devoted entirely to the promotion of local artists, including singers, dancers and painters. KLTN-FM (Houston) provides a full hour each week during which local talent from Houston are featured. Univision Comments at 17-18.
- KAJA-FM (San Antonio) airs *The Other Side of KJ*, which features “Texas Music,” a genre popular along the Interstate Highway – 35 Corridor. Bands playing Texas Music all write their own songs; in fact, fans often check the liner notes on CDs and reject bands that purchase songs. KAJA’s program began only on Sunday evenings, but proved so popular it expanded it to Monday through Friday. Clear Channel Comments at 16.
- WTTS-FM (Bloomington, IN) relies on its listeners in selecting programming on the station; the station communicates regularly with the 15,000 listeners that have chosen to be part of the station’s database. These listeners participate in surveys and special advisory panels designed to improve and fine-tune the station’s programming efforts.<sup>54</sup>
- WVEE-FM (Atlanta) plays and interview local artists Monday through Friday during the *Artist Hour*, which airs in the 7:00PM hour.<sup>55</sup>
- KKMJ-FM (Austin) airs a two-hour music program every Sunday night during which over 90% of the music by local artists, both unsigned and on small, independent local record labels. Infinity Comments at Attachment 2.
- WBCN-FM (Boston) airs a weekly two-hour Sunday night show featuring brand new music with over 90% from small or independent labels, followed by another two-hour program featuring new Boston music selected from submitted records and tapes. *Id.*

The record in this proceeding shows that broadcasters play local music artists much more frequently than the Future Music Coalition and others would have the Commission believe. Like local news and public affairs, providing locally-produced music is one of the best ways for broadcasters to distinguish themselves from the many, and growing, alternative media outlets available today. Thus, also like local news and public affairs, radio stations deliver local music as a means of cementing audience loyalty, and in turn, surviving in an increasingly competitive

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<sup>54</sup> Comments of Sarkes Tarzian, Inc. in MB Docket No. 04-233, at 2 (filed Nov. 1, 2004).

<sup>55</sup> Comments of Infinity in MB Docket No. 04-233, at Attachment 2 (filed Nov. 1, 2004).

media marketplace. Accordingly, there is no justification exists for Commission action in this area.

## **II. The Record Demonstrates That Broadcasters Provide Community-Responsive Programming In Response To Marketplace Forces**

Certain commenters repeat well-worn arguments that, contrary to the Commission's twenty-year old conclusion, marketplace incentives are insufficient to compel broadcasters to provide adequate amounts of local news, public affairs, and political programming. CFA, for example, asserts that "the assumption that economic incentives in a largely unregulated marketplace will lead broadcasters to meet the needs of their local communities is wrong."<sup>56</sup> CFA opines that, among other reasons, a free media marketplace "undervalues diversity and localism," which leads broadcasters instead to "serve the needs of the majority through a lowest-common-denominator orientation."<sup>57</sup> Similarly, the Campaign Legal Center ("CLC") argues that television stations do not provide adequate election coverage, and that, of the stories that are broadcast, many are focused on sound bites or campaign strategy and polls, as opposed to issues.<sup>58</sup> CFA and CLC, among others, therefore urge the Commission to impose stringent rules on the amounts and types of local non-entertainment programming that broadcasters must provide. Essentially, these parties would have the Commission ignore the record evidence, assume the worst, and reinstate the same "regulations that straight-jacket all stations into the same mold" that the Commission eliminated more than twenty years ago.<sup>59</sup>

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<sup>56</sup> CFA Comments at Attachment B, page 2.

<sup>57</sup> *Id.*

<sup>58</sup> Comments of the Campaign Legal Center and the Alliance for Better Campaigns in MB Docket No. 04-233 (filed Nov. 1, 2004) ("CLC Comments") at 3-4.

<sup>59</sup> See Sarkes Tarzian Comments at 2 quoting *Deregulation of Radio, Report and Order*, in BC Docket No. 79-219, 84 FCC 2d 968, 998 (1981).

