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April 23, 2008

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
235 Massachusetts Ave, N.E.  
Suite 110  
Washington, D.C. 20002

**FILED/ACCEPTED**

**APR 23 2008**

Federal Communications Commission  
Office of the Secretary

Re: Broadcast Localism  
MB Docket No. 04-233

Spanish Broadcasting System, Inc.

Dear Ms. Dortch:

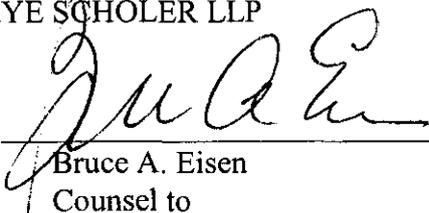
On behalf of Spanish Broadcasting System, Inc., there is transmitted herewith an original and four (4) copies of its Comments in the above-referenced proceeding.

Should there be any questions concerning this matter, kindly communicate directly with the undersigned counsel.

Respectfully submitted,

KAYE SCHOLER LLP

By:



Bruce A. Eisen  
Counsel to  
Spanish Broadcasting System, Inc.

Enclosure

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APR 23 2008  
Federal Communications Commission  
Office of the Secretary

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

In the Matter of )  
 )  
BROADCAST LOCALISM ) MB Docket No. 04-233  
 )  
TO: The Commission

**COMMENTS OF SPANISH BROADCASTING SYSTEM, INC.**

Spanish Broadcasting System, Inc. (“SBS”), by its attorneys, hereby submits its comments in response to the Commission’s above-referenced Notice of Proposed Rulemaking, FCC 07-218, released January 24, 2008 (“NPRM”). In support thereof, the following is respectfully shown:

**Background**

SBS is the largest Hispanic-controlled radio broadcasting company in the United States. Together with its affiliates, SBS currently owns and/or operates 20 stations in six of the top-10 Hispanic markets, including New York, Los Angeles, Miami, Chicago, San Francisco and Puerto Rico. SBS also owns a full-service television station and a Class A television station in the Miami, Florida television market.

The NPRM includes a number of prospective measures that threaten to roll back Commission and court-approved deregulation that has worked well for more than a decade. SBS believes that some of the intended re-regulation is unjustified and likely to place significant burdens on broadcast stations without providing corresponding benefits to the public. Moreover,

the Commission's initiative comes at a time when the general health of the broadcasting industry is in question. While some of the Commission's proposals are praiseworthy, others have less merit, especially since no one has truly shown that present regulations are insufficient to accomplish the regulatory goals set forth in the NPRM.

### **Enhanced Disclosure Order**

The Commission determined, in its localism hearings, "that the public is concerned with the limited disclosure of local programming aired by broadcasters, and public access to such information." On January 24, 2008, it released its Report and Order, MM Docket No. 00-168, in Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, FCC 07-205 ("Enhanced Disclosure"), wherein the agency (1) required that almost all material that is presently required to be in a television station's public file be made available on a station's existing website, and (2) implemented a new "Standardized Television Disclosure Form" ("TV Form"), which it required television stations to complete and file electronically on the Commission's website and to further place in the station's public file and website on a quarterly basis. The TV Form is intended to be a replacement for the existing Quarterly Issues/Program Report ("Quarterly Report").

The TV Form requests detailed information regarding a station's quarterly broadcasting of all categories of non-entertainment programming. The necessary information includes the average number hours per week of (1) national news programming, (2) local news programs produced by the station, (3) local news programming produced by an entity other than the station, (4) local civic affairs, (5) local electoral affairs, (6) independently produced programming, (7) other local programming, (8) public service announcements, and (9) paid public service announcements. For each category, the form requires the title, day and times aired, length of

program, whether the program is locally produced, has been aired on the subject station or another station, has been part of a regularly scheduled news program and whether it has been broadcast for payment or any other sort of consideration to the licensee. The form also asks whether the licensee undertook any efforts to determine the programming needs of its community and whether it designed any programming to address the identified needs of the community. The licensee must then describe the steps that it took to determine the programming needs of its community. The TV Form seeks additional information regarding any broadcast of information concerning a “current emergency that was intended to further the protection of life, health, safety and property,” whether the licensee leases or sells three hours or more per day to an entity other than the licensee pursuant to a Local Marketing Agreement or Time Brokerage Agreement, or whether the licensee has entered into a joint sales or similar agreement. Finally, the TV Form requests information regarding service for persons with disabilities such as close captioning and video description.

