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## EXECUTIVE SUMMARY

Trinity Christian Center of Santa Ana d/b/a Trinity Broadcasting Network (“Trinity”) and Tri-State Christian TV, Inc. (“Tri-State”) respond to the Commission’s invitation to comment on proposed rule changes that the Commission contemplates undertaking in pursuit of “broadcast localism.” In particular, Trinity and Tri-State (“these Commentators”), present the Commission their views in opposition to the proposed “Community Advisory Board,” the proposed modification of the main studio rule, and the return of mandatory attended operations. In the view of these Commentators, the proposals are unsound and should be rejected.

The Commission will, without doubt, hear from a broad variety of voices on these questions. These Commentators – both broadcast licensees of the Commission and both Christian religious broadcasters – present a distinct and valuable voice of concern over the proposed modifications. As religious broadcasters, the Commentators are entitled by law, Title 42 USC § 2000-bb *et seq.*, to have the Commission consider the impact on their religious exercise of its proposed rule changes. The Religious Freedom Restoration Act, by which Congress amended *all* federal law, and by which Congress imposed on *all* federal agencies a set of affirmative duties, guarantees to these Commentators that no substantial burden on their religious exercises would be inflicted or sustained *except* when, in doing so, the burden serves a compelling government interest by the least restrictive means available to the government.

Here, there is no doubt that the Community Advisory Board, as proposed, imposes substantial burdens on the religious exercise of the Commentators in particular, and religious broadcasters generally. The burdens imposed include administrative ones related to identifying and selecting potential board members, reviewing qualifications of board members to insure that

their participation is consistent with the religious function and purpose of the religious broadcast service, and being threatened with regulatory consequences for insisting on religious identity. These burdens are proposed by the Commission even though they do not serve a compelling governmental interest, and even though any relevant governmental interest can be fully secured by a variety of less restrictive means already noted by the Commission.

The Commission's prior experience in pursuit of diversity in employment among licensees ought to inform its pursuit of the Community Advisory Board as a tool to enhance broadcast localism. In light of the *Lutheran Church-Missouri Synod v. FCC* controversy, and both the *King's Garden* policy and the changes to it, the Commission should provide relief from the commands of any proposed rule in order to take religious nature and identity of licensees into account.

Because of the considerable discretion belonging to broadcast licensees in the selection of programming, and because licensees are not at liberty to surrender that discretion to the exercise of another, there is little or no substantive value in mandating a consultative enterprise such as the Community Advisory Board. Licensees, after all, enjoy constitutional protections under the First Amendment from content- and viewpoint-based restrictions. Moreover, there are no sensible, fact-based arguments to be made that such consultative boards are designed for any purpose other than driving decisions related to programming content. Nor is the pursuit of broadcast localism, either by statutory terms or by actual regulatory determinations, a particularly compelling purpose of the Commission, such as would be necessary to justify interference with programming choices of licensees.

Regarding the reimposition of a main studio only within the city of license requirement, the Commission should take note of the dearth of evidence indicating that licensees are failing to serve the public interest in a context sensitive to their communities of license and the location of the main studio. Given that dearth of concerning evidence, it seems highly inappropriate for the Commission to impose the substantial costs and planning and administrative expenses of compliance with its proposed reimposition of the city of license main studio location requirement. There is a track record of reliance by licensees, including these Commentators, on the Commission's liberalized rule regarding main studio location. That track record indicates substantial investment in main studios in locations permissible under the relaxed rule.

Retrenching to the former rule would negate any investment made by licensees in many of their current main studio locations. The hardship caused by the proposed rule change goes beyond those losses, however. A change in the rule would compel compliance and, because compliance would mean relocation, licensees will have both wasted assets in reliance on the relaxed rule and will now be compelled to expend substantial sums to attain compliance on a retrenched rule. Yet the value of such a retrenchment is doubtlessly negligible.

The Commission is certainly aware of how very seldom viewers take advantage of the opportunity to physically visit a licensee's studio. Consequently, when the value of such a decision is weighed against its disastrous financial consequences on licensees, the only reasonable conclusion, in the opinion of Commentators, is for the Commission to forego the amendment altogether. Failing that, the Commission should take substantial steps to minimize the attending harms. Those substantial steps could include "grandfathering" current main studio locations permanently, or they could include providing an extended term of years (at least 10, as

was the experience with the digital TV conversion) in which licensees would be permitted to come into compliance with such a change.

Lastly, retrenching on the attended operation requirement likewise works a heavy and costly burden on broadcasters. It ignores the benefit of the technological advances and operational reliability unattended operations have provided, and would reverse the important cost savings licensees have garnered.

Accordingly, Commentators urge the Commission not to reimpose the “only within the city limits” main studio rule, or the attended operations requirement. Nor should the Commission adopt a requirement for a standing Community Advisory Board.



regarding three proposed rules: the permanent Community Advisory Board rule, the Main Studio rule, and the attended operation rule.

In the Broadcast Localism NPRM the Commission proposed to adopt a rule requiring all licensees to “convene a permanent advisory board” for the purpose of “determining matters of local interest for broadcasters.” FCC 07-218, ¶¶ 25-27. In significant part, the Commission stated:

25. Community Advisory Boards. The Commission’s former ascertainment requirement directed broadcasters to comply with detailed, formal procedures to determine the needs and interests of their communities, at the time that they initially sought their station authorizations, asked for approval to obtain a station, and sought license renewal. The record before us here shows that new efforts are needed to ensure that licensees regularly gather information from community representatives to help inform the stations’ programming decisions, but we are not persuaded that the appropriate measure should be reinstatement of the former ascertainment mandates. As when the Commission eliminated those procedures in the 1980s, we do not believe that their potential benefits justify the costs. We do tentatively conclude, however, that the same fundamental objectives can be achieved through other means, including regular, quarterly licensee meetings with a board of community advisors and improved access by the public to station decision makers.

26. As noted supra, a number of licensee commenters have reported the benefits of community advisory boards in determining matters of local interest for broadcasters. We tentatively conclude that each licensee should convene a permanent advisory board made up of officials and other leaders from the service area of its broadcast station. We believe that these boards will promote both localism and diversity and, as such, should be an integral component of the Commission’s localism efforts. Accordingly, we seek comment on this proposal. *Will such community advisory boards be able to alert each broadcaster to issues that are important to its community of license? How should members of the advisory boards be selected or elected? Should the former ascertainment guidelines be a starting point to identify those various segments in the community with whom the licensees should consult?<sup>11</sup> How can the advisory boards be composed so as to ensure that all segments of the community, including minority or underserved members of the community, would also have an opportunity to voice their concerns about local issues facing the area? How frequently should licensees be required to meet with these advisory boards? We*

believe that, generally speaking, if a licensee already has formal groups in place with which it consults to determine the needs of its community, it should be deemed to have satisfied this requirement. *We also seek comment on under what circumstances a licensee should be deemed to have satisfied this requirement with its current practices.*

. . . .