First, the views of CFA and CLC do not necessarily reflect the opinions of the majority of Americans. For example, although the raw number of complaints about broadcasters' programming has soared over the past two years, it has been determined that nearly all such complaints were filed by the Parents Television Council ("PTC"), a Los Angeles-based activist advocacy group. Specifically, the PTC was responsible for 99.8% of the indecency complaints filed with the Commission in 2003, and 99.9% of the complaints filed through October 2004, excluding complaints concerning the Janet Jackson Super Bowl incident.<sup>60</sup> Thus, NAB believes that, in actuality, CFA, CLC and the PTC are out of step with the majority of Americans when it comes to the quality and enjoyment of broadcast programming.

These media critics also completely ignore the realities of today's media marketplace. With respect to television, in 1984, there were 1,163 commercial and non-commercial stations on the air, compared to 1,726 in mid-2003, U.S. cable penetration was approximately 40%, compared to an estimated 96.3% in mid-2003, and satellite video providers had about 500,000 subscribers, compared to over 20 million today. As of June 2003, cable had almost 66 million subscribers. With respect to radio, in mid-1979, there were a total of 8,654 radio stations in the U.S., compared to a total of 13,486 today, and satellite radio services, which today has more than 3.5 million subscribers, did not yet exist. NAB Comments at 7-8.

These developments have had a powerful impact on broadcasters. For example, in 1982, the three major networks accounted for 80% of all television viewing, compared to average 45 share during the 2002-2003 season. Even in areas where broadcasters have historically dominated, such as news, fewer viewers are watching local and national television news, and this

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<sup>60</sup> See e.g., Todd Shields, *Activists Dominate Content Complaints*, MediaWeek, December 6, 2004, available at [http://www.mediaweek.com/media week/headlines/article\\_display.jsp?vnu\\_content\\_id=1000731656](http://www.mediaweek.com/media week/headlines/article_display.jsp?vnu_content_id=1000731656).

drop is due in part to competition from other media outlets, including cable and the Internet.

According to recent research, viewership of local broadcast news has fallen from 77% in 1993 to 57% in 2002, and the regular audience for national network news has declined from 60% in 1993 to 32% in 2002. The differential is approximately the same size as the total cable news audience.<sup>61</sup>

The explosion in the number of alternative media outlets has caused broadcasters to compete through improved service. For example, in the local news arena, many radio and television stations have greatly expanded their coverage of the local weather. WJTV-TV (Jackson, MS), for one, states that in its community, “there is no bigger importance to our viewers than our coverage of severe weather than threatens our state.” Thus, WJTV states that it has the largest working television weather lab in its state, which allows its meteorologists instant access to immediate weather conditions from anywhere in the world. In 2004 alone, WJTV invested hundreds of thousands of dollars to purchase the state-of-the-art, most accurate weather forecasting system available. The station also purchased the most powerful local weather radar system produced. As a result, WJTV states that it was the only station in its area to provide 15-hours of non-stop coverage of the approach and landfall of Hurricane Ivan in September 2004. The station’s coverage included information and maps of the hurricane’s path, and live updates from reporters at the anticipated locations of where the hurricane was expected to hit, as well as other on-the-spot, live reports.<sup>62</sup>

Often, over-the-air broadcasters are the last link to vital emergency information. For instance, during Hurricane Frances, which hit Florida in October 2004, various reports indicated

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<sup>61</sup> Survey Report, Pew Research Center for the People & the Press, *Public’s News Habits Little Changes by September 11*, at 5 (June 9, 2002).