In Enhanced Disclosure, the Commission did not require television stations that did not already have a website to create one. It did not adopt quantitative programming requirements or guidelines, and it did not require television broadcasters to air any particular category of non-entertainment programming or mixed-programming types. Despite the fact that the TV Form very pointedly asks whether the licensee has taken efforts to assess the programming needs of its community and whether the licensee has designed its programming to address those needs, the Commission insisted that it was not re-imposing the detailed ascertainment obligations that it eliminated in the mid 1980s.

The instant NPRM, while referring to its previous discussion of the Enhanced Disclosure measures for television and noting that these obligations only apply to television licensees,

nevertheless refers to its Digital Audio FNPRM<sup>1</sup> wherein “we have inquired as to whether radio licensees should also be subject to these requirements.” This rather alarming reference promises nothing but further unwarranted hardship to a struggling radio broadcast industry.

SBS strongly resists imposing the aforementioned television requirements on radio stations. Mandating that virtually all public file material be placed on a station’s website is burdensome and generally duplicative. It also raises unwarranted dangers for licensees. First, placing all of this documentation online and continuously maintaining its accuracy and currency will significantly increase the station staff’s workload and likely result in the expenditure of additional resources on IT fees. Second, virtually all of the material required by the Commission’s rules to be in the station’s public file will already be available online at the FCC’s website. These include licenses, applications, EEO reports, ownership reports, technical information, etc. The only substantive portion of the public file that will not be online and that would be newly required is the Quarterly Report which the Commission now proposes to replace with an online form! This rule change would make every radio licensee the easy target of any person with access to a computer, whether an actual listener or not, and whether residing in the listening area or not. It would create a new class of self-appointed objectors and petitioners, ready to patrol websites and scrutinize and file complaints if a filing isn’t uploaded on the appointed date. Surely the Commission does not intend such a result!

SBS also opposes the replacement of the now traditional Quarterly Report for radio licensees with a standardized, electronically filed disclosure form similar to the TV form. Such a form is unnecessary and actually provides less information than the current form. Significantly,

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<sup>1</sup> Digital Audio Broadcasting Systems and Their Impact on Terrestrial Broadcast Service; 22 FCC Rcd 10344 10390 (2007).

it does not allow broadcasters to disclose their non-broadcast activities to their service areas, and that is perhaps their most important connection to the listening public.

The current requirements for the Quarterly Report provide that a station may ascertain the issues, problems and needs of its community of license and service area in any feasible manner. Once the relevant problems, needs and issues are determined, the licensee is expected to develop and to broadcast programs to address the ascertained issues. The Quarterly Report lists the issues and details regarding those programs, including the title, date, time, guests and the substance of the program. Moreover, licensees have added sections on public service announcements, other public affairs programming and related matters. Radio broadcasters have been successfully engaging in ascertainment and placing these reports in their public files for over 20 years. SBS firmly believes that the proposal included in the NPRM is burdensome and without concomitant benefits to the listening public. Its implementation would compromise radio broadcasters economically and result in a surfeit of unwarranted regulation.

The TV Form provides less relevant data than the current reports. First, there is no list of community issues which the licensee would have to ascertain, nor is there any requirement that the programming broadcast is in any way related to those issues. More importantly, the form does not require a showing of the actual substance of the program broadcast. It calls only for a list of programming accompanied by date and length, segregated by somewhat arbitrary and meaningless categories. Hence, the proposal would provide less substance, but more regulation.