*We also call for comment on whether we should adopt rules or guidelines that encompass these approaches, or other similar efforts, for fostering better communication between licensees and their communities. We note that the standardized disclosure form recently adopted by the Commission will require broadcasters to describe any public outreach efforts undertaken during the reporting period.*

(Footnotes omitted) (emphasis added).

The Broadcast Localism NPRM also invited comment on reimposing the “main studio rule” requiring all licensees to revert to the pre-1987 rule requiring licensees to locate their main studios within the licensees’ communities of license. *Id.*, ¶¶ 41. The Commission stated:

41. *Main Studio Rule.* We share the concern underlying proposals that the Commission require that licensees locate their main studios within the local communities so that they are “part of the neighborhood.” The main studio rule is rooted in Section 307(b) of the Communications Act. Section 307(b) requires the Commission to “make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide for a fair, efficient, and equitable distribution of radio service to each of the same.” In carrying out this mandate, the Commission established a method for distributing broadcast service in which every radio and television station was assigned to a community of license with a primary obligation to serve that community. A central component of this scheme required that a broadcast station's main studio be accessible to its community of license. At one time, all broadcasters were required to maintain their main studios in their communities of license. In 1987, however, the Commission changed its rules to allow a station to locate its main studio at any location within the station’s principal community contour. In 1998, the Commission further liberalized the rule to allow the studio to be located within either the principal community contour of any station, of any service, licensed to its community of license or 25 miles from the reference coordinates of the center of its community of license, whichever location the licensee chooses. *We seek comment on whether we should revert to our pre-1987 main studio rule in order to encourage broadcasters to produce locally*

*originated programming, and seek comment on this, and on whether accessibility of the main studio increases interaction between the broadcast station and the community of service.*

(Footnotes omitted) (emphasis added).

Lastly, comments were requested on the reimposition of an attended operation requirement. *Id.*, ¶ 29. In pertinent part the Commission stated:

29. Recently, the Commission issued a Notice of Proposed Rulemaking regarding this issue, in connection with a public interest review of digital audio broadcasting. The Commission asked whether it should review its rules and determinations that facilitated the development of the automated radio broadcast operations described above. It also asked whether changes in remote radio operation should affect existing rules. Comments are still being received in that proceeding. We are considering requiring that licensees maintain a physical presence at each radio broadcasting facility during all hours of operation. Requiring that all radio stations be attended can only increase the ability of the station to provide information of a local nature to the community of license. Particularly in the event of severe weather or a local emergency, such a requirement that all operations be attended may increase the likelihood that each broadcaster will be capable of relaying critical life-saving information to the public. Although parties have commented in that proceeding on this issue in the context of radio, we seek comment here on whether we should extend this requirement to television stations, as well as radio facilities.

(Footnotes omitted)

In each case, the Commentators urge the Commission to forego imposition of the proposed rule.

**I. THE COMMISSION SHOULD FOREGO IMPOSITION OF A MANDATORY COMMUNITY ADVISORY BOARD SYSTEM TO AID LICENSEES IN ATTAINING AND MAINTAINING LOCALISM**

The Commission should forego adoption of a policy requiring broadcast licensees to constitute Community Advisory Boards and to consult with such boards in pursuit of attaining and maintaining localism. As explained within, substantial obstacles present themselves in the contemplated policy, and in its application to *all* broadcast licensees. Of particular and

considerable significance to the Commentators, imposing a mandatory Community Advisory Board industry-wide cannot pass scrutiny under the RFRA when applied to religious broadcasters. *See* Argument I A, *infra*.

The Commission’s prior experiment in pursuing affirmative action policies by the imposition across the board of equal employment opportunity principles provides a clear example of the problems presented by prophylactic prescriptions that fail to account for serious and deep differences between different *kinds* of broadcast licensees. For that reason, the Commission should view its proposed policy in the light of its experience in the *Lutheran Church-Missouri Synod* matter. That approach will, undoubtedly lead the Commission to give special considerations for religious broadcasters. *See* Argument I B, *infra*.

In addition, related to the nature of these Commentators as religious broadcast licensees, additional weighty justifications undermine the wisdom of the Community Advisory Board rule. First, because broadcast licensees enjoy broad discretion in ascertaining the public interest and in formulating programming to serve that perceived need, the Community Advisory Board would be of, at best, limited value. *See* Argument I C, *infra*. Second, the Commission should approach the proposed rule with great circumspection. There are substantial reasons to conclude that imposition of the rule is beyond the regulatory authority of the Commission. *See* Argument I D, *infra*.

A. Imposing a Mandatory Community Advisory Board Requirement Industry-wide Fails Scrutiny under the RFRA When Applied to Religious Broadcasters

Federal law – the Religious Freedom Restoration Act of 2003 (hereinafter “RFRA”), Title 42 U.S.C. § 2000bb *et seq.* – compels the Commission to evaluate whether its proposed

permanent Community Advisory Board requirement may be constitutionally applied to religious broadcasters. This independent duty, arising under RFRA, obliges the Commission to consider in advance of any rule-making whether the imposition of the Community Advisory Board substantially burdens a religious practice, and if it does, whether the burden serves a compelling government interest by the least restrictive means available. *Id.* In the view of these licensee Commentators, the Community Advisory Board proposal fails scrutiny under RFRA because it substantially burdens their religious practices, and it does so by means that assuredly are not the least restrictive ones available to the Commission's purpose.

1. By its enactment of RFRA, Congress amended ALL federal law, and imposed a mandatory duty on federal actors and agencies to evaluate planned actions for the purpose of insuring that religious exercise is not substantially burdened except when in service of a compelling interest and when served by the least restrictive means available.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). In so doing, the *Smith* Court held that the so-called *Sherbert* test does not govern such neutral, generally applicable laws. That test, set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), involved a balancing process in which the court would ask whether a statutory or regulatory prohibition "substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest." *City of Boerne*, 521 U.S. at 513.

After the *Smith* decision, in 1993 Congress enacted RFRA for the express purpose of restoring the *Sherbert* Free Exercise test. See 42 U.S.C. § 2000bb(b)(1); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Under RFRA, "[g]overnment shall

not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that the application of the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

RFRA's judicial relief provision is couched in broad terms: "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." Id. § 2000bb-1 (c). In its definition section, RFRA states: "[T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States. . . ." Id § 2000bb-2(1).