<sup>62</sup> WJTV-TV Comments at 2-3.

that cable and satellite systems were useless. Instead, when the power gave out, many Floridians merely switched over to their trusty, battery-operated, over-the-air televisions. “During weather emergencies, there is only place folks can see Doppler radar to know where the hurricane is at any moment – free over-the-air TV. It doesn’t matter how much penetration cable has when the cable’s out. Free over-the-air saves lives.”<sup>63</sup>

Despite the evidence to the contrary, these commenters continue the same theme they proposed 20 years ago – government should not trust unregulated markets. CFA, in particular, believes that economics should be reduced, if not eliminated, as a factor in weighing broadcasters’ obligations to the public. Congress, of course, decided decades ago that the United States would have a predominantly privately-owned commercial system of broadcasting, such that broadcasters are rightly concerned with their ability to operate efficiently and profitably in a commercial marketplace.<sup>64</sup> Indeed, if the Commission seeks to maintain a system of viable commercial broadcast stations that offer free, over-the-air service, then these broadcaster concerns should remain an important consideration in this proceeding. Only competitively viable broadcast stations can serve the public interest in localism. As the Commission decided over a decade ago, the broadcast “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”<sup>65</sup> The Commission’s decision in this proceeding therefore must take account of the continued

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<sup>63</sup> Michael Silbergleid, *Free Over-The-Air Saves the Day*, DigitalTV, at 6 (Oct. 2004).

<sup>64</sup> See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940) (the Communications “Act recognizes that the field of broadcasting is one of free competition,” and that “Congress intended” each licensee to “survive or succumb according to his ability to make his programs attractive to the public”).

<sup>65</sup> *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2760 (1992) (FCC loosened the radio ownership rules because the “bleak” revenue and profit outlook for radio stations “substantially threatened” radio’s “ability to serve the public interest in the spirit of the Communications Act”).

“economic viability” of free, over-the-air broadcasting in an environment radically changed by greater competition and advances in technology.

In particular, the Commission must be mindful of the impact its decisions in this proceeding will have on smaller, and small market, broadcasters. Neither CFA nor CLC recognize that many smaller and small market radio and television stations already struggle to make ends meet, or that imposing burdensome new restrictions on the programming of these broadcasters very well could put them out of business. As noted in NAB’s comments, the profits of certain smaller stations and stations in smaller markets are being squeezed by several factors, including the growth of new competitors, the costs of the DTV transition, and the decline in the compensation payments made by networks to affiliated stations. NAB Comments at 30-34. Thus, these stations may need to find other ways to serve the public consistent with their economic conditions. New rules that impose one-size fits-all standards in this area most likely would hit hardest those small stations and less profitable stations in medium and small markets and could well force them out of business altogether.

There is ample evidence in this record that such a draconian approach is not necessary. In any given market, there are broadcasters who have responded to their increased competition with extensive coverage of local news, local public affairs, political events, and other local non-entertainment programming. The Commission should continue to provide necessary flexibility and allow broadcasters to respond to market conditions.

The Commission itself has recognized the positive impacts of an increasingly competitive media marketplace.

[T]here are far more types of media available today, far more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before. . . . [T]he competitive pressure

placed upon free, over-the-air media has led to better quality and in some cases, an increase in the quantity of some types of content.<sup>66</sup>

The record demonstrates that, in order to survive in today's increasingly competitive marketplace, radio and television broadcasters focus much of their resources and commitment on their main advantage, namely, the uniquely local nature of their services. Broadcasters use high-profile news anchors and journalistic depth to explore, investigate and analyze local public interest stories better than any other electronic media outlet. As Belo states, "local news, in essence, is the broadcaster's franchise." Belo Comments at 18.

Additional regulation is also unnecessary given the powerful economic incentives that encourage broadcasters to produce and provide local news. Local news and other local non-entertainment programming is the most lucrative programming for broadcasters. Specifically, broadcasters receive a larger percentage of the advertising revenue from local newscasts and other locally produced programming because they own the copyright for such material. When stations air general entertainment programming, which frequently comes from national networks or syndicators, broadcasters receive only a fraction of the advertising revenue. Belo notes, for examples, that newscasts represent about 40% of its stations' revenues, but only about 23% of their total programming. *Id.* at 19.

In addition, unlike entertainment programming, television local news is largely immune to "time-shifting," where viewers record programs and watch them later, often fast-forwarding through the commercials. Local news is typically broadcast live, and news changes rapidly; thus viewers rarely record the local news. As a result, local news is the most reliably viewed programming, making it a premium product for both advertisers and broadcasters. *Id.*

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<sup>66</sup> 2002 *Biennial Regulatory Review, Report and Order* in MB Docket No. 02-277 *et al.*, 18 FCC Rcd 13620, 13667 (2003) ("*Biennial Order*").

