

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Standardized and Enhanced Disclosure)	MM Docket No. 00-168
Requirements for Television Broadcast Licensee)	
Public Interest Obligations)	
)	
Extension of the Filing Requirements)	
For Children's Television Programming)	MM Docket No. 00-44
Report (FCC Form 398))	

To: The Commission

PETITION FOR RECONSIDERATION

**Broadcasting Licenses Limited Partnership
Davis Television Clarksburg, LLC
Davis Television Wausau, LLC
Eagle Creek Broadcasting of Corpus Christi, LLC
Eagle Creek Broadcasting of Laredo, LLC
Educational Broadcasting Corporation
Journal Broadcast Corporation
Multicultural Television Broadcasting LLC
Mountain Licenses, L.P.
Ramar Communications Ltd., II
Sarkes Tarzian, Inc.
Shooting Star Broadcasting Inc.
Stainless Broadcasting, L.P.
Telecentro of Puerto Rico, LLC
Western Kentucky University
WQED Multimedia**

April 14, 2008

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SUMMARY

In 1984, the Commission concluded a careful and thorough review of many of its rules relating to programming, ascertainment methodology, and program logging requirements for broadcast television stations. At the end of this review, the Commission eliminated a number of “unnecessary and often burdensome regulations,” including minimum requirements for non-entertainment and local programming in the license renewal context, formal ascertainment procedures, and the requirement to maintain program logs. The Commission has now taken action that turns back the clock and reinstates many of these long-abandoned, tremendously burdensome requirements, which will impose significant costs on television broadcasters.

The Commission justified its new requirements as a means of improving the ability of the public to participate in the broadcast license renewal process, and of bringing conformity to the issue-responsive programming reporting requirements with which television stations have long had to comply. The newly adopted standardized disclosure form, however, requires reporting that goes well beyond what is necessary to assist the public in participating in the license renewal process. Moreover, adoption of the new form as a device to increase the public’s participation in the license renewal process completely ignores the fact that cross-station programming comparisons are neither permitted nor relevant under the statutory license renewal standard.

The Commission also ignored the significant impact the reporting requirements will have on the First Amendment rights of broadcasters. By identifying fixed categories of programming that every station must report, and indicating that the resulting information will be used in the license renewal context, the Commission implicitly but unmistakably indicated a preference for those types of programming. While the Commission may contend that it has not adopted explicit programming quotas, it cannot ignore that its action creates pressure on broadcasters that will

inevitably alter or restrict their editorial judgment. The greatly expanded reporting requirements, which, by their nature, are a type of content-based regulation, are not narrowly tailored to achieve a substantial governmental interest -- indeed, they have not been shown to serve any meaningful government interest.

The new regulations also require television broadcasters to post significant portions of their public inspection files on-line. In adopting this requirement, the Commission failed properly to consider its previously stated objective of striking a balance between ensuring reasonable access to public files and minimizing regulatory burdens on broadcasters.

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¹ The Joint Parties are the licensees of the 39 television stations listed on Attachment 1 hereto.

² Consideration of the facts presented herein is required by the public interest. 47 C.F.R. § 1.429(b)(3).

enhanced disclosure obligations for broadcast television licensees.³ The newly adopted rules will improperly restrict the Joint Parties' First Amendment rights and negatively affect their ability to provide quality responsive programming to their communities. The Commission has adopted these highly burdensome and vague obligations without adducing sufficient or convincing evidence that they are necessary or will serve the public interest. The regulations should be abandoned.

I. The Standardized Television Disclosure Form Is Vague, Highly Burdensome, and Fails to Adhere to the Principles of the Statutory Renewal Standard.

The Commission's newly adopted Standardized Television Disclosure Form – Form 355 (the “*Standardized Form*”) – has been required in place of the quarterly issues/programs list that television stations currently compile and place in their public inspection files. Unlike the issues/programs lists, in which stations describe briefly the community issues they addressed in a particular calendar quarter and provide information about representative programs that covered those issues, the Standardized Form requires stations to classify and report vast amounts of programming and programming segments in discrete, frequently overlapping, and often vague categories. Every program broadcast in the delineated categories must be included in the report each calendar quarter. The form also requires licensees to provide information regarding a station's issues ascertainment methodology, closed captioning and video description services, and emergency information activities.

Although the Commission indicated in 2000 that it intended to adopt a standardized format for issue-responsive program disclosure, it was not until 2004 that a sample form was

³ See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, *Report and Order*, FCC 07-205 (rel. Jan. 24, 2008) (“*Report and Order*”).

introduced through an *ex parte* notice filed by the Public Interest, Public Airwaves coalition. The coalition's proposal, submitted long after the close of the reply comment period in this proceeding, was virtually identical to the form adopted by the Commission. The Commission gave no further notice of the proposed form, and made no independent proposal of any form for public comment, until the Standardized Form was adopted in the *Report and Order*. Because of these circumstances, the substantial burdens posed by the Standardized Form have not been properly considered and analyzed.