SBS further submits that the form is extremely misleading and confusing. Despite the Commission's observations to the contrary, the mere listing of the programming categories will lead the public to believe that broadcasters must broadcast non-entertainment programs that fall into each and every category, i.e., "local electoral affairs," "religious," etc. In fact, few stations,

except those specializing in news/talk, actually do. The categories themselves are vague. For instance, "local electoral public affairs programming" could well qualify as "local civic affairs programming." And, what if that particular program which addressed "local electoral public affairs" and constituted "local civic affairs" was also "independently produced?" Does the broadcaster then have to list the same show in three different places? How does a broadcaster determine whether it has aired programs that were aimed at "serving the needs of under-served communities?" Will the Commission provide a definition of the demographic segment of the community to whom little or no programming is directed? How will a licensee judge whether this particular demographic segment has been the recipient of little or no programming? Clearly, the numerous decisions that will have to be made as to classification of programming alone will be burdensome in the extreme. Worse, it will set up broadcasters for the kind of "fly specking" that could jam the Commission with petitions and objections. The Quarterly Report which is presently in place is more than adequate. Of course, broadcasters must continue to take the Quarterly Reports very seriously and to supply the specific information that is necessary to demonstrate their attachment to and understanding of their communities and listening areas.

As SBS has already noted, the proposed form ignores what may be the most important part of the relationship between local radio broadcasters and their communities: non-broadcast activities. Radio listeners receive "public affairs programming" from a variety of sources, including local commercial television, public television and radio, hundreds of video channels broadcast or delivered by satellite and cable, and all-pervasive Internet. What none of these media deliver, not even most local TV, is the close community-oriented bond that radio stations have traditionally had with their listeners. Each SBS broadcast station maintains strong ties to its community and service area. Throughout the year, the stations raise money for charity and

disaster relief, participate in voter registration drives, schedule appearances by SBS on-air personalities at hospitals, schools and churches and provide support to many other charitable and community events. No other medium of mass communication participates as much in the life of its community of license and listening area as radio stations do. This information is completely absent from the form which, as proposed, merely constitutes another burdensome checklist.

### **Community Advisory Boards**

The Commission has asked for comments regarding the possible adoption of rules or guidelines that would require licensees to convene permanent advisory boards comprised of officials and other leaders from the service areas of broadcast stations. The Commission believes that such boards will serve to alert each broadcaster to the issues that are important to its community of license and which should be addressed by appropriate programming. It has raised questions regarding how members of such boards should be selected or elected and whether or not former ascertainment guidelines should be a starting point to identify the segments in the community with whom the licensees should consult.

SBS believes that the institution of community advisory boards can have a positive effect on a station's ability to identify the problems and needs that should be addressed through programming in the relevant service area. Nevertheless, there are dangers that lurk in the Commission's proposal and which must be brought to light. First, there is a prospect of reinstating regulations that have previously been eliminated for good cause because they were determined to have been unnecessary in light of existing marketplace conditions. See, Radio Deregulation, 84 FCC 2d 716, 721 (1981); Television Deregulation, 98 FCC 2d 1078 (1984). No one can doubt that seeking advise from community groups is potentially beneficial, but whether or not the FCC should compel its broadcast licensees to follow strict guidelines to do so is

another matter. Surely institutional memory recalls the years of over-regulation nitpicking that accompanied the use of the Commission's Primer on Ascertainment. See, Community Problems-Broadcast Applicants, 27 FCC 2d 650 (1971), and cases like WIOO, Inc., 95 FCC 2d 974 (1983) (renewal granted after hearing despite problems in choosing community leaders in ascertainment process).

The required establishment of community advisory boards may be a reasonable extension of the agency's regulation. However, the notion that specific requirements should be imposed on the manner in which the board is structured, the frequency of meetings with the licensee, and how it should make its recommendations known will lead both the Commission and its licensees to the edge of a slippery slope, indeed. It was the accumulation of burdensome and ineffective guidelines that ultimately resulted in the repeal of formalized ascertainment.