Upon close examination, it is clear that CFA and CLC's arguments actually reflect a desire to control the specific content or perceived quality of broadcasters' fare. For example, CFA states that it "is well-documented that the dictates of mass audiences create a largest market share/lowest common denominator ethic that undercuts the ability [of broadcasters] to deliver culturally-diverse, locally-oriented and public interest programming." CFA Comments at Attachment B pages 10-11. Similarly, CLC complains that broadcasters' political coverage focuses too often on polls and the horserace between candidates instead of "substantive, issue-based" matters. CLC Comments at 4.

Of course, these parties largely gloss over the fact that the Commission may not regulate program content without specific statutory authority. The Commission simply lacks authority to force broadcasters to air more BBC-like programming because, notwithstanding the entreaties of CFA, CLC and other media critics, it cannot satisfy the concerns of these parties without venturing into very specific – and unconstitutional – content mandates.<sup>67</sup> It is also important to recall that these parties are calling on the Commission to reverse the course it took two decades ago when it determined that broadcast stations would in fact provide an "appropriate mix" of programming (including non-entertainment) in response to market forces without any evidence suggesting a need to do so.<sup>68</sup> This record clearly does not provide sufficient evidence for an

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<sup>67</sup> See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations").

<sup>68</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1087 (1984) (eliminating programming guidelines and ascertainment requirements for television stations). In eliminating the broadcast programming guidelines for radio in the early 1980s, the Commission even suggested that "it may be *offensive* to the public interest to require any type of programming be offered in amounts that please the Commission rather than the public whose interest, after all, is intended to be the interest served under the public interest standard." *Radio Deregulation Order*, 84 FCC 2d at 1064.

agency to overcome the high hurdle it would face to make such a change of course.<sup>69</sup> But even assuming *arguendo* that market forces sometimes produce “lowest common denominator” of programming, NAB questions how the “good” or “poor” quality of media products would be measured, and by whom. Even asking such questions suggests the grave Constitutional concerns raised by any attempt to justify broadcast regulation on the basis of perceived failings in the quality or content of programming.<sup>70</sup>

### **III. The Impact Of The Record In This Proceeding Confirms That Additional Federal Governance Of Broadcasters’ Programming Is Unnecessary**

It is particularly noteworthy that the overwhelming majority of comments in this proceeding concern two particular situations relating to political broadcasting: (1) the decision by Sinclair Broadcasting to air a documentary critical of Senator John Kerry shortly before the Presidential election; and (2) Pappas Telecasting’s donation of \$325,000 in airtime to Republican county committees in California for use on behalf of GOP state and local candidates.

Specifically, in early October 2004, Sinclair announced plans to preempt regular programming on all 62 of its television stations on one evening between October 21-24, 2004, in order to broadcast “Stolen Honor: Wounds That Never Heal,” a documentary that, in part, features former prisoners of war criticizing Senator Kerry’s anti-war statements efforts following

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<sup>69</sup> See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

<sup>70</sup> See generally T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 311, 315 (1994) (in discussing critics’ contentions that broadcasters should produce more and better news and public affairs programming, authors note that “[n]o regulation can make local news harder and better,” and observe that these demands stem from the “belief that it is the right of elites to dictate tastes to viewers and listeners”). This “belief” in the “right” to “dictate tastes to viewers and listeners” is certainly reflected in commenters’ laments about “turning citizens into passive couch potatoes,” and how the media produces “standardized, lowest common denominator products,” avoids “culturally uplifting but less commercially attractive content” and “favors entertainment at the expense of information.” Comments of CFA at 24-25, 29. NAB remains unconvinced that concerns over broadcasters somehow fostering “couch potatoism” constitute a valid basis for structural ownership regulation. *Id.* at 24.