Moreover, in adopting the Standardized Form, the Commission failed to justify the abrupt reinstatement of requirements that it previously eliminated after a careful, incremental, and well-supported rulemaking process. The Standardized Form seems primarily designed to bring about program content regulation that the Commission could not implement directly.

In 1984, the Commission concluded a lengthy examination of its rules regarding programming, ascertainment, and program log requirements for commercial television stations.⁴ At the conclusion of this review, the Commission eliminated a number of “unnecessary and often burdensome regulations,” including rules establishing program minimums for specific types of non-entertainment and local programming that were considered as part of the license renewal process, formal ascertainment requirements, and the requirement to maintain program logs.⁵ In eliminating these requirements, the Commission stressed the “importance and viability of market incentives” as a means of achieving its goals, and the benefits of “provid[ing] television

⁴ See *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order*, 98 FCC 2d 1076 (1984) (the “*Deregulation Report and Order*”).

⁵ *Deregulation Report and Order* at 1077.

broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities.”⁶

The programming guidelines then abandoned had required full Commission review of any license renewal application reporting less than 5% local programming, 5% informational programming, or 10% total non-entertainment programming. In discarding these renewal processing guidelines, the Commission noted that, to the extent programming levels exceeded regulatory standards, the guidelines were not necessary and the regulations implementing them could be considered capricious.⁷ In particular, the Commission cited to “convincing evidence” that “existing marketplace forces, not our guidelines, are the primary determinants of the levels of informational, local and overall non-entertainment programming provided on commercial television” and that these existing and future incentives would continue to elicit levels of such programming well above the FCC’s arbitrarily set processing guidelines.⁸ The Commission also concluded that the guidelines imposed burdensome compliance issues in potential conflict with the Regulatory Flexibility Act and the Paperwork Reduction Act, and with the First Amendment.⁹

In 1984, the Commission simultaneously did away with the requirement that television broadcasters compile and keep detailed programming logs. In light of the elimination of the programming guidelines, the FCC reasonably determined that the intensive logging obligation served no regulatory purpose.¹⁰ As the *Deregulation Report and Order* noted, elimination of the logging requirements terminated a requirement that the Government Accountability Office had

⁶ *Id.*

⁷ *Deregulation Report and Order* at 1088.

⁸ *Id.* at 1085.

⁹ *Id.* at 1080 and 1089.

¹⁰ *Id.* at 1109.

found “constituted the largest government burden on business in terms of total burden hours,” costing licensees more than 2,468,000 hours per year.¹¹

Finally, in 1984, the FCC also eliminated formal ascertainment procedures, which had required that licensees interview members of the local community representing specific segments of a “typical” community, to determine the most significant issues faced within the community. The Commission found that there was no evidence that the ascertainment procedures were effective in assisting stations in identifying these issues. The FCC instead allowed stations to determine the community issues deserving coverage by whatever methods stations deemed appropriate.¹² The Commission noted that the costs of its ascertainment procedures had been considerable, requiring the dedication of 66,956 work hours per year, and calculated that elimination of the requirement would result in a savings of up to \$8,986 per broadcaster per year.¹³ The Commission expressly stated that it should not be reviewing the methods by which stations made these determinations, but rather, should focus on the responsiveness of programming itself.¹⁴

Now, more than two decades later, the *Report and Order* has effectively, and arbitrarily, reinstated massive, unduly burdensome recordkeeping and reporting obligations -- albeit under a slightly different guise -- without a legally sufficient explanation as to why the solid evidence amassed earlier that compelled the elimination of such requirements is now suddenly suspect or invalid.

¹¹ *Id.* at 1106 (citing GAO, *Federal Paperwork: Its Impact on American Business*, pp. 43-44 (1978)).

¹² *Id.* at 1098.

¹³ *Id.* at 1099.

¹⁴ *Id.* at 1101.

A. The Standardized and Expanded Disclosure Requirements Were Adopted Without An Adequate Factual Foundation.

In taking regulatory action, an agency must examine relevant data and satisfactorily explain its decision with a “rational connection between the facts found and the choice made.”¹⁵ An agency’s action is unjustified if its explanation “runs counter to the evidence before” it.¹⁶ Adoption of the Standardized Form is a clear example of agency action that runs counter to the evidence.