The Supreme Court ruled in *City of Boerne* that Congress lacks the constitutional authority to enforce RFRA against the states. 521 U.S. at 536. Congress does, however, have the power to enforce RFRA against the federal government. *See Holy Land Found for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003) ("[W]e have held that without doubt 'the portion [of RFRA] applicable to the federal government. . . survived the Supreme Court's decision striking down the statute as applied to the States.'" (quoting *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001)), *cert. denied*, 540 U.S. 1218 (2004)). Consequently, there is no doubt of the reach of RFRA to the duties and responsibilities of the Commission. As stated in *Gonzales*, "the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. 546 U.S. 424

## 2. RFRA and the Commission

Of course, the Commission has had some experience in the litigation of claimed violations of the Religious Freedom Restoration Act.

Claims and defenses under RFRA in cases involving the Commission have obtained mixed results. In *La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313 (6<sup>th</sup> Cir. 2000), a microbroadcaster had sued the Commission in the District Court, rather than seeking review of the agency's administrative actions on appeal. In its suit, *La Voz Radio* laid a claim under RFRA, and argued that, while typically review of the Commission's decisions would take parties to the D.C. Circuit, the RFRA claim entitled the District Court to determine their case. The Sixth Circuit dismissed the action.<sup>1</sup> *Id.* at 319-320.<sup>2</sup>

On the other hand, that same Sixth Circuit *allowed* a microbroadcaster to assert RFRA as a defense to an *in rem* forfeiture action in the District Court. *See United States v. Any and All*

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<sup>1</sup> In *La Voz Radio de la Comunidad*, the Sixth Circuit observed the view, shared by some, that RFRA violated separation of powers principles by substituting the thinking Congress for the decisions of the Supreme Court. *See, e.g., Dickerson v. United States*, 120 S. Ct. 2326, 2328 (2000) (Congress may not legislatively supersede Supreme Court decisions interpreting and applying the Constitution). If, in fact, there is a separation of powers defect in Congress' enactment of RFRA, the Supreme Court has not seen fit to so hold. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussing separation of powers question without deciding); *cf. O Centro Espiritu v. Gonzalez*, 546 U.S. 418 (2006) (affirming judgment for RFRA claimant against federal government's enforcement of prohibition on use of huasca tea in religious ceremonies).

<sup>2</sup> Similarly, in *Radio Luz v. FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), the District Court for the Eastern District of Pennsylvania rejected a claimant's attempted circumvention of review of the Commission's administrative action in the D.C. Circuit via the assertion of a claim for relief under RFRA. 88 F. Supp. 2d at 373, 375-76. *See also United States v. Any & All Radio Station Equip. (2151 Jerome Avenue, 2nd Floor Bronx, New York 10453)*, 93 F. Supp. 2d 414 (D.N.Y. 2000) (rejecting RFRA defense to *in rem* forfeiture); *United States v. Any and All Radio Station Transmission Equipment (200 Griggs St. SW, Grand Rapids, MI)*, 1999 U.S. Dist. LEXIS 18846, at \*13-18 (W.D. Mi. 1999) (same).

*Radio Station Transmission Equip. (Strawcutter)*, 204 F.3d 658 (6th Cir. 2000).<sup>3</sup> Distinguishing *Strawcutter* from *La Voz Radio*, the Sixth Circuit explained,

In *Strawcutter*, this court held that when the FCC does not proceed administratively against an unlicensed microbroadcaster, but instead initiates an *in rem* action in the district court seeking the forfeiture of offending broadcasting equipment, the microbroadcaster is not precluded from challenging the legal basis of the government's forfeiture case in the district court.

223 F.3d at 319.

It might tempt the Commission to defer determination of whether RFRA limits its power to impose the obligations of the Community Advisory Board.<sup>4</sup> These Commentators urge the Commission to satisfy the duty imposed on it under RFRA to evaluate their contention under the Act. As set out within, it is patent that the proposed rule changes would substantially burden their religious practices without being in service of a compelling interest and without employing the least restrictive means available.

3. The Commission's proposed Community Advisory Board Rule violates the rights of religious broadcasters, particularly of these Commentators.

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<sup>3.</sup> In like vein, *United States v. Any and All Radio Station Transmission Equipment (103 Locust Street, Lancaster, Pennsylvania)*, 1999 U.S. Dist. LEXIS 13967 (E.D. Pa. 1999), the District Court for the Eastern District of Pennsylvania concluded that in an *in rem* action against a microbroadcasting church that forfeiture was not the least restrictive means to accomplishing its statutorily authorized purposes. 1999 U.S. Dist. LEXIS 13967 \*10-14.

<sup>4.</sup> See *In the Matter of Jones Cable TV Fund 12-A, Ltd.*, 14 FCC Rcd 2808 (FCC 1999). In *Jones Cable TV Fund 12-A*, the Commission sadly conflated the free speech consideration of content-neutrality with the mandatory duty under RFRA to determine whether or not its actions substantially burdened religious practices, and if so, whether such burden served a compelling government interest by the least restrictive means available. That mistaken conflation of issues allowed the important statutory issues to escape the Commission's consideration and determination. The Commission should proceed advisedly, with the understanding – made patent in the cases cited above – that its failure to satisfy the RFRA standards in its consideration of the proposed rules is subject to review before the D.C. Circuit.

- i. The Commentators broadcast in furtherance of their religious beliefs regarding the duty to proclaim the Gospel and to disciple the nation.

Commentators are church organizations. Both offer a broadcast service of religious programming. Both offer their programming to further their religious duties, in particular of propagating the Gospel of Jesus Christ. Both plainly fall within the category of “religious broadcasters” as contemplated by the Commission: those licensees that are themselves a church, synagogue or religious entity, or that have a close affiliation with a church, synagogue, or such other religious entity.<sup>5</sup> Apart from these regulatory considerations, the plain case is that Commentators have formed and organized themselves for the purpose and long-term goal of spreading the Gospel of Jesus Christ, to facilitate the discipleship of all believers, for worship, study of the scriptures, ordination, and fellowship.

Here, both Commentators enjoy exemption from taxation, and their status as tax exempt church organizations is evidenced by their listing in Publication 78 of the IRS.<sup>6</sup> Both were organized for religious purposes; both dedicate their properties irrevocably to religious or charitable purposes, and both provide that upon dissolution or winding up thereof, the proceeds and assets of each of them shall devolve upon another church or nonprofit corporation organized for religious purposes, and which is recognized as such by the IRS. Trinity organized as a

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<sup>5</sup> See *Second Report and Order in MM Docket No. 98-204, Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, FCC 02-203, ¶50 (rel. Nov. 20, 2002) (“*Second Report and Order*”) (quoting *EEO Report and Order*, ¶157-161, 15 FCC Rcd at 2392-93).

<sup>6</sup> IRS Pub. 78, <http://www.irs.gov/charities/article/0,,id=96136,00.html> (last visited March 14, 2008).

church/religious corporation under California law, effective August 2, 1973. Likewise, Tri-State organized under Ohio law, effective May 20, 1977.