his return from the Vietnam War. Sinclair characterized its plans as a “special news event.”<sup>71</sup> During the ensuing uproar, opponents argued that Sinclair’s airing of the program was partisan and would not serve the public interest.<sup>72</sup> Reports also suggested that Sinclair received inquiries from certain of its institutional investors.<sup>73</sup>

In addition, there were the more than 60,000 individual complaints filed in this proceeding, most of which argue that Sinclair’s action was an example of improper bias.<sup>74</sup> Subsequently, Sinclair decided not to air the documentary in its entirety, and instead produced an hour-long special news program on October 22, 2004 that focused on allegations of media bias and included only portions of “Stolen Honor” along with footage from other political documentaries.

The other situation revolved around whether Pappas Telecasting’s donation of airtime triggered federal requirements that broadcasters must grant equal opportunities to all candidates for the same office, and if so, whether the opponents of Republican candidates who take advantage of Pappas’ offer would be entitled to equal time at no charge. NAB estimates that at least 5,000 individuals filed comments in this proceeding expressing concerns that Pappas’ donation of airtime only to Republican committees violated a broadcaster’s obligation to use the public airwaves in a manner that serves the public interest.<sup>75</sup> The Commission’s Media Bureau

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<sup>71</sup> Todd Shields, *Criticism of Sinclair’s Kerry Documentary Mounts*, MediaWeek.Com (Oct. 12, 2004), available at [http://www.mediaweek.com/mediaweek/search/article\\_display.jsp?vnu\\_content\\_id=1000664403](http://www.mediaweek.com/mediaweek/search/article_display.jsp?vnu_content_id=1000664403).

<sup>72</sup> Greg Gatlin, *Sinclair Kerry Plans Drawing Dem Fire*, BostonHerald.Com (Oct. 13, 2004), available at <http://news.bostonherald.com/election2004/view.bg?articleid=48778>.

<sup>73</sup> Frank Ahrens and Howard Kurtz, *Anti-Kerry Film Won’t Be Aired*, Washington Post, page A07 (Oct. 20, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A46338-2004Oct19.html>.

<sup>74</sup> See, e.g., Comments of Carrie Fragnoli in MB Docket No. 04-233 (filed Oct. 15, 2004).

<sup>75</sup> See, e.g., Comments of Jessica Bond Medaille in MB Docket No. 04-233 (filed Oct. 26, 2004)

ultimately decided that Pappas' donation did trigger its equal opportunities requirements, and that opponents of those Republican candidates using the donation to run campaign ads were entitled to equal time free of charge.<sup>76</sup>

Fair evaluation of the ultimate resolutions of these two circumstances shows that rule changes are not necessary. First, at least with respect to Sinclair, it is apparent that the public's involvement, pressure from Wall Street, and the risk of alienating advertisers,<sup>77</sup> all may have affected Sinclair's decision to include only portions of the anti-Kerry documentary within a large program about media bias, instead of airing the entire documentary. Indeed, the Commission's regulations were largely irrelevant to the eventual format of Sinclair's broadcast. In this case, the ultimate outcome was shaped not by federal regulation, but instead by the same pro-competitive, free market incentives that the Commission relied upon in deregulating radio and television over two decades ago.<sup>78</sup> In deregulating television in 1984, the Commission specifically concluded that "market incentives will ensure the presentation of programming that responds to community needs. . . ." *TV Deregulation Order*, 98 FCC 2d at 1077. NAB believes that the resolution of the Sinclair is only further proof that the Commission's long-standing decision to rely on marketplace forces to govern broadcasters' programming and behavior has

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<sup>76</sup> *Equal Opportunities Complaint Filed By Nicole Parra Against Pappas Telecasting Companies*, Order, DA 04-3494 (rel. Oct. 29, 2004).

<sup>77</sup> See, e.g., Barry Meyer, *Sinclair Feels the Heat Over Anti-Kerry Program*, Elites TV (Oct. 2004), available at <<http://www.elitestv.com/pub/2004/Oct/EEN4173ff5dd9dbe.html>> (stating that three local Maine companies pulled their advertising from Sinclair-owned WGME (Portland), and that local businesses in Madison, WI, Springfield, IL, and Minneapolis cancelled advertising buys from Sinclair stations in those communities).