The Commission justified the Standardized Form not to cure “rule violations by licensees or the failings of a particular station or even the television industry generally,” but instead, as a means of addressing the perceived lack of accessibility and uniformity in the issues/programs lists currently prepared by television stations.¹⁷ In particular, the FCC found that a lack of uniformity makes it difficult to aggregate information such that a “comparison between broadcasters is virtually impossible.”¹⁸ The greatly expanded disclosure requirements were also presented as enhancing the ability of the public to “more effectively” participate in license renewal proceedings.¹⁹ Yet the Commission failed to discuss how this claimed justification could be reconciled with its past reliance on marketplace incentives to produce adequate quantities of non-entertainment programming. The Commission offered no evidence -- let alone compelling evidence -- of the “significant market failure” that it previously indicated would be necessary for reinstatement of those logging requirements.²⁰

¹⁵ *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁶ *Id.*

¹⁷ *Report and Order* at ¶ 37.

¹⁸ *Id.* at ¶ 35.

¹⁹ *Id.* at ¶ 44.

²⁰ *Deregulation Report and Order* at 1109.

The Commission has not explained how the expanded scope of information to be reported in the Standardized Form is an efficient way to remedy the perceived lack of uniformity that it concluded exists among the issues/programs lists now prepared. Many of the program categories in the Standardized Form are only vaguely differentiated one from another -- for example, "local news" versus "local civic affairs programming" versus "local electoral affairs programming" versus "local programming." It is inevitable that the hair splitting use of so many confusingly similar categories will result in a lack of uniformity in the reporting of programming -- the very problem (with respect to the current issues/programs lists) the FCC was ostensibly trying to cure.

Rather than addressing this perceived problem by simply standardizing the manner in which current issues/programs reports are prepared, the Commission arbitrarily turned an asserted need for uniformity into a dragnet search for every program segment broadcast by a station which the licensee might ever want to claim to be creditworthy in the face of a renewal challenge. Without solid evidence of industry failure, a mere desire for more information than the Commission has previously determined necessary for licensing purposes does not serve as an adequate basis for the imposition of detailed, comprehensive and highly burdensome recordkeeping and reporting requirements.

Nor does justification of the adoption of the Standardized Form as necessary to assist members of the public wishing to participate in license renewal proceedings satisfy the Commission's obligations in this regard. This rationale ignores the fact that comparative renewal proceedings have been eliminated and that license renewal applications are reviewed under station specific statutory renewal standards which do not involve cross-station

comparisons.²¹ Since a comparison of one station's issue-responsive programming to that of another station is not permitted or relevant under the statutory standard, any claimed "benefit" from the standardization of information for the purpose of such a comparison does not justify the imposition of these burdensome new requirements.

The unconditioned grant of thousands of television license renewal applications under the existing statutory standard provides strong evidence that stations are satisfying their public interest obligations. The new standardized disclosure obligations are, in other words, a solution in search of a problem. The *Report and Order* failed to offer any support that the expanded disclosure requirements are relevant to the Commission's license renewal process, or that they will increase the "effectiveness" of public participation in license renewal proceedings -- the stated justifications for the new disclosure requirements. As a result, adoption of the new requirements was unjustified.

B. The Commission Ignored Serious First Amendment Concerns Raised In This Proceeding When Adopting the Expanded Disclosure Requirements.

Because the newly adopted regulations will act to chill the editorial judgment of broadcasters, they are content-based restrictions that may be upheld only if they are narrowly tailored to achieve a substantial government interest.²² Indeed, in interpreting the Communications Act of 1934, as amended, the Supreme Court has held that Congress intended

²¹ Pub. L. No. 104-104, 110 Stat. 56 (1996). *See also* 47 U.S.C. § 309(k)(1), 47 C.F.R. § 73.3591(d) (2007) (providing that a license renewal application is to be granted if, during the preceding license term: (i) the station has served the public interest, convenience, and necessity; (ii) the licensee has committed no serious violations of the FCC's rules or regulations; and (iii) the licensee has not committed any other violations of the FCC's rules or regulations which, taken together, constitute a pattern of abuse).

²² *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.”²³

In the *Deregulation Report and Order*, the Commission specifically warned that broad program reporting requirements, such as those embedded in the Standardized Form, naturally heighten First Amendment concerns due to the “lack of a direct nexus between a quantitative approach and licensee performance.”²⁴ Yet, with little or no explanation for its divergence from past decisions, the Commission ignored these concerns in the *Report and Order*.

The Commission also denied that the enumeration of detailed program categories, in a form which requires that every program or program segment be listed, will serve to establish quantitative programming requirements or quotas. Common sense suggests otherwise, especially given the encouragement the Commission offers to third parties anxious to turn the renewal process into a comparative proceeding.

As several parties commented, courts have long disfavored regulations mandating the types of programs that broadcasters must provide. The record in this proceeding noted that, in the context of exempting certain categories of television programming from prime time access rules, courts have warned that “mandatory programming by the Commission *even in categories* [might] raise serious First Amendment questions.”²⁵ The Named State Broadcasters Associations noted that the Commission’s refusal to adopt quantitative standards in the context of comparative renewal proceedings survived judicial review, and resulted in a determination

²³ *Nat’l Black Media Coal. v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (citing *CBS v. DNC*, 412 U.S. 94, 110 (1973)).