Commentators carry out their work and ministry of broadcast programming with the aid of spiritual disciplines including prayer and scripture study. These spiritual disciplines mark the regular life of the stations operated by the Licensees. That theirs is a religious broadcast service is evident from their program content. That programming consists entirely of religious, non-entertainment, informational, public affairs, children's and family oriented programs. Individually and taken together, the programming offered by these Licensees is purposefully crafted to advance Christian values, a Christian world-view, and Christian family values. Both Trinity and Tri-State are supported by contributions from fellow Christians, along with sharing of air-time costs with other religious ministries providing programming for use on the licensees' stations.

- ii. The Community Advisory Board requirement would substantially burden the religious exercise of religiously affiliated broadcasters.

The imposition of a Community Advisory Board rule substantially burdens religious broadcast licensees. These licensees already have the obligation to ascertain the public interest, and to serve it through their programming, including their locally originated broadcasts. The Community Advisory Board rule, contemplated by the Broadcast Localism NPRM imposes *additional and different* duties on licensees.<sup>7</sup> Religious broadcasting licensees, including these Commentators, that are performing their statutory duties in good faith already seek out the

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<sup>7</sup> The Supreme Court has taken note of this separate duty of broadcasters: “[p]ublic and private *broadcasters* alike are not only permitted, but *indeed required, to exercise substantial editorial discretion* in the selection and presentation of their programming.” *Forbes v. Ark. Educ. Television Comm’n.*, 523 U.S. 666, 673 (1997) (emphases added).

public interest and make active determinations in kinds, quantity and content of programming to meet the public interest and need.

Of greatest significance to these Commentators is the risk to the programming selection criteria that they employ in their efforts to serve the public interest while accomplishing their ministry objectives. The mix of religious, public affairs, educational and children's programming carried by these Commentators reflects their thoughtful, careful and deliberate pursuit of twin mandates: that of the Lord Jesus Christ to go into all the world and proclaim the Gospel, and that of the Communications Act to serve the public interest. Now, the Commission proposes to interject into the careful and deliberate exercises a forced consultation with an advisory board. Such a consultative body is either a waste of precious time for all involved, or it is the camel's nose under the tent flap.

If the consultative body is a waste of precious time and resources, that reflects its quality as nothing more than a source of mere advice and information that neither binds the immediate programming decisions of licensees, nor reflects on the question of license renewal if not followed. Broadcast licensees would act at great risk of harm by assuming that the Commission imposed a Community Advisory Board requirement but did not intend for licensees to be guided by the advice and direction offered by such boards. But if the Commission intends the Community Advisory Boards only to be advisory and informative, then these religious broadcast licensees will be driven to constitute and consult with such boards even though they will not allow guidance and advice from such a Community Advisory Board to distract it from the pursuit of its ministry objectives.

If there are to be “teeth” to the Community Advisory Board rule – that is, if a licensee’s compliance with the rule and the community board’s level of satisfaction with the licensee’s responsiveness to it are made relevant to a licensee’s status and eligibility for renewal – then the Community Advisory Board is the proverbial camel’s nose under the tent flap. These religious broadcasters will lose their particular religious voice and identity if they must set aside those carefully calculated, thoughtfully and prayerfully developed programming choices in service of an agenda weighted by considerations different than the one followed by the licensee.

Assembling a Community Advisory Board would also impose an obvious substantial burden – the difficult task of selecting participants. That task is not simplified by the Commission’s mention of “officials and leaders.” Some examples of “officials” seem obvious, such as the elected mayor or the elected city councilman. Others are just as likely truly to be government “officials” even though not “elected” ones. The latter category could include Sheriff’s deputies, courtroom clerks, probation officers, directors of parks and recreation departments, and water conservation district board members.

The separate problem of “leaders” does not clarify the nature of licensees duties of compliance in good faith with such a rule. Perhaps the Commission contemplates some specific limiting classification of leaders: perhaps the directors of civic organizations such as Kiwanis, Jaycees, and the Optimists. Or the Commission may have in mind, those that direct the affairs of local veterans’ organizations, or local charitable organizations such as the Shriners. On the other hand, perhaps the Commission contemplates that licensees will make efforts to view their communities of licensee as heterogenous collections of demographic cliques. Then, once each racial, ethnic, socio-economic, political or religious clique is perceived by the licensees, there

will next become evident for the licensees those among each “clique” that are “leaders” as the Commission contemplates the term.<sup>8</sup> The simpler solution for licensees, though it may not be within the Commission’s contemplation, is to choose as Board members those whose penchant for public notice and ink make them the self-appointed and self-anointed “leaders” of their “followers.”

Moving beyond the ambiguity problem, there remains the substantial administrative problems of selection, calendar coordination for meetings, and facilitation of such Board meetings. Plainly, this proposed rule calls for Herculean effort and keen diplomatic arts. That effort, moreover, is demanded of licensees even when the guidance and advice they tender (if any shared view or voice is sufficient to constitute “guidance”) cannot rightly substitute itself for the exercise of the constitutionally dimensioned programming discretion of the licensees.

Finally, and significantly, the rule as described in the Broadcast Localism NPRM fails to contemplate the religious identity and nature of religious broadcasters, and the deleterious impact of being compelled, by the Commission’s failure to afford any exception from its rule, to

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<sup>8</sup> The Commission recently made clear that it was not intending to return to the days of compliance with the 1971 Policy on Community Ascertainment, with its formalized ascertainment processes and list of some twenty community “leader” categories. *See, Report and Order on Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations* (23 FCC Rcd 1274, FCC 07-205, ¶ 45, released January 24, 2008) (“[t]he requirement we are adopting does not remotely approach re-imposition of the detailed ascertainment obligations the Commission previously eliminated. Unlike prior ascertainment requirements, our standardized form does not mandate the nature, frequency, or methodology to be used by licensees in determining how to assess and meet their communities’ needs; *identify the community members that must be consulted*; require that only certain levels of station employees conduct ascertainment; or even *identify the programming needs of particular segments of the community*. It is *only* asking the licensee whether and how it assessed and addressed the community’s programming needs.”).

conduct a consultancy with “constituency” groups whose own religious (or irreligious) identity put their ideology and purposes in diametric opposition to those of the licensee. By failing even to consider the propriety of imposing a “one size fits all” solution to its localism ascertainment concerns, the Commission puts excessive burdensome duties on this selected category of licensees without giving any indication that the impact of the rule could be disastrous to religious identity. This is a substantial burden because it directly affects and denigrates the important and central role of self-definition for religious broadcasters.

- iii. No compelling interest justifies the imposition of the Community Advisory Board rule.

Localism, the interest asserted by the Commission in justification of its Broadcast Localism NPRM, does not rise to the level of a compelling government interest. True enough, the Commission has a long history of asserting the localism concern, and of imposing burdensome regulatory frameworks on licensees in pursuit of that interest. But as noted in our discussion in *Argument I D, infra*, that localism issue is not embodied in the statutory mandates of the Commission or its predecessor agency. For purposes of analyzing whether the Commission would violate RFRA by imposing the Community Advisory Board rule on religious broadcasters, these Commentators incorporate *Argument I D, infra*, as though fully set out here.

