



## 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.    TEL (202) 973-4200  
WASHINGTON, D.C. 20006-3402    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 State Broadcast Associations listed below to convey their surprise and disappointment at learning 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. If this is in fact the case, it is hard to imagine any rational justification for abandoning the precedents set in the last 25 years. 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 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 the Commission can be convinced otherwise.

Initially, it is important to note that each of the undersigned broadcast associations agree that service to the public is paramount, and is the bedrock of the broadcast industry, setting it apart from virtually any other industry in the country. The State Broadcast Associations have repeatedly demonstrated to the Commission in many proceedings the dedication of their members to serving the public. That being said, however, the Associations cannot 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 broadcaster's own self-interest that they determine the needs of their audience and address those needs so as to not become irrelevant to their audiences. Broadcasters accordingly require the flexibility to decide how best to make the determinations of what is important to their audience, and how service to the public is provided. Adopting a one-size-fits-all approach, where broadcasters face 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 every corner of Maine or Texas or Washington State.

It is our understanding that the NPRM will seek comment on tentative conclusions in several areas that, if adopted, would directly insert the FCC into the process by which broadcasters determine how 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 requiring specific quantities of certain types of shows, such as news, public affairs, and similar programming. 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.

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. Moreover, the regulatory risk and burden to each broadcaster, especially the smaller stations which already have staffs that are stretched to the breaking point, cannot be calculated. Imposing specific quantitative standards on something as subjective as what is good



programming requires that small stations, rather than spending unavailable funds to hire lawyers to defend their practices, must hew to the narrow confines of the prescribed program guidelines, even if they think that some other mix of programming might better serve their audiences. As a result, programming becomes more homogenized, not more diverse. Moreover, the regulations historically did not produce better programming, but instead simply a greater regulatory burden that resulted in litigation over meaningless regulatory details. Notably, with respect to the ascertainment, among the reasons for repealing the formal requirements was that renewal challenges typically were not directed to the targeted station's failure to serve the needs of its community, but rather petitions to deny implicating ascertainment challenged failures to comply with strict adherence to numerical quotas of interviewees, not the absence of ascertainment or community-interest programming itself. *See, e.g., Deregulation of Radio*, 73 F.C.C.2d 457, 519 (1979) ("since the adoption of the initial Primer in 1971, the cases dealing with ascertainment have been so numerous that just the annotated index of cases covers almost 60 pages" but "[t]he bulk of these cases deal with purely mechanistic aspects of the formal ascertainment procedures."). Such requirements accordingly have a substantial chilling effect, as broadcasters simply cannot afford the regulatory risk of doing something new or breaking the mold, yet produce little in the way of the results that the FCC is apparently seeking. Imposing these kind of quantitative obligations on the creative process simply is not justified.

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 1076 (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. As Commissioner Quello stated upon adoption of the Notice of Inquiry and Proposed Rulemaking that begat the *Radio Deregulation Order*, the "onerous process of ascertainment of community needs and interests, as defined in great detail by this Commission, is a mechanistic exercise which has only served to elevate form over substance. A broadcaster, if he is to survive and prosper, must in his own way know and ascertain his community." *Deregulation of Radio*, 73 F.C.C.2d at 589.

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 core 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)).

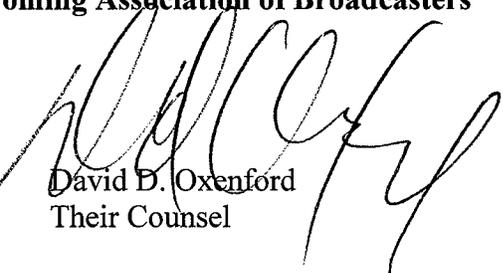
All things considered, there simply is no justification for the type of content-intensive FCC regulations that it is rumored the NPRM will propose in the name of “broadcast localism.” Broadcasters have served their communities of license for decades, and are in a better position than any non-local competitor – 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 State Broadcast Associations 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.

**Alabama Broadcasters Association  
Arizona Broadcasters Association  
Arkansas Broadcasters Association  
Colorado Broadcasters Association  
Connecticut Broadcasters Association  
Florida Association of Broadcasters  
Georgia Association of Broadcasters  
Illinois Broadcasters Association  
Iowa Broadcasters Association  
Kentucky Broadcasters Association  
Louisiana Association of Broadcasters  
Maine Association of Broadcasters  
MD/DC/DE Broadcasters Association  
Massachusetts Broadcasters Association  
Michigan Association of Broadcasters  
Mississippi Association of Broadcasters  
Missouri Broadcasters Association  
Nebraska Broadcasters Association  
Nevada Broadcasters Association  
New Hampshire Association of Broadcasters  
New Jersey Broadcasters Association  
New Mexico Broadcasters Association  
The New York State Broadcasters Association, Inc.  
North Dakota Broadcasters Association**



**Oklahoma Association of Broadcasters  
Oregon Association of Broadcasters  
Pennsylvania Association of Broadcasters  
Radio Broadcasters Association of Puerto Rico  
South Dakota Broadcasters Association  
Tennessee Association of Broadcasters  
Vermont Association of Broadcasters  
Washington State Association of Broadcasters  
Wisconsin Broadcasters Association  
Wyoming Association of Broadcasters**

By:   
David D. Oxenford  
Their Counsel

cc: Monica Desai, Chief