²⁴ *Deregulation Report and Order* at 1089.

²⁵ Comments of Viacom Inc., MM Docket No. 00-168, at 14 (emphasis added) (citing *Nat’l. Assoc. of Indp’t. TV Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975)).

that quantitative standards can limit broadcasters' editorial discretion without providing any assurance of improved service.²⁶

Even though these judicial admonitions are directly applicable to the adoption of the enhanced disclosure requirements, the majority of the Commission summarily brushed aside these First Amendment concerns, claiming that the *Report and Order* neither adopts quantitative standards nor requires broadcasters to air specific categories of programming.²⁷ Yet conclusory statements cannot substitute for considered analysis, especially in the context of new government regulations which affect broadcasters' First Amendment rights. The Commission admits that the requirement that a station list every program it deems relevant on the new disclosure form is a new obligation,²⁸ but seems all too willing to dismiss out of hand the inherent, impermissible chilling effect that its "raised eyebrow" approach to regulation will have. Alone among the Commissioners, in his partial dissent Commissioner McDowell called the Standardized Form the FCC's "not-so-subtle attempt to exert pressure to air certain types of content."²⁹

The pressure that will alter or restrict a broadcaster's editorial judgment through this "raised eyebrow" form of regulation cannot be ignored. By requiring licensees to provide detailed information about, and list the quantities of, specific categories of programming aired each quarter, the FCC is implicitly stamping a more favored status on those types of programming. Requiring broadcasters to report the amount of programming aired in each of the specified categories will no doubt incentivize stations to ensure carriage of some amount of programming in every one of those categories, and create a disincentive to broadcast other types

²⁶ Joint Comments of Named State Broadcasters Associations, MM Docket No. 00-168, at 12 (citing *Nat'l Black Media Coalition*, 589 F.2d 578, 580 (D.C. Cir. 1978).

²⁷ *Report and Order* at ¶ 36.

²⁸ *Id.* at ¶ 44.

²⁹ *Statement of Commissioner Robert M. McDowell, Report and Order* at 48.

of programming. This will occur without regard for whether a licensee believes that those other types of programming would be more beneficial to its community, and despite the Commission's well-established reliance upon a licensee's good faith exercise of its programming discretion. This phenomenon, and its intrinsic First Amendment implications, was emphasized by several commenters. The Commission failed to address this legitimate and paramount concern.³⁰

Courts have expressed serious concerns when agencies attempt to engage in "raised eyebrow" regulation in the First Amendment context. For example, in evaluating First Amendment concerns raised in response to a requirement that certain noncommercial broadcast stations retain audio tapes of programs discussing issues of public importance, the United States Court of Appeals for the D.C. Circuit noted that broadcasters can be subject to a "variety of *sub silentio* pressures and 'raised eyebrow' regulation of program content," and that such "subtle forms of pressure are well known."³¹ The Court found that the tape retention rule could inhibit a station's programming discretion, and thus would be "effecting a new and significant diminution in the broadcasters' First Amendment freedoms."³²

The Commission itself has similarly concluded, and previously cautioned, that the application of standards for specific types of programming could have a chilling effect and might "artificially increase the time most television stations devote to local, news and public affairs programming," resulting in a "restriction on licensees' programming discretion, in the context of

³⁰ Comments of The Walt Disney Company, MM Docket 00-168, at 10; Comments of the Named State Broadcasters Associations, MM Docket 00-168, at 13; Joint Comments of Benedek Broadcasting Corporation, LIN Television Corporation, Post-Newsweek Stations, Inc. and Raycom Media, Inc., MM Docket 00-168, at 7.

³¹ *Cnty.-Serv. Broad. Of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) ("*Community-Service Broadcasting*") (cited in Comments of Viacom Inc., MM Docket No. 00-168, at 11, and in Comments of Named State Broadcasters Associations, MM Docket No. 00-168, at 10).

³² *Id.*

determining what constituted ‘substantial service’ for comparative license renewals.”³³ That the Commission does not literally impose specific quantitative requirements on licensees at this time does not eliminate or excuse the interference with licensees’ proper exercise of their editorial discretion that will result from the obligation to report the amount of programming broadcast in each of the designated categories. The First Amendment does not allow “even minimal burdens on protected rights where no legitimate interest is truly being served.”³⁴ Characterizing the comprehensive report as “replacing” the issues/programs lists now required is insufficient to satisfy the Commission’s burden in this sensitive area.³⁵

The application of “raised eyebrow” regulation to accomplish indirectly what cannot be justified directly is most clearly illustrated by the new requirement to report any “video description services” provided by each station. This disclosure obligation has been imposed despite the fact that the Commission’s prior attempt to require television broadcasters to provide these services was struck down by the courts.³⁶ Whatever distinction the Commission attempts to draw between noting that video description services are not required, but must be reported if voluntarily provided, is without a difference in this context. Stations will inevitably feel pressured to provide video description services, because their only alternative is to report on the Standardized Form that they provided no such services - - yet the only acknowledgement that there is *no requirement* to provide such services is found solely in the instructions, not in the part of the form that will be publicly viewed.