- iv. The mandatory duty to constitute and to consult a Community Advisory Board is not the least restrictive means available to serve the Commission’s interests in serving the public interest or in fostering localism.

Even if, for purposes of argument only, one assumes that insuring and increasing broadcast localism is a compelling government interest, the rule imposing a mandatory

Community Advisory Board is not the least restrictive means available to serve the Commission's interest in broadcast localism. As an initial matter, imposed as a blank rule without consideration for the religious identity of its religious broadcast licensees, the rule fails to account for the special contours that religious identity requires the Commission to draw for such licensees. So even if its fit in all other circumstances is quite neat, it is not as closely tailored as a virtually identical requirement that excludes religious broadcasters from the rule, or that extends to such broadcasters leeway to craft such boards in a way that respects the religious identity of the licensee.

Moreover, a number of the methods identified by the Commission in its Broadcast Localism NPRM are certainly less restrictive on the religious exercises of religious broadcasters. The Commission described a variety of methods used by various broadcasters to ascertain local concerns:

The record indicates that efforts such as the following have been successful for licensees . . . formal or ad hoc listener or viewer surveys, by telephone, Internet, or other means . . . focus sessions or "town hall" meetings with viewers and listeners to help prioritize issues to be covered through news, public affairs, public service, and special programming . . . sit[ing in] on various boards, committees, councils and commissions, particularly in sparsely populated areas in which community functions depend on community participation in often voluntary public efforts . . . us[ing] dedicated telephone numbers, websites and e-mail addresses, publicized during programming, to facilitate community dialogue . . . .

Broadcast Localism NPRM ¶ 24.

Moreover, the proposed rule indicates that the Commission has already contemplated some licenses to forego the requirement of the Community Advisory Board. *Id.* at ¶ 23 ("[w]e believe that, generally speaking, if a licensee already has formal groups in place with which it

consults to determine the needs of its community, it should be deemed to have satisfied this requirement”). Further, the Commission appears willing at least to consider whether other approaches currently being used by licensees may be considered to satisfy the proposed rule. *Id.* (“[w]e also seek comment on under what circumstances a licensee should be deemed to have satisfied this requirement with its current practices”).

Clearly, in pursuit of broadcast localism, the Commission has less burdensome alternatives to the Community Advisory Board rule.

B. *Lutheran Church-Missouri Synod* and Special Considerations for Religious Broadcasters

It is said that “past is prologue.”<sup>9</sup> If such is the case, then the Commission’s experience with the interplay between its efforts to foster diversity among licensees, *see Lutheran Church-Missouri Synod v. FCC (LC-MS)*, 141 F.3d 344, 349 (D.C. Cir. 1998), and its duty to give appropriate deference to the religious identity of those of its licensees whose religious broadcast service is an outgrowth of their essentially religious nature should counsel the Commission of the need to proceed only with great caution in its contemplated imposition on broadcast licensees of a mandatory duty to constitute and to consult with a Community Advisory Board.

In *Lutheran Church-Missouri Synod*, the Commission’s failure to appreciate the broadly important role of religious identity and affiliation troubled it, LC-MS, and the D.C. Circuit. The Commission contemplated, *see King's Garden, Inc.*, 38 F.C.C.2d 339 (1972), that it was reasonable to conclude that the religious identity and the religious message of religiously

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<sup>9</sup> Wm. Shakespeare, “The Tempest,” Act. 2, sc. 1 (“[w]e all were sea-swallow'd, though some cast again, And by that destiny to perform an act, Whereof what's past is prologue, what to come, In yours and my discharge”).

affiliated broadcasters would be secure even when the Commission limited religious broadcasters to applying religious affiliation tests only for those directly involved in broadcasting. *Id.* That stunted view ignored how religious identity within a religiously constituted enterprise reinforces the central purposes of the enterprise, and how insuring such identity is essential to securing the nature and the voice of the religious broadcaster.

For the church and for the church serving as a religious broadcaster, there is great significance to the question of identity as followers of Christ. Christians, including Commentators, are under the biblical injunction not to be “Christians, including Commentators, are under the biblical injunction not to be "unequally yoked" with those of dissimilar faith. Saint Paul's Second Letter to the Church at Corinth, chap.3, verse 14. Just as, in agriculture, a yoke harnesses beasts of burden, Paul's instruction to the Corinthian Church directs those who follow after Christ not to share the yoke of labor with one who does not follow after Christ. Pairing animals of different speed, strength, or footing results in the diminution of the labor of both animals.

Likewise, the follower of Christ, being yoked with an unbeliever diminishes the capacity to work well toward the religious purposes and goals to which the follower of Christ is called. Just as other private associations and organizations have a respected right, one of constitutional dimensions, to assert and to assess their own identity, so to have those who are followers of Christ. The Body of Christ has always defined itself and its members in accord with the lights of Scripture. This important question of maintaining and securing their distinctively Christian, religious identity has always been of deep significance and ultimate importance to these Commentators, and certainly will continue to be.

Despite the lessons of *Lutheran Church-Missouri Synod*, the Commission now contemplates pairing all broadcast licensees with Community Advisory Boards for the purposes of pursuing the goal of broadcast localism, *see* Broadcast Localism NPRM ¶ 23, without expressly drawing its attention to the peculiar issues presented by the religious identity of its religiously affiliated licensees. In its proposal, the Commission contemplates the kinds of voices to which it will *compel* broadcast licensees to attune themselves: “officials and other leaders from the service area of its broadcast station.” *Id.* On the assumption that these are not ambiguous categories in any sense,<sup>10</sup> there remains the troubling failure of the Commission to consider the impact on the religious identity and religious voice of religious broadcasters of the duty to constitute Community Advisory Boards. Nothing in the Broadcast Localism NPRM indicates that the Commission is prepared to afford to religious broadcasters the prerogative, essential to securing religious identity, of selecting participants for the Community Advisory Board with religious affiliation as an express consideration.<sup>11</sup> The lesson of *Lutheran Church-Missouri Synod* counsels care here. In the view of Commentators, if the Commission will insist upon the imposition of such Boards, then it must, paired with that imposition, expressly recognize, where religious affiliation is determined by a religious broadcast licensee to be

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<sup>10.</sup> That is, however, an assumption Commentators do not find reasonable. *See, infra.* pages 16-17 and note 9.