The ascertainment process remains important to SBS. Localism can be advanced by the effective interaction between advisory boards and licensees. But the manner in which boards should be selected and the composition of such boards should be left wholly to the discretion of the licensee. While the Commission can certainly make rules to help assure that all segments of the community are represented on a board, including under-served members of the community, and that they have an opportunity to voice their concerns about local issues, a licensee should nevertheless only be required to certify in its renewal application that at least one management level staff person has met with a community advisory board biannually in order to receive the board's input on area problems and needs. No further requirements should be imposed. If it can be shown at renewal time that a licensee has not utilized a community advisory board to ascertain community problems and needs, then appropriate action could be taken. Short of that, a return to anything approaching the old ascertainment rules would be extremely unwise. Broadcasters have

the ability to describe at reasonable intervals what they use for public outreach in order to determine community problems and needs. These can encompass listener or viewer surveys, “town hall” meetings, or website blogs. Community advisory boards are an additional tool. If the Commission insists on promulgating a rule that requires a licensee to interact with a community advisory board, then the licensee should be afforded the greatest breadth and discretion in meeting such a requirement.

Absent formal ascertainment requirements, most stations still do a good job of identifying problems in their service areas and addressing the problems with appropriate programming. Station news departments, talk and call-in shows and diverse public service announcements are sufficient to publicize matters of local concern. If these programming elements are combined with regularly scheduled meetings between station personnel and community advisory boards, effective local programming may well be enhanced, but imposing specific rules is onerous and not likely to achieve anything more than is presently accomplished.

### **Renewal Application Processing Guidelines**

The Commission is aware of the First Amendment and other considerations that result from a number of its proposed rules. While some may have questioned the general scope of broadcaster ties to their communities, there is no reason to conclude that they have abdicated their attempts to serve their respective audiences or that they have jettisoned programming tailored to local tastes and needs. Courts and the Commission have often noted the vast variety of choices enjoyed by the public in receiving information, both of a general and a local nature. See, e.g., *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir.), cert denied, 464 U.S. 1008 (1983); see, also, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time has Passed* (Media Bureau Staff Research Paper, 2005). When ascertainment guidelines were

initially fashioned and imposed upon broadcasters, many of these diverse choices hardly existed at all.<sup>2</sup> Some of the proposals offered in the NPRM are contrary to what the Commission has attempted to accomplish in the past decade in light of the sea change in American media. The proposed renewal application processing guidelines are perhaps the most highly objectionable elements in the NPRM, and infringe upon core First Amendment rights that have been granted to broadcasters in the past.

The Commission has tentatively concluded that “guidelines” are necessary in order to process applications for renewal of licenses, and that the guidelines should be based on localism programming performance. If stations meet their prescribed minimum percentages of locally-oriented programming, the Staff would be free to process the renewal application to conclusion. The full Commission would consider applications for renewal where licensees did not meet the prescribed minimums.

Renewal application processing guidelines that require a specified minimum percentage of programming to address local issues result in a “chilling effect” on speech. It is true that the Supreme Court has determined that the electronic press has less protection from government regulation than does the print press. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). However, that case was decided well in advance of the technology explosion we have experienced in the past twenty years. In any event, the Court noted that its views on content regulation could change in the future if there was evidence of a chilling effect. Quantitative guidelines will actually suppress expression because they compel broadcasters to air a particular

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<sup>2</sup> These include cable television, multi-point distribution service, UHF and VHF television, AM and FM radio, direct broadcast satellite, newspapers, magazines, low power television, DVD players, computer services of many kinds, telephone yellow pages, outdoor advertising, etc.

kind of programming even though there are ample public affairs and talk formats on AM, FM and television stations throughout the country, and a wide range of choices from other media.

It is more than interesting to note that the Commission has put forth the present proposal during an economically difficult time for radio broadcasters in particular. The need to formulate even more local programming may not be an effective strategy if a terrestrial radio broadcaster must compete with satellite radio, the internet, and various MP3 devices. If listeners determine that more localism means more relevancy to the station, additional advertising time will likely be sold to local sponsors and the business model will succeed. Hence, whether or not the FCC institutes quantitative processing guidelines expressed as hours per week or as a percentage of overall programming, the significant First Amendment considerations remain.