³³ See Comments of Viacom, Inc., MM Docket No. 00-168, at 13 (citing *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 FCC 2d 419, 428-29 (1977)).

³⁴ *Community-Service Broadcasting* at 1122.

³⁵ *Report and Order* at 22. See also *Statement of Commissioner Jonathan S. Adelstein, Report and Order* at 45.

³⁶ *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2003).

Because the new rules will inevitably restrict broadcasters' editorial discretion while significantly expanding the amount of information that broadcasters will be required to review, compile and report, the new requirements cannot reasonably be found to be narrowly tailored so as to satisfy the Commission's obligations under the First Amendment.

C. The Commission Failed to Weigh the Immense Costs That Stations Will Incur In Complying With the Expanded Disclosure Requirements.

The Commission appears to have ignored the extensive costs that stations will incur to track, compile, and complete the Standardized Form. Indeed, the Commission downplays these costs by saying that the economic impact of the new form will be diminished because "much of the information required" for the new form is already required to prepare the issues/programs list the form replaces.³⁷ This statement is simply not accurate.

The Standardized Form requires television stations to track and report all responsive programs and program segments and categorize programs in ten separate but often overlapping classifications.³⁸ For each program or program segment, a station is required to record title, length, the dates and times aired, and respond to five questions with regard to the broadcast carried on the main and each multicast program stream. Due to the level of detail and recordkeeping required, the amount of time and the cost entailed to complete the Standardized Form will vastly exceed the time and finances consumed in the preparation of the issues/programs list. Indeed, the costs to complete the Standardized Form may well far exceed the costs incurred in complying with the former program logging and monitoring requirements,

³⁷ *Report and Order* at 22.

³⁸ The categories are: National News; Local News; Local Civic Affairs Programming; Local Electoral Affairs Programming; Independently Produced Programming; Local Programming; Public Service Announcements; Paid Public Service Announcements; Programming for Underserved Communities; and Religious Programming.

which were discarded on the conclusion that the resources necessary were not justifiable under the public interest standard. When those logging requirements were eliminated in 1984, each station had one program stream for which to track and report; today, each station must analyze and report programming for numerous multicast program streams, multiplying compliance costs exponentially.

The Commission's estimate of the time and effort needed to complete the Standardized Form -- between 2.5 and 52 hours per response³⁹ -- is so imprecise that it calls into question whether the FCC truly understands the burden it is imposing on stations. This estimate is also significantly lower than broadcasters have estimated. WQED Multimedia undertook to complete the Standardized Form with respect to a 24-hour period of WQED(TV)'s programming.⁴⁰ The categorization and reporting of programming for this single day took 3.75 hours. Extrapolating this information, the reporting requirements would consume 29.5 workdays each calendar quarter. Journal Broadcast Group, which operates eleven commercial television stations, estimates that the monitoring, record-keeping and reporting of all non-entertainment programming, including each local newscast, needed to complete the form will require 1 to 1.5 persons working full time on this task at each station. Complying with other aspects of the new requirements, including the establishment and implementation of ascertainment procedures and compilation of information regarding a station's closed-captioning and video description services, will require many additional hours each week.

³⁹ 73 Fed. Reg. 13542. When the *Report and Order* was initially released, the Commission was able to insert only a blank into its estimation of the number of hours necessary to comply with the new requirements. *Report and Order* at 30. To date, the Commission has not explained how it determined the wide differential in its estimates of the time necessary to complete the Standardized Form.

⁴⁰ WQED(TV) operates an analog channel, a full-time digital channel and a secondary digital channel that broadcasts archived locally produced programming for 7 hours per month.

The Commission calculates that the total annual burden on television licensees to complete the new form will be 2,072,814 hours,⁴¹ with an annual cost of \$11,600,000.⁴² Even if these estimates are accurate, however, they are too high a cost if the purpose of the Standardized Form was merely to create a more uniform information base regarding television programming. Broadcasters already facing tight budgets will be required to divert scarce resources from the production of quality issue-responsive and other programming in order to track and compile vast amounts of information for the Standardized Form. These burdens will fall disproportionately onto smaller broadcasters, many of whom are already struggling to provide issue-responsive programming, or to stay on the air at all. The massive costs and burdens imposed cannot be justified by the record in this proceeding.