<sup>11.</sup> *Cf. Streamlining Broadcast EEO Rule Order and Policy Statement*, 13 FCC Rcd 322 ¶ 6 (Feb. 25, 1998) (“it is reasonable to conclude that it may be appropriate for *all* employees of religious broadcasters to share a common commitment to a licensee's basic religious objective and mission”); *id.* (“employees at all levels have an ability to affect the morale and cohesiveness of religious organizations by the beliefs they espouse and the standards of moral conduct that they maintain”).

essential to its religious identity and purpose, the right to select Board members according to shared religious affiliation.<sup>12</sup>

C. Any Requirement of an Advisory Board Would Be of Limited Value Given the Broad Discretion Afforded Licensees in Ascertaining and Formulating Programming to Serve the Public Interest

While the rubric is that broadcast licensees hold their licenses in trust for the public and are obliged to broadcast in the public interest, a real schema of constitutional dimensions ultimately limits the ability of the Commission to interfere with the programming choices and decisions of licensees.

As the Supreme Court explained:

As an initial matter, the argument exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming. The FCC is forbidden by statute from engaging in “censorship” or from promulgating any regulation which shall interfere with the [broadcasters’] right of free speech. 47 U.S.C. § 326. The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment. In particular, the FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.

*Turner Broadcasting System v. FCC*, 512 U.S. 622, 651-52 (1994) (some quotations marks and citations omitted).

As the Court further explained in *Turner*, “our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast

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<sup>12</sup> Of course, Commentators do not take the view that their religious identity and their right to preserve religious identity justifies invidious discrimination based on race, national origin, or sex. *Bob Jones University v. United States*, 461 U.S. 574 (1983)

licensees must retain abundant discretion over programming choices.” 512 U.S. at 652 (citations omitted). That narrow limitation, with residually broad discretion in licensees, reflects what the Supreme Court has described as “the risk of an enlargement of Government control over the content of broadcast discussion of public issues,” a risk the Court concluded was “of ‘critical importance’ to the First Amendment . . . .” *Id.* (citations omitted). In other words, because the opposite approach, one featuring expanded Government control of programming, *threatens* the essential interests secured by it, *the First Amendment commands broad discretion for broadcast licensees.*<sup>13</sup> Nor is it an answer to say that the Community Advisory Board interpose a non-governmental voice in the determination of a broadcast licensee’s programming. “The Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee.” *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967).

Of course, the Commission recognizes the constitutional dimensions of broadcast licensees’ discretion in the selection of broadcast programming. *See In the Matter of Children’s Television Programming and Advertising Practices*, 96 F.C.C.2d 634, ¶¶ 39-43 (FCC 1984) (discussing cases and decisions); *id.*, ¶ 43 (“[w]e thus find ourselves precisely caught between the apparent possibility of accomplishing an extremely important and socially desirable objective and the legislative and Constitutional mandate and the values on which they are based which forbid our direct involvement in program censorship and which require that broadcast station licensees retain broad discretion in the programming they broadcast”).

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<sup>13.</sup> *See Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) (“the First Amendment rights of public television viewers are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest”).

The problem with mandatory ascertainment – the problem with *compelling* licensees to consult with others toward the selection of programming – is that, ultimately, despite such consultation, the First Amendment guarantees that the programming choices reflected in the broadcast service of a licensee are those of the licensee. Consequently, broadcast licensees will be compelled to constitute and to consult the Community Advisory Board. Broadcast licensees will not be compelled to respect the judgments of the Board or to embody the Board’s wishes in their programming choices. To conclude that the Commission can command both that licensees consult with various private parties and that they give place to the programming preferences expressed in their localism consultations means that a “broadcast licensee [no longer] has sole programming discretion but is under an obligation to serve the public interest.” *Muir*, 688 F.2d 1033. Thus, because of the intervening protection of the First Amendment, the Community Advisory Board’s value as a mandatory consultative body is virtually nil.

D. Considerations of Localism Do Not Warrant Creation of a Permanent Community Advisory Board Requirement

The proposed Community Advisory Board rule is proffered in furtherance of the Commission’s pursuit of broadcast localism. *See generally* Broadcast Localism NPRM. The proposal, however, is not a meaningful step toward enhancing the public interest. As stated above (sections I.A. - I.C.), it trenches upon First Amendment values and religious liberty concerns under RFRA. Moreover, these Commentators already provide significant local service to each of the communities where they maintain a station. Trinity’s KTBN-TV/DT, Santa Ana, California, for example, provides a noncommercial, non-entertainment (informational, religious, cultural, and public affairs) program service for the length of its broadcast day, including large

percentages of local programming, ranging from fifteen to twenty hours per week. TCT's WTCT-TV/DT, Marion, Illinois provides a similar service to its local communities of license. Of unique note is its "Ask the Pastor" program. This is a local TCT program produced in each community where it operates. It consists of a panel discussion among local pastors, ministers, priests, etc., addressing church activities and community service and involvement. The dialogue created permits and promotes understanding among different denominations, faith expressions, and congregations.

In addition, over the last four years Trinity has developed four new digital, free-to-the-home program services. These include The Church Channel, a collection of some of the most compelling and current church services throughout the country; JCTV, which provides programming geared to older adolescents and young adults, such as Christian concerts and extreme sports events; TBN Enlace, which provides a noncommercial, non-entertainment (inspirational and religious) Spanish language program service; and Smile of a Child, which provides an exclusive children's television service focusing on values, virtue, education, and positive decision making. Each of these channels provides a locally valuable service. Clearly, Commentators are heavily invested in providing a meaningful and informative service on many levels, all with the intention of serving their communities of license.

While Commentators fully appreciate the value and importance of providing a unique, inspiring, family-friendly level of public service, that judgment, however, is based on *their* judgment and *their* intention to provide a meaningful program service where they operate, not any Government mandate. Because there is neither an express congressional mandate for permanent Community Advisory Boards, and given the serious First Amendment and RFRA

issues implicated by any such mandate, the Commission's proposal would not be a meaningful step toward enhancing the public interest.

Almost fifteen years ago, in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the D.C. Circuit challenged the Commission's application of another longstanding policy purported to advance localism. In *Bechtel*, the D.C. Circuit overturned the Commission's policy that gave broadcast applicants a virtually unbeatable comparative advantage through an "integration credit" if the applicant proposed to have an owner-manager working locally at the station. The court concluded, in an unusually interventionist decision, that even after granting the Commission substantial expert agency deference, the "integration in the interest of localism" policy was arbitrary and capricious. *Id.* at 887 The court found the credit unlawful because the Commission had, *inter alia*, failed to support the claimed public interest advantage of integration, and had emphasized integration to the exclusion of other factors that could affect a station's performance to its community of license. *Id.* at 882-84 The proposed permanent Community Advisory Board has the same infirmity. There is no material support that such an entity will actually advance local service, especially to the exclusion of other factors such as licensee programming judgment, ongoing ascertainment efforts, the local service already provided though regional, national or local programming, and broadcast experience. *Id.* As the ruling in *Bechtel* noted, it is exceedingly difficult to determine exactly what measures would achieve localism. Accordingly, the Commission should not mandate that every broadcast station create and permanently maintain a Community Advisory Board.

