



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

DAVID OXENFORD
DIRECT (202) 973-4256
davidoxenford@dwt.com

SUITE 200
1919 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006-3402

TEL (202) 973-4200
FAX (202) 973-4499
www.dwt.com

December 14, 2007

Kevin J. Martin, Chairman
Michael J. Copps, Commissioner
Jonathan S. Adelstein, Commissioner
Deborah Taylor Tate, Commissioner
Robert M. McDowell, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: MB Docket No. 04-233
Notice of Proposed Rulemaking
on Broadcasting Localism**

Dear FCC:

We write on behalf of the broadcasters listed below to convey their surprise and disappointment at learning, through the press and their trade association, that the Report and Notice of Proposed Rulemaking on Broadcasting Localism appearing on the Agenda for FCC adoption at the Open Meeting on December 18, 2007 will tentatively conclude the Commission should impose various obligations on broadcasters that are describable only as a return to government-imposed mandates on programming that were rolled back over a quarter century ago as unnecessary in a competitive marketplace, particularly given the First Amendment burden that they imposed. Though we obviously have not seen the NPRM, it is hard to imagine any rational justification for the proposals it is rumored to contain. The re-imposition of ascertainment and specific programming requirements, more stringent main studio rules, and oversight of radio playlists would be particularly unsound policy, especially now, when broadcasters such as those joining in this letter face more competition than ever before – unimaginably more competition than that faced by broadcasters when the Commission concluded that marketplace forces obviated the need for these types of programming restrictions in the mid-1980s. If these rumors of the Commission's plan are indeed true, we urge the Commission to abandon these plans rather



than entrenching the proposals as ones that will be implemented unless it can be convinced to the contrary.

It is our understanding, more specifically, that the NPRM will seek comment on tentative conclusions in several areas that, if adopted, would directly insert the FCC into how broadcasters determine they can best serve their communities of license, including the content choices they make in doing so. For example, it appears the Commission is poised to go back to prescribing the specific steps each broadcaster must undertake to determine its program choices – including specific requirements for meeting regularly with specific community leaders to get their input on programming – as well as specific quantities of certain types of shows, such as news, public affairs, and similar programming, that broadcasters must offer. These requirements would be backed by new reporting obligations for licensees, and processing guidelines that would require action by the full Commission on license renewals, rather than at the Bureau level, if certain preset quantities of programming are not met. It also seems the Commission is prepared to begin seeking detailed information about how radio stations compile their playlists, including whether they air any “local music.” The Commission also apparently is proposing that it return to old rules requiring all stations to have a manned main studio during all hours of operation.

While each of the undersigned broadcasters agree that serve to the public is important, none can find any reason for the re-imposition of rules that were deemed by the Commission itself to be unnecessary 25 years ago. It is in each broadcasters own self-interest that they determine the needs of their audience and address those needs so as to not become irrelevant to their audiences. But broadcasters need the flexibility to determine how the determinations of what is important to their audience is made, and how the service to the public is provided. Adopting a one-size-fits-all approach, where a broadcaster faces heightened regulatory scrutiny if they don't reach some arbitrary level of some particular type of programming that someone in Washington defines and deems important, does not provide a recipe for creating compelling content in Peoria, St. George or Ventura.

Requirements of the type rumored to be on the Commission's agenda are vestiges of FCC rules that have long since been abandoned as intrusive and unnecessary, especially as broadcasters face more and more competition from both old and new media. The requirements that the Commission long ago abandoned were quite burdensome, especially for small stations and stations in small markets with limited staffs where, rather than spending time on broadcast operations, stations had to ensure their operations met programming standards reflecting an arbitrary set of government-imposed standards as to what was good for a station's audience. This was so even if the station felt, because of its format or the audience demographics, that a particular type of programming did not serve its audience. Indeed, as stated in the Notice of Inquiry opening the docket into which the instant NPRM will be adopted, “the Commission deregulated many behavioral rules ... in the 1980s,” because it “found that market forces, in an increasingly competitive environment, would encourage broadcasters to [serve their local communities], and that certain rules were no longer necessary.” *Broadcast Localism*, 19 FCC Rcd. 12425 (2004). The *Radio Deregulation Order* and *Commercial TV Deregulation Order*



eliminated the FCC's nonentertainment programming guideline, ascertainment mandates, and program log requirements, *Deregulation of Radio*, 84 F.C.C.2d 968 (1981); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1075 (1984), and the Commission later revised the main studio rules to permit broadcasters to locate their main studios outside their communities of license at any point in their city contour, and to eliminate the station program origination rule. *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, 3 FCC Rcd 5024 (1988).

The Commission correctly held then that regulating broadcasters this granularly was a poor substitute for market forces, and unduly intrusive into their editorial discretion as well. The economic incentive of the fear of the loss of audience to a competitor who better served the public was deemed enough to ensure that the broadcaster acted responsibly. Indeed, twenty years ago, as the Commission neared the end of the deregulatory efforts highlighted above, there were 10,175 radio stations and 1,651 television stations vying for audiences. *Broadcast Station Totals as of September 30, 1987*, News Release (rel. October 6, 1987). Today, the number of radio stations has grown by forty-five percent to 14,754 stations, and the number of television stations has *nearly tripled* to 4,677 stations. *Broadcast Station Totals as of September 30, 2007*, News Release (rel. October 18, 2007). In other words, at a time when the FCC now plans to reimpose onerous programming and other obligations, there are almost twice as many broadcast stations competing than there were when it removed those obligations on grounds that competitive forces rendered them unnecessary.