II. Requiring Internet Posting of Public Files Fails to Strike the Appropriate Balance Between Reasonable Access and Regulatory Burdens.

The *Report and Order* also required that each television station post much of its public inspection file on line.⁴³ In imposing this obligation, the Commission stated it is “merely making material more accessible to the public.”⁴⁴ In so doing, however, the Commission has completely reversed its previously stated objective “to strike an *appropriate balance* between ensuring that the public has *reasonable access* to each station’s . . . public file while *minimizing regulatory burdens* on licensees.”⁴⁵ In the *Report and Order*, the Commission failed even to mention, let

⁴¹ 73 Fed. Reg. 13542.

⁴² *Id.*

⁴³ *Report and Order* at ¶ 17 (stations must post letters and comments from the public received via email, but are not required to post the contents of their political files or other documents for which direct electronic links can be posted).

⁴⁴ *Report and Order* at ¶ 12.

⁴⁵ Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, *Memorandum Opinion and Order*, 14 FCC Rcd 11113, 11113 (1999) (emphasis added) (“1999 Order”).

alone justify, how mandatory Internet posting of millions of collective pages of administrative documentation strikes an “appropriate balance.” In dismissing public file conversion costs that it admits “may be appreciable,”⁴⁶ the Commission not only failed to minimize regulatory burdens - it has greatly magnified them.

After conceding the “appreciable” expenditures associated with the new rule, the Commission concluded, with no meaningful discussion of any alternatives or of the hardships such expenses might impose, that *all* costs (whatever they may be) of wholesale scanning, organizing, and online posting of public files must simply be borne by television stations. The purported benefit to be derived from these costs is “for the community to have Internet access to information it may not otherwise be able to obtain.”⁴⁷ Yet, there is no evidence that the community does not presently have access. The *very same* information is available *now* by visiting, or if a station’s main studio is located outside its community of license by simply calling, the station.⁴⁸

Many commenters supplied the Commission with good-faith estimates of the time, and financial outlay, required to digitize the public files of television stations.⁴⁹ Some of these were prepared by experts in computer data management. For example, the Named State Broadcasters Associations provided an estimate of a minimum of 20 minutes per page to post information in a disability-friendly format, as is required, and an estimate of \$65 per hour for professional

⁴⁶ *Report and Order* at ¶ 10.

⁴⁷ *Id.* (emphasis added).

⁴⁸ See 47 C.F.R. § 73.3526(b-c) (2007) (providing that public inspection files are to be maintained at the main studio and available during regular business hours; and that licensees must assist citizens with locating information in file, and provide by mail copies of information upon telephone request).

⁴⁹ It should be noted that many of these estimates were prepared shortly after release of the NPRM in 2000, and as a result are likely outdated and need to be adjusted for inflation and cost increases.

assistance.⁵⁰ The National Association of Broadcasters submitted a detailed report from a consultant, estimating a cost of more than \$125,000 for scanning, converting, and indexing of approximately 14,000 pages of documents. This figure did not take into account maintenance, updating, or storage.

The Commission dismissed these estimates from experts in the field as “grossly inflated,” choosing instead to rely on its “own cost estimates,” which were marked by hazy modifiers and little support.⁵¹ The Commission’s conclusion that the public file website implementation costs “should not be overly burdensome” (though at least in the thousands of dollars) was entirely unsupported by reports or data, but based instead on estimates by “Commission staff.”⁵² Rejecting expert evidence in favor of staff approximations, the Commission has engaged in an arbitrary and incomplete analysis that strays far from the “appropriate balancing” demanded by its own precedent.

In 1998, just two years before the Commission issued its Notice of Proposed Rulemaking in this proceeding, it undertook a detailed analysis of public file accessibility, investigating the appropriate location for public files, and the numerous proposals it termed “accommodations” -- ways broadcast stations could assist members of the public who chose not, or perhaps were unable, to visit the main studio facility housing the public file.⁵³ The balanced findings in the *1998 Order* stand in stark contrast to those of the current *Report and Order*.

⁵⁰ See Joint Comments of the Named State Broadcasters Associations, MM Docket No. 00-168, at 21.

⁵¹ *Report and Order* at 10. According to the Commission, initial conversion costs “*may be* appreciable,” but “in nearly all cases, *should not be* overly burdensome.” Ongoing costs “*should be* relatively modest.” *Id.* (emphasis added).