**II. IN THE ABSENCE OF EVIDENCE THAT LICENSEES ARE FAILING TO SERVE THE PUBLIC INTEREST IN A CONTEXT SENSITIVE TO THEIR COMMUNITIES OF LICENSE, THE COMMISSION SHOULD FOREGO**

## **REIMPOSITION OF CITY OF LICENSE STUDIO LOCATION REQUIREMENTS**

### **A. Fifteen Years Experience Justifies the Current Rule and Practice**

Commentators have an impressive record of service in their communities of license.

The dearth of complaints about their performance – like the hounds that did not bark<sup>14</sup> – serves as a valuable clue to the quality of service to the public that these Commentators perform. The public files of these Commentators and their records with the Commission indicate virtually no complaints related to the locations of the main studios of these licensees. The “silence of the hounds” reasonably supports the conclusion that the public already feels adequately served by the existing locations for these licensees’ main studios.<sup>15</sup>

Recently the Commission obligated its licensees to provide immediate access – by Internet – to virtually all public file documents, either by “housing” such documents on the licensee’s web pages, or by providing active hyperlinks to such documents from the licensee’s web pages. *See, Report and Order on Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd 1274 (Jan. 24, 2008).<sup>16</sup>

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<sup>14.</sup> *Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (U.S. 1987) (“[a]ll in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’ that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill”) (discussing, without citing, ARTHUR CONAN DOYLE, *The Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* (1938)).

<sup>15.</sup> As many commentators observed in the Commission’s proceeding concluded in *Report and Order on Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations* (23 FCC Rcd 1274, FCC 07-205, ¶ 11, released January 24, 2008), “few people actually [ever] visit[ ] [a] stations’ studios to view their public files”).

<sup>16.</sup> Documents required to be housed online on the licensee’s website include:

(continued...)

In addition to immediate electronic access, each licensee must mail, postage prepaid, a copy of the licensee's public file materials to any requestor that resides within the station's geographic service area. 47 CFR § 73.3526(c)(2)(i)-(iii). While licensees are still not required to post the contents of their political files online (47 CFR §73.1943), they must continue, however, to provide the "paper-based" political files to members of the public wishing to review those files during normal business hours (including lunch time).

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16. (...continued)
1. Citizen's Agreements, if any
  2. Contour Maps
  3. Equal Employment Opportunity File Material (e.g., Annual EEO Public File Reports, EEO Random Audit Letters from the Commission, and the station's response)
  4. E-mail received from the public (paper letters from the public are exempt from this online requirement, although the website must disclose that paper letters are available in the station's paper-based public inspection file located at the station's main studio)
  5. Material relating to Commission investigations or complaints
  6. Records regarding compliance with the Children's Television commercial time limits (applies to commercial stations only)
  7. Local Public Notice Renewal Announcements
  8. Time Brokerage, Joint Sales, or Local Marketing Agreements
  9. Must-Carry or Retransmission Consent Elections
  10. Donor Lists of donors supporting specific programs (applies to noncommercial stations only).

See FCC Rule 73.3526(e) (commercial station) and 73.3527(e) (noncommercial stations). Those documents that may be linked from the licensee's website include:

1. FCC Authorizations
2. FCC Applications and related materials
3. Ownership Reports and related materials
4. "The Public and Broadcasting Manual"
5. The Standardized Television Disclosure Form (FCC Form 355)
6. The Children's Television Programming Reports (FCC Form 398) (applies to commercial stations only)

*Id.*

In essence, the Commission has already imposed an “open skies” approach on broadcast licensees. The breadth and the depth of required contents of the public file, and the extent of public disclosure – both immediately online and also at licensee expense by mailing – commands quite complete disclosure by licensees. Each of these regulatory steps insures extensive opportunities for locally oriented scrutiny of the broadcast service of licensees. Now, in the ostensible pursuit of localism, the Commission contemplates shrinking the geographic area within which broadcast licensees may locate their main studio facilities.

Given the approaches described above, and contrasted against the manifest unfairness and astronomical expense to licensees of moving main studio facilities, Commentators urge the Commission to forego re-implementation of the old main studio location rule. Failing that, a significantly less onerous way, although hardly inconsequential in its imposition on licensees, the Commission could consider requiring broadcast licensees whose main studios lie outside their community of license, in the alternative to relocating within the community of license, also to post the political file on-line. If the Commission has concluded that these other forms of insured access to station public files serves the public interest, then there must be obvious values to both electronic availability, and postage paid provision of all public file information. In that case, it would be altogether preferable to increase the categories of materials to be made available to all members of the local and cyberspace community.

- B. Detrimental Reliance on the Current Rule and Practice Counsel Against Arbitrary and Capricious Reimposition of the City of License Studio Location Requirement When Alternatives Exist

When the Commission twice relaxed its main studio rule,<sup>17</sup> it had to be within the Commission's grasp that licensees would rely on the adjusted rule to relocate main studios within the larger areas permitted under the altered rules. In both instances, the Commission concluded, based on the record before it, that the interest in broadcast localism would be just as adequately served by the combination of the enlarged area of location for main studios, together with enhanced access to a licensee's public file by postage paid mail and online.

Even if the Commission, at the highest level of administrative generality, may pursue as though it were a legitimate statutory goal the development of broadcast localism, there remains for the Commission the considerable problem that the direction of the Commission's pursuit of localism over the last two decades evidences a serious problem of arbitrary and capricious agency action. The Commission's actions relieving the burdensomeness of earlier regulations imposing ascertainment obligations were supported on the record evidence developed in those proceedings. Now, on a dearth of evidence that the public interest is failing to be served, the Commission contemplates a reinvigorated regulatory scheme drawn to serve its vision of broadcast localism. In such a case, the sudden reversal of policy, when the former policy is supported by the Commission's record and the later policy is not, lends considerable weight to the concern that the Commission's actions are arbitrary and capricious.

In the instant case, the proposal to shrink the permissible geographic zone for the placement of main studios has no record evidence supporting its value as a method of pursuing

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<sup>17.</sup> See, *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television and Television Broadcast Stations*, 3 FCC Rcd 5024 (Aug. 17, 1988); *Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691 (Aug. 11, 1998).

broadcast localism. That complete absence of the supporting record evidence is significant. As the D. C. Circuit has explained, “An agency must demonstrate the rationality of its decisionmaking process by responding to those comments that are relevant *and significant*.” *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (emphasis added) (cited in *MCI Worldcom v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)).