And that is without even considering the many other forms of competition for audio and video services broadcasters did not face when the Commission deregulated. In today's world, with both radio and television provided over cable, satellite and Internet, and other digital entertainment choices as well, broadcasters are forced, if for no other reason than by self-interest, to address what local audiences find relevant, or the broadcaster will have that audience abandon the station for some other medium. This cuts directly to the heart of the contradiction that would lie at the heart of any NPRM that proposed unnecessary FCC oversight of broadcast content in the name of ensuring that "localism" is promoted – with so many competing platforms vying for the audience attention, one of the principal means broadcasters have of distinguishing themselves from a field of competitors that is more crowded than at any point in history, is their presence in, and ability to assess and serve the interests of, their local market. Now, more than ever, specific quantitative standards for broadcast programs are not needed as broadcasters must be allowed the flexibility to address the needs of their audiences in a way most relevant to that audience, not according to some prescribed formula.

The Commission's apparent plan to return to dictating to licensees the amounts and types of programming that will serve local interests, and how they should go about ascertaining those interests, also is utterly inconsistent with broadcasters' First Amendment rights. Indeed, in deregulating in these areas in the first instance, the Commission displayed its awareness that "the



public interest standard necessarily invites reference to First Amendment principles,” and that “Congress intended [] broadcasting to develop with the widest journalistic freedom.” *Commercial TV Deregulation Order*, 98 FCC 2d at 1089 (citing *CBS, Inc. v. DNC*, 412 U.S. 914 (1973); *FCC v. National Citizens Committee for Broad.*, 436 U.S. 775, 795 (1978)). See also *PIRG v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (expressing “doubts as to the wisdom of mandating ... government intervention in the programming ... decisions of private broadcasters”); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) (“the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress ... limited [FCC] power in this area”). Moreover, the evolution of the competitive landscape since the FCC deregulated should “obviate the constitutional legitimacy of the FCC’s robust oversight” of broadcast content in the manner it appears the NPRM will recommend. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). This is especially significant given that the Commission concluded – *twenty-three years ago* – that “concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance” when it comes to ascertainment and programming obligations such as those the NPRM forebodes. *Commercial TV Deregulation Order*, 98 FCC 2d at 1089 (citing *Office of Communication of the United Church of Christ v. FCC*, 707 F. 2d 1413, 1430 (D.C. Cir. 1983); *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978)).

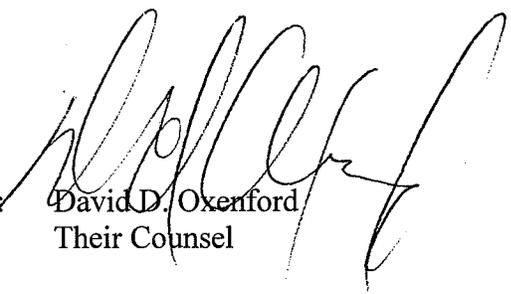
All things considered, there simply is no justification for the type of content-intensive FCC regulations that it is rumored that the NPRM will propose in the name of “broadcast localism.” Broadcasters have served their communities of license for decades, and are in a better position than any non-local competitor – or Washington, D.C. regulator – to determine what will best serve local interests. The competition that the Commission cited a quarter century ago has only blossomed, increasing the pressure on broadcasters to respond to local concerns to set themselves apart in the market. The Commission cannot lightly abandon its precedent of the last quarter century, nor can it lightly interfere with broadcasters’ editorial discretion in that regard without violating long-settled First Amendment precepts.

For these reasons, the named broadcasters respectfully urge the Commission to table or otherwise reconsider the NPRM if it indeed contains the provisions that have been reported before its adoption and/or release at the Open Meeting.

Buckley Broadcasting/ WOR, LLC
Buckley Broadcasting of New York, LLC
Buckley Broadcasting of Connecticut, LLC
Buckley Communications, Inc.
Buckley Broadcasting of California, LLC
Buckley Broadcasting Corporation of Monterey
Buckley Broadcasting Corporation of the San
Joaquin Valley
Buckley Broadcasting Corporation of Salinas
Canyon Media Corporation



Connoisseur Media, LLC
Connoisseur Media of Omaha, LLC
Connoisseur Media of Bloomington, LLC
Connoisseur Media of WV-OH, LLC
Connoisseur Media of Wichita, LLC
Connoisseur Media of Erie, LLC
Connoisseur Media of Billings, LLC
Family Radio, Inc.
Frandsen Media Company, LLC
Gold Coast Broadcasting, LLC
Huron Broadcasting, LLC
Jackson Radio Works, Inc.
Long Nine, Inc.
Mid-West Management, Inc.
Monterey Licenses, LLC
MW Springmo, Inc.
New Field Broadcasting, LLC
NRC Broadcasting Mountain Group, LLC
NRC Broadcasting, Inc.
People's Wireless, Inc.
Point Broadcasting Company
Rincon License Subsidiary LLC
Sand Hill Media Corporation
Sun Valley Radio, Inc.
Triad Broadcasting Company, LLC
Wildcat Communications, L.L.C.
WSJM, Inc.

By: 
David D. Oxenford
Their Counsel

cc: Monica Desai, Chief