⁵² *Id.*

⁵³ See In the Matter of Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, *Report and Order*, 13 FCC

In the *1998 Order*, the Commission required that a station's public file be maintained at its main studio, wherever that studio is located. The Commission simultaneously relaxed the main studio rule to allow studios (and thus public files) to be located *twenty-five miles* from the community of license.⁵⁴ At such a distance, the Commission determined, residents of the community of license would still have "reasonable access" to the studio, and thus, the public file.⁵⁵ As long as the file remained "reasonably accessible" to citizens in "*the geographic service area of the station*"⁵⁶ (as opposed to anywhere in the world via the Internet, as the current *Report and Order* mandates), the appropriate balance had been struck.⁵⁷

The *1998 Order*, and the follow-up *1999 Memorandum Opinion and Order*, also considered the burdens that would be lifted from, or not imposed on, licensees. Until 1998, stations with main studios outside of their community of license had to make a copy of the station's public file available at some location inside the community of license. This requirement was eliminated, in part because co-location of the main studio and public file would "*reduce the burdens* on licensees who previously were required to maintain an off-premises public file."⁵⁸ The Commission also considered requiring licensees to respond to public file telephone requests by faxing, e-mailing, or sending by courier requested documents, but these

Rcd 15691 (1998) ("*1998 Order*"), *modified*, Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, *Memorandum Opinion and Order*, 14 FCC Rcd 11113 (1999).

⁵⁴ *1998 Order* at 15697. Under the 25-mile radius option endorsed by the Commission, "citizens at the opposite end of the community would not be expected to have to travel more than 50 miles to reach the studio, which we believe is a *reasonably accessible distance*." *Id.* (emphasis added).

⁵⁵ *Id.* at 15696.

⁵⁶ *1999 Order* at 11119.

⁵⁷ *Id.* at 11119-11120 ("[W]e believe the accommodation should be tailored to the listeners and viewers *that are served by the station*.") (emphasis added).

⁵⁸ *1998 Order* at 15702.

proposals were deemed not appropriately “balanced.”⁵⁹ The accommodation adopted -- that viewers or listeners could telephone stations and request that copies of public file materials be sent by mail (with the requestor paying photocopying costs) -- “further[ed the] stated goals of balancing public access with regulatory burden.”⁶⁰ Even this modest accommodation applied only to stations with main studios outside their community of license, and the required mailing area was limited to stations’ geographic service areas.⁶¹

A comparison of the *1998/1999 Orders* with the *Report and Order* reveals troubling discrepancies and inconsistencies. Ten years ago, the inconvenience of maintaining a paper copy of a public file in the community of license was considered “too burdensome” for stations with out-of-town studios. Now, the lengthy, costly process of posting the contents of public files on Internet websites, according to the Commission, is not “overly burdensome.”⁶² Until 2008, e-mailing a single document from a public file was considered burdensome. Now, the Commission endorses blanket conversion of stacks of hard-copy documents into electronic data, and the posting and maintenance of them on Internet websites. Until now, citizens paid photocopying requests associated with public file requests, because that struck an appropriate regulatory “balance.” Now, saddling television licensees with Internet conversion costs that “may be appreciable”⁶³ is not “overly burdensome.”⁶⁴ For years, stations were required to provide public file information *only* to “listeners and viewers that are served by the station.”⁶⁵

⁵⁹ *Id.* at 15703.

⁶⁰ *Id.*

⁶¹ *1999 Order* at 11119. Stations that maintained main studios in their communities of license were not required to provide this accommodation. *Id.*

⁶² *Report and Order* at ¶ 10.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *1999 Order* at 11120.

Now, the Commission mandates posting public files on the *World Wide Web* (the name has significance), which, by definition, means any “benefit” of such posting will inure largely to citizens *outside* the station’s geographic service area.⁶⁶ In 1998, the Commission concluded that locating public files at any location in a station’s community of license, *or* within twenty-five miles of that community, *or* in any location within the principal community contour of any broadcast station licensed to that community, ensured “a reasonably accessible location [for] the members of the community.”⁶⁷ In the *Report and Order*, the Commission concludes, without supporting evidence, that “[i]t may well be that the requirement of physically going to the station and viewing the file during normal business hours has discouraged public interest in viewing the public files.”⁶⁸

The Commission is obligated to provide a reasoned analysis for broad departures from prior norms.⁶⁹ In this instance, it has failed to meet this burden, or even to acknowledge that the *Report and Order* repudiates the long-held “reasonable access” standard of public file accessibility. Given the lack of a clear explanation and support in the record for this departure from prior policy, the new rules should be rescinded.

⁶⁶ Compare 1999 Order at 11120 (rejecting as “beyond the scope of this process” the “collateral benefits” of stations mailing the public file information outside their geographic service area, such as “allowing citizens to compare performance of local broadcasters with distant broadcasters, or enabling national organizations and academics to collect information from broadcasters nationwide”), with *Report and Order* at ¶ 51 (mandatory filing of certain public file information will make information “more accessible by public interest groups and academics”).

⁶⁷ 1998 Order at 15696.

⁶⁸ *Report and Order* at ¶ 12 (emphasis added).