The Commission must both give reasons for its decisions, and the reasons it gives must be supported by the record before it. The Commission’s decisions are always screened by the D. C. Circuit on the question of whether they are adequately supported. *Communs. & Control, Inc. v. FCC*, 374 F.3d 1329, 1335-36 (D.C. Cir. 2004). Of course, the D. C. Circuit’s reasoning simply reflects the longer standing instruction of the Supreme Court on this point: “[a]n agency changing its course must supply a reasoned analysis.” *Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Insurance*, 463 U.S. 29, 57 (1983) (internal quotation marks omitted). Without doubt, the Commission’s decisions retrenching the main studio rule mark a substantial change of course.

The Commission must justify its decision to impose what may work out to be hundreds of millions of dollars of total market costs in main studio relocation expense. This circumstance is *precisely not the one* in which the Commission may require a licensee to bear the full cost of its own mistake, unless we are now to conclude that complying with a liberalized rule of the Commission is to be equated with having made a mistake. *Cf. RKO Gen., Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Such a conclusion, it would seem, is not a wholesome lesson to be taught by the Commission.

The D. C. Circuit has explained its approach to the contention that an agency has proceeded arbitrarily and capriciously. *See, Sinclair Broad. Group v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002). In *Sinclair Broad. Group*, the D. C. Circuit explained that it will “examine[] whether the Commission has considered the relevant factors and has provided a reasoned explanation for its action that does not “run[] counter to the evidence before [it].” As the D.C. Circuit has said, agency action not supported by substantial evidence will not survive its review on the arbitrary and capricious agency action standard. *See Earthlink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006).

While other considerations fully justify retaining the present rule, the prohibitive costs of giving effect to a change in the Main Studio Rule strongly militate against returning to the pre-1987 rule. A survey of newspaper and trade journals for the last two years reveals recently undertaken, completed, or postponed studio construction, relocation and rehabilitation projects across the Nation range from a couple hundred thousand dollars to millions of dollars. *See Springfield News-Leader*, at 2A (Dec. 18, 2007) (“new studio represents an investment of several hundred thousand dollars”); *New Orleans Times-Picayune*, at 1 (Feb. 10, 2007) (“[w]hile unable to reveal the cost, Delia said the new studio is ‘in the millions,’ and that the Galleria space was the only suitable site after ‘looking at 30 to 40 buildings in New Orleans”); *Fort Wayne Journal-Gazette*, at C6 (Sept. 8, 2006) (“donation of the old studios will save the PBS station at least \$2 million in construction costs it would have faced to build its own new studios”); *The Register-Guard*, at B1 (July 28, 2006) (“[t]he low bid for the remodeling project was \$759,000, well above the \$480,000 budgeted for the job;” “[r]efurbishing plans . . . include two production studios, a larger on-air studio and news and production control rooms. A small

performance space that can accommodate live, on-air shows with a small audience also is included”); Milwaukee Business Journal (Aug. 21, 2006) (“[t]he owner of WDDW-FM (104.7) . . . bought a two-story office building at 1136 S. 108th St. for \$1.2 million. . . . The building is vacant and is undergoing remodeling for the offices and studios of WDDW, which is owned by Bustos Media L.L.C., Sacramento, Calif., and a television station Bustos plans to launch here. The project will cost an estimated \$250,000, according to building permits filed with the city of West Allis”); Arkansas Democrat-Gazette (June 9, 2007) (“KUAF, a National Public Radio affiliate, has begun a 12-month campaign to raise \$1.5 million for a new 6,000-square-foot facility”); Austin American-Statesman, at B01 (Dec. 10, 2006) (“In August, KOOP received a federal Public Telecommunications Facilities Program matching grant of \$104,553 that paid for the replacement of much of the equipment destroyed by the fire. The total project cost was about \$170,000, including the build-out, supplies, and technical and engineering consulting for the installation of the equipment. “We were really able to stretch out dollars,” McCarson said. “More than half of that was equipment. The low cost of the build-out was entirely due to volunteer effort.”); The Portales, News-Tribune (Sept. 29, 2006) (“The new facility will replace the 32-year old building that housed KENW-TV and KENW-FM radio. . . . The building itself comes at a price of \$5.2 million. All digital equipment will be phased into the building over the next five to seven years, at a cost of about \$3 million, to bring the total cost of ENMU’s new broadcast center to a little more than \$8 million dollars. Most of the funding came from the state Legislature and general obligation bonds”); Chattanooga Times Free Press, (Nov. 16, 2007) (“Three weeks ago, the station’s nearly 30 employees moved into a new 33,000-square-foot broadcast center -- nearly three times the size of their former location

near the campus of Chattanooga State Technical Community College. . . . The station bought the property in 2000 from Dillard Construction Co. The asking price for the building had been \$1.2 million, but thanks to a more than \$300,000 in-kind donation from the seller, WTCI paid \$900,000. It cost about \$1.5 million to build out the facility”).

The foregoing is merely a brief, anecdotal survey of recent reports related to the question of studio costs. It is indicative of the economic impact inherent in reimposition of the Main Studio Rule. Prior to undertaking such a sweeping reversal of its regulations, the Commission should give more than a glancing consideration to adoption of a rule having the potential of inflicting such substantial costs.

To legitimize such a move by the Commission, in the view of these Commentators, it would be necessary to assess the impact of the rule. As an initial matter, for example, the Commission should seek to ascertain the number of Licensees that would be affected by the Rule. In addition, to the extent such cost forecasts can be made with reasonable certainty, the Commission should request affected Licensees to provide to it information about the anticipated cost of compliance. These two steps would provide a bare minimum, at least, of information from which the Commission could extrapolate the total financial impact of the proposed rule reversal.

1. “Grandfathering” pre-existing studio placements by licensees

There is no reasoned basis on which to doubt the serious, crippling impact on licensees of compliance with a retrenched main studio rule. The Commission should, prior to such a *fiat*, consider the utility and fairness of “grandfathering” existing main studio facilities in their present locations.

The current standard under FCC Rule 73.1125 permits a broadcast licensee to locate the main studio anywhere within the principal community contour of any AM, FM, or TV station licensed to the station's community of license, or within twenty-five miles from the reference coordinates for the center of the community of license. Broadcast licensees have relied upon that for over 15 years, situating main studios within the larger area permitted under the amended rule, and expending considerable sums in doing so. Retrenching on the amended rule, shrinking down the permissible area within the main studio may permissibly be placed, would work substantial economic harm to broadcast licensees, a harm indicated only in part by the studio construction costs noted in the above-discussed articles.

There is simply no justification sufficiently compelling to reinstate the former main studio rule. The relevant interests of access to both the main studio and to the contents of each broadcast licensee's public file are already more than adequately served under the current combination of the present version of the main studio rule together with the public file rule. If the Commission concludes that it must change the main studio rule by reducing the contour within which licensees' main studios are located, it is fully within the capacity of the Commission to "grandfather" those current licensees who have, in reliance to their own detriment, located within a zone permissible under the current rule but who would be