The Commission questions whether or not categories of local programming should be established, such as news, public affairs, etc. But when the Commission in the 1980s repealed detailed programming requirements, it carefully noted how burdensome, especially for small stations with limited staffs, such requirements had been. The whole idea of imposing its own views of what was in the public interest - - without regard to format or demographics - - was controversial and of debatable effectiveness. There is enough media diversity that the marketplace is the only logical arbiter of what serves the public interest. A broadcaster can be expected to act responsibly because there is an economic incentive that results from the fear of audience loss to a competitor who serves the public better.

Advances in media technology and such regulatory initiatives as Docket 80-90 have markedly increased the number of broadcast stations over the past 25 years. There is no legitimate basis for imposing new obligations on licensees that will only serve to complicate the license renewal process. Quantitative standards are unnecessary because broadcasters, like SBS,

have implemented varying and effective strategies to ascertain the needs of their listening areas. There is no SBS station that does not maintain a strong bond with its local audience even though it may establish those bonds through programming that would not necessarily meet the quantitative guidelines laid down by the Commission, i.e., public affairs programs, news programs, etc. As stated, supra, there are non-broadcast mechanisms, as well, that maintain the nexus between a station and its service area. The concept of quantitative programming standards also raises difficulties with regard to just how much local programming would satisfy any Commission guidelines. It would also place a significant burden on broadcasters who would have to shift many staff hours to regulatory and paperwork management. It would place corresponding burdens upon the Commission's processing staff in its attempts to review and evaluate specific renewal showings. In the end, it is the small and mid-market broadcast licensees that would have to bear the brunt of this regulation, and these are the very entities that can least afford increased regulation in the present difficult economic environment.

#### **Remote Operation/Voice Tracking**

The Commission has requested comments with regard to whether it should require a physical presence during all hours of operation. Despite having used its IBOC proceeding to review certain requirements that it published with its new digital rules, it now inquires as to whether or not unattended operations could adversely affect EAS alerts and other obligations.

Once again, it is the small and mid-market stations that would be most impacted by new regulations that compel continuous staffing by station personnel. In 1995 the Commission authorized unattended operations of stations allowing them to control their technical facilities from remote locations. This was largely due to improvements in monitoring and transmission equipment. Nothing that has occurred in the interim justifies any change in the rules.

SBS believes that disallowing operation by remote control would neutralize a labor-saving technology while largely failing to enhance a broadcaster's responsiveness to its local community. Emergency and disaster warnings can be provided in a variety of ways that do not require a physical presence at a studio during all hours of operation. The EAS system, while not perfect, allows for automatic alerts and multiple-monitored sources, but does not mandate full-time staffing. In the event of an emergency, there are many reliable outlets that can be relied upon to transmit information, including the very licensee that may operate a given facility by remote control. On the other hand, there is a possibility that because of the expense occasioned by full-time staffing, some stations will have no alternative but to broadcast fewer hours, especially during the late evening or in the early morning hours.

The Commission also has inquired into the desirability of the continued use of voice tracking, whether the practice should be curtailed, and whether it should be disclosed when utilized by broadcasters. Voice tracking is the practice of importing programming usually hosted by out-of-town personalities who may "customize" the programming to make it seem that they are local residents. It also solicits comments on whether or not licensees should provide the Commission with data regarding their music playlists so that the agency could monitor the quantity of local artists, presumably to be factored into the station's overall performance at renewal time.

SBS opposes both the proposed regulation of voice tracking and the evaluation of playlists. These matters infringe significantly on a broadcast licensee's First Amendment protection. It has been well established for nearly 25 years that reliance on the market is the most assured way to allow for diversity in entertainment. See, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). If, as the Court found, marketplace regulation is a constitutionally protected

means of implementing the public interest standard of the Communications Act, then agency incursions into the derivation of a station's programming and the composition of the music that it plays, appears to run counter to the Supreme Court's 1981 ruling.

### **Main Studio Location**

The NPRM also addresses whether or not the Commission should reinstitute its pre-1987 main studio rule which required that each station have a main studio located within its community of license. That rule has been relaxed over the past 20 years so that the present rule requires a station's main studio to be located within either (a) the principal community contour of any station, of any service, licensed to its community of license, or (b) 25 miles from the reference coordinates of the center of its community of license. The Commission is concerned that the present regulation allows broadcasters to locate their main studios at a far flung distance from their communities of license. The Commission appears to believe that the accessibility of the main studio will somehow increase interaction between the station and the community of license to counter the alleged problem that many stations do not engage in a necessary public dialogue to ascertain community needs and interests.