<sup>78</sup> See, e.g., *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ("*TV Deregulation Order*"); *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981) ("*Radio Deregulation Order*").

never been more right, and that additional government intrusion into the operations of radio and television stations has never been less necessary.

Second, the outcome of the Pappas situation also supports NAB's view that no additional changes to the Commission's political broadcasting rules are warranted. As mentioned above, the Commission ultimately decided that opponents of candidates airing Pappas-sponsored ads were entitled to equal access, and at no charge. Thus, the complaints of parties commenting in this proceeding were addressed, as the Commission's rules ensured equitable treatment by broadcasters of political candidates. Moreover, to the extent that individuals commenting on Pappas' donation implicitly were pushing the Commission to mandate equal time for political candidates, the Commission's order proved again that its current rules are sufficient.

Accordingly, NAB believes that these incidents and their ultimate resolutions underscore the wisdom of the Commission's long-standing reliance on marketplace incentives to govern broadcasters' programming, rather than justify further government regulation.

#### **IV. EchoStar's Proposal To Strip Certain Broadcasters Of Their Statutory Rights Under The "Carry One, Carry All" Requirement Would Violate SHVIA**

EchoStar urges the Commission to adopt a rule denying stations their rights under the "carry one, carry all" provisions of the Satellite Home Viewer Improvement Act, 47 U.S.C. § 338(a), if the stations do not satisfy some numerical standard concerning "local content."<sup>79</sup> As the plain language of the Act demonstrates, EchoStar's proposal would violate the letter, intent, and purpose of Section 338, which is to preserve free, over-the-air television (whatever its specific content) for those who cannot afford to -- or choose not to -- subscribe to a costly cable or satellite service.

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<sup>79</sup> Comments of EchoStar Satellite L.L.C. in MB Docket No. 04-233 (filed Nov. 1, 2004).

**A. The Commission Lacks Authority to Deprive Television Stations Of Their Rights Under The Statutory “Carry One, Carry All” Regime**

Section 338(a) of the Communications Act provides that DBS operators must “carry upon request the signals of all television broadcast stations located within that local market.” The definition of “television broadcast station” is incorporated by reference from Section 325(b)(7) of the Act, and includes any full-power television station licensed by the Commission. Nothing in Section 338 limits the “carry one, carry all” requirement based on the content of a television station’s programming.

EchoStar purports to identify a “trick” that the Commission could use to impose, by administrative fiat, a “local-content” requirement that Congress refused to accept. Specifically, EchoStar seizes on the use of the phrase “local television broadcast station” in a provision (Section 338(f)(1)) relating to enforcement of certain aspects of Section 338, and urges the Commission to define the phrase “local television broadcast station” so as to deprive certain stations of their rights under the substantive “carry one, carry all” provision. EchoStar Comments at 20.

EchoStar’s proposal would seek to eviscerate the central substantive rule of Section 338 by depriving many television broadcast stations -- which indisputably *are* entitled to carriage under Section 338(a)(1) -- of the ability to *enforce* that right. And EchoStar’s proposed trick, even on its own terms, is based on a misreading of the statutory phrase -- “local television broadcast station” -- that EchoStar purports to quote.<sup>80</sup>

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<sup>80</sup> EchoStar focuses on the word “local” in the phrase “local television broadcast station” in the “remedies” section, 47 U.S.C. § 338(f)(1) relating to certain specific violations by satellite carriers. EchoStar Comments at 20. But that provision is merely a slightly revised version of the similar enforcement provision relating to *cable* must-carry, in 47 U.S.C. § 334(d)(1), which uses the phrase “local commercial television broadcast station.” The latter term, in turn, is defined in section 334(h)(1) to mean any full-power commercial TV station “within the same television market as the cable system.” 47 U.S.C. § 334(h)(1). Given this history, it could not be more plain that the word “local” simply means located “within the same television market.”