⁶⁹ See, e.g., *Atchison, Topeka and Santa Fe R.R. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (agency has a duty to explain departures from prior norms); *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st. Cir. 1989) (agencies must follow precedents or explain departures).

A. The Commission Has Not Adequately Considered the Privacy Issues Inherent in Internet Posting of Public Files.

In its *Report and Order*, and despite commenter concerns,⁷⁰ the Commission omitted any discussion of privacy concerns raised by on-line posting of certain public file materials. The Commission must recognize that the requirement to post all electronically received letters from the public raises significant privacy concerns with regard to personally identifiable information contained in these documents. Assuming arguendo that the new on-line posting requirements survive, the need for broadcasters to comply with pertinent privacy regulations must be taken into account.

Complying with these and other applicable privacy regulations will not come without substantial cost. The conclusion that e-mails received from viewers be placed on station websites “because stations will incur no cost other than the cost of electronic storage,”⁷¹ is a remarkable oversimplification. Each e-mail will have to be parsed for sensitive personal information, and many will need to be printed, edited, and re-scanned. Additional issues arise in determining the authenticity of e-mail correspondence, in assuring submitters are of appropriate age, and in stripping e-mails of potentially revealing metadata. Because the Commission failed even to consider the privacy issues and potential liabilities associated with mandatory Internet posting of public file materials, it similarly failed to account for the additional cost implications of station compliance with these necessary privacy policies.

⁷⁰ See, e.g., Comments of the National Association of Broadcasters, MM Docket No. 00-168, at 25-26.

⁷¹ *Report and Order* at ¶ 25.

B. The Commission Did Not Adequately Explain Its Website Accessibility Requirements, and Did Not Consider the Associated Burden of Compliance.

The Commission discussed minimally, yet incorporated firmly, the requirement that public files be posted on-line in a manner that meets “a minimal level of compliance with the most recent W3C/WAI guidelines.”⁷² The Commission left television broadcasters on their own to navigate commands such as “checkpoints [must have] a priority level assigned by the W3C/WAI Working Group based on the checkpoint’s impact on accessibility.”⁷³ By incorporating such highly technical, specialized and vague requirements into its online public file obligations, the Commission assured that television broadcasters will be forced to seek professional computer, website, and data management assistance.

The Commission’s offhand comment that “[m]any . . . stations are already equipped to place material on the Internet”⁷⁴ ignores the fact that these stations may very well be unequipped to comply with “a Priority 1 checkpoint,” or any of the other W3C/WAI technicalities, and may be forced to upgrade their existing computer software, hardware and web hosting arrangements to achieve such compliance at potentially a very considerable expense. While the exact requirements of ensuring that the public file portions of websites are disability friendly are left muddy by the *Report and Order*, what is clear is that meeting these obligations does *not* mean the mere scanning of paper documents and placing them online in a form such as portable document format (PDF).⁷⁵ The Commission gave no estimate of the costs to conform with these standards, or whether its staff’s cost estimates included compliance with them.

⁷² *Report and Order* at ¶ 27.

⁷³ *Id.*

⁷⁴ *Id.* at 10.

⁷⁵ “Many non-W3C formats (e.g., PDF, Shockwave, etc.) . . . cannot be viewed or navigated [and] [a]voiding non-W3C . . . features . . . will tend to make pages more accessible to more

III. Conclusion.

In adopting the new standardized and enhanced disclosure requirements, the Commission has adopted rules that effectively reinstate policies and requirements previously abandoned as onerous and unnecessary. The Commission has also ignored serious First Amendment considerations implicit in the new reporting requirements. The Commission has adopted burdensome requirements that stations must post the contents of their public inspection files on-line. All of these actions have been imposed without sufficient justification or documented support. For these and the other reasons discussed previously, the Joint Parties request that the Commission reconsider and eliminate the new standardized and enhanced disclosure rules for broadcast television stations.

people.” Web Content Accessibility Guidelines 1.0, W3C Recommendation 5-May-1999. “[Yet,] [c]onverting documents (from PDF . . . etc.) to W3C markup languages (HTML, XML) does not always create an accessible document.” *Id.* Whatever a broadcaster is to make of guidelines like this, he or she is almost certain to need costly, professional assistance to decipher and comply with them.

Respectfully submitted,

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Davis Television Wausau, LLC
Eagle Creek Broadcasting of Corpus Christi, LLC
Eagle Creek Broadcasting of Laredo, LLC
Educational Broadcasting Corporation
Journal Broadcast Corporation
Multicultural Television Broadcasting LLC
Mountain Licenses, L.P.
Ramar Communications Ltd., II
Sarkes Tarzian, Inc.
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Station KTLL-TV (Fac. Id No. 82613), Durango, CO
Station KUPT(TV) (Fac. Id No. 27431), Hobbs, NM

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Sarkes Tarzian Inc. is the owner of:

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