SBS submits that a proposal to roll-back the regulatory clock to the pre-1987 rule is unjustified. First, the mere requirement that the main studio must be physically placed in the community of license does nothing to enhance the notion that it will increase interaction between local residents and the licensee. There are many communities of license throughout the country where it may actually be more desirable to place a studio in an economically desired location that is far removed from pockets of population, although technically in the community of license. Indeed, to simply require that a main studio be situated within a community of license does not

guarantee that the main studio will even be the site of programming production. Mandating a particular studio location does not necessarily create local programming.

The cost of maintaining studio facilities in a community of license is another reason why reinstating the pre-1987 rule would be a bad idea. As always, the major economic brunt would fall to the smaller and middle-sized broadcast licensees, many of whom program to minority groups. These licensees might have to hire full-time managers, face steeper rents and utility costs, and possibly incur significant expenditures for making necessary improvements to roads, establishing utility access to the studio, etc. SBS, like other broadcasters, would face a real hardship. Less than half of its radio stations are licensed to the primary metropolitan city in the respective market. In the Miami, Florida market, alone, SBS would be forced to establish new main studios in Hialeah, North Miami Beach and Ft. Lauderdale. Currently a single studio location in Miami allows SBS to serve all these communities. The savings that result from the use of a single studio are significant and these economies of scale can be expected to be passed along in such a way that the service area will receive even better programming. Finally, in the case of brokered stations, which the Commission still freely permits, the savings accomplished through consolidated operations could be permanently lost by imposition of the proposed rule.

SBS is unaware of any body of relevant evidence to demonstrate that the rule as proposed would help insure community access to station personnel and stimulate station involvement with the community. There are other ways of achieving the Commission's stated objectives. Many stations have internet sites that provide a far more realistic and easier way for the public to communicate with the station. In 1987 there were no internet sites to link listeners to their local stations. Hence, technology and real world considerations trump the deceptively comfortable idea of each station physically maintaining its presence in its community of license.

## Conclusion

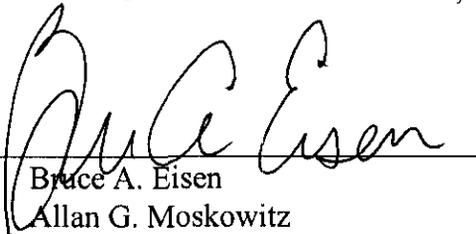
It is beyond dispute that broadcast licensees must address the needs of their local communities because effective local service results in an informed service area. However, over the years the Commission has eliminated many of its rules that have encouraged localism because the rules have proven inefficient and administratively burdensome for both the agency and its regulatees. SBS believes that media competition and a broadcaster's economic best interests are ordinarily enough to make Commission licensees responsive to community needs. If the Commission adopts some of the new proposed rules, the manner in which local radio stations operate will change dramatically. Unfortunately, the change may not equate with the Commission's intentions. The increased paperwork and studio staffing that some of these new rules would engender, may result in reduced air time to the public. There can be no question but that implementation of some of the rules will economically damage many broadcasters at the worst possible moment. The new rules will also create numerous pitfalls at renewal time, both for the Commission's processing staff and for broadcasters in general. It could hardly be otherwise when station staffs, rather than spending their time on broadcast operations, will have to devote significant hours to meeting program standards imposed by the government which consist only of the Commission's idea of what is good for local audiences. Moreover, these proposed rules do not truly reflect today's media landscape where satellite and internet radio as well as other digital

choices of entertainment are now prevalent. Given this environment, quantitative standards for broadcast programs are uncalled for at this time.

Encouraging better local programming is a good idea. But increasing regulation is not, especially where it threatens to bring back a regulatory environment that proved unsuccessful and burdensome when it was extant three decades ago.

Respectfully submitted,

SPANISH BROADCASTING SYSTEM, INC.

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April 23, 2008