But even more fundamentally, EchoStar’s proposal misinterprets the structure of the remedial provisions of Section 338. The enforcement provision upon which EchoStar relies -- Section 338(f)(1) is applicable only to certain specific provisions of the Act -- *ancillary* disputes over delivery of a “good quality signal,” programming duplication, channel positioning, or payment for carriage. 47 U.S.C. § 338(f)(1) (referring to a carrier’s “obligations under subsections (b) through (e) of this section”). The *core* provision of the Act -- the duty under Section 338(a)(1) to carry all television broadcast stations located in the same market if the carrier chooses to use the local-to-local copyright license -- is *not* subject to Section 338(f)(1). Rather, if a satellite carrier refuses to carry a television station, the station has always (since “carry one, carry all” became effective in 2002) had the right to bring a copyright lawsuit to enforce its carry-one-carry-all rights.<sup>81</sup> Indeed, until the enactment of the SHVERA this month, a copyright lawsuit was the *only* way to enforce Section 338(a)(1).

With the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) this month, television stations have a new way to enforce “carry one, carry all” against satellite carriers. As now in effect, Section 338(a)(2) provides:

“(2) REMEDIES FOR FAILURE TO CARRY. - In addition to the remedies available to television broadcast stations under section 501(f) of title 17, United States Code, *the Commission may use the Commission's authority under this Act to assure compliance with the obligations of this subsection*, but in no instance shall a Commission enforcement proceeding be required as a predicate to the pursuit of a remedy available under such section 501(f).” (Emphasis added.)

Nothing in this provision provides *any* support for the “trick” that EchoStar urges the Commission to employ, or contains the slightest hint that the Commission has the authority to

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<sup>81</sup> See 17 U.S.C. § 501(f)(2) (“A television broadcast station may file a civil action against any satellite carrier that has refused to carry television broadcast signals, as required under section 122(a)(2), to enforce that television broadcast station’s rights under section 338(a) of the Communications Act of 1934.”).

administratively repeal “carry one, carry all” by depriving certain stations -- based on the content of their programming -- of their rights under Section 338(a)(1). To the contrary, adoption of EchoStar’s procedures would defeat the plain and undisputed meaning of the “carry one, carry all” provision, Section 338(a)(1), and would therefore violate the Act.

**B. EchoStar’s Proposal Would Defeat the Purposes of the Statutory “Carry One, Carry All” Mandate**

Tens of millions of American households continue to rely *solely* on reception of free over-the-air broadcast stations as their source of television programming. By enacting both a “must carry” regime applicable to cable and a “carry one, carry all” rule applicable to satellite, Congress has consistently sought to protect the ability of these households to continue receiving free, over-the-air television -- without regard to the specific content of the broadcast programming.

For example: EchoStar’s proposal is oblivious to these goals, as demonstrated by its application to the Washington, D.C. metropolitan area. This area includes many Hispanic families, including many immigrants from Mexico and Latin America, for whom Spanish-language programming is of special importance. Whether because of financial constraints or by choice, many of these families obtain television programming only over the air. For these families, the ability to receive Spanish-language programming for free from local television broadcast stations, such as WFDC (Channel 14), is vital. While EchoStar claims (in an appendix to its Comments) that WFDC carries no local programming, what is critical to WFDC’s local Hispanic audience is that it offers *free, Spanish-language* programming of great interest to its local viewers. Yet if the DBS firms were allowed to refuse to carry WFDC, the station would immediately lose access to nearly 25% of local viewers -- with predictably harsh effects on its ability to continue to serve *all* of its local audience, including over-the-air households.

Congress was well aware of this dynamic in enacting the mandatory carriage provisions of Section 338 of the Communications Act. As the Court of Appeals for the Fourth Circuit explained in rebuffing EchoStar’s constitutional attack on “carry one, carry all,” the Act “was designed to promote competition between satellite and cable while ‘*preserv[ing] free television for those not served by satellite or cable*’” -- such as the local Hispanic audiences who rely on free, over-the-air reception of WFDC. *Satellite Broadcasting And Communications Association v. FCC*, 275 F.3d 337, 344, 349 (4th Cir. 2001) (quoting SHVIA Conference Report) (emphasis added). Put another way, “[l]ike the cable must-carry rules, SHVIA’s carry one, carry all rule was designed to preserve a rich mix of broadcast outlets for consumers who do not (or cannot) pay for subscription television services.” *Id.* at 350 (emphasis added). The carry-one-carry-all rule is vital to protect this interest, whether the programming being broadcast is national or local in origin.

To prevent harmful “cherry-picking” by satellite carriers, Congress elected to make the new local-to-local compulsory license in Section 122 of the Copyright Act available only on a “market-by-market” basis. *Id.* at 351. The alternative -- a “station-by-station” compulsory license -- would mean that satellite carriers “would choose to retransmit only the signals of major network affiliates [*i.e.*, ABC, CBS, Fox, and NBC] in most markets,” with the result that “competing stations would suffer from the loss of access to a significant (and growing) part of their potential audiences.” *Id.* at 349. EchoStar’s obsession with the *content* of the programming on the excluded stations -- including whether its origin is local or national -- is completely irrelevant to this Congressional objective.

Congress was fully aware, when it adopted the carry-one-carry-all rule in 1999, that over-the-air television stations vary in the amount of local programming they broadcast. Indeed, EchoStar itself cites to studies from *before the enactment of SHVIA* (such as a 1998 Benton

Foundation study) that purport to show wide variations in the amounts of local programming offered by broadcast stations, including some stations that offer little or no such programming. EchoStar Comments at 7. Since EchoStar concedes that the issue of “local content” was fully vetted before Congress adopted the carry-one-carry-all rule and yet chose not to include it as a prerequisite for carriage, EchoStar’s suggestion that the Commission can now refuse to enforce the statute with respect to certain stations -- based on their supposed lack of “local content” -- is utterly without merit.

Accordingly, the Commission would violate the Act if it were, as EchoStar urges, to refuse to enforce the “carry one, carry all” requirement.<sup>82</sup> The carry-one-carry-all mandate applies without regard to the content of the programming carried by a television station. EchoStar’s proposal is also inconsistent with the core purpose of “carry one, carry all,” which is to preserve the availability of *free, over-the-air* programming for those who choose not to, or are unable to, subscribe to cable or satellite.

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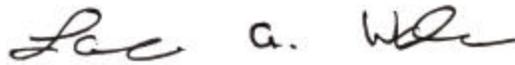
<sup>82</sup> EchoStar also makes certain unsubstantiated, ridiculous claims concerning NAB’s *2004 Community Service Report*. EchoStar questions the completeness of the report because “only 63%” of commercial television stations responded to the survey, even though most legitimate researchers in the media space would view 63% as an exceptionally strong response rate in this era of declining survey response rates. Moreover, despite its view that the survey was too small to be accurate, EchoStar goes on to demean and mischaracterize the content of the survey. EchoStar’s notes that the majority of stations cited in the survey are affiliates of ABC, NBC, CBS and FOX, and contends that this happenstance somehow proves that stations not mentioned in the survey are failing to provide sufficient amounts of local non-entertainment programming. EchoStar Comments at 12-14. However, EchoStar fails to acknowledge that NAB makes no effort to represent all stations in these reports; nor does NAB pay any attention to a station’s affiliation, or lack thereof, when choosing stations to include in the report. Rather, the report is designed based on the important issues of the past year, and merely recognize some of the stations that involved themselves in those issues. NAB just as easily could have selected a majority of independent, unaffiliated stations for inclusion in the report.

## **VIII. Conclusion**

For the foregoing reasons, NAB respectfully requests that the Commission refrain from imposing additional obligations concerning broadcasters' provision of community-responsive programming, free political airtime, or their commitment to localism.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BROADCASTERS**  
1771 N Street, N.W.  
Washington, D.C. 20036  
Tel: (202) 429-5430



Marsha MacBride  
Larry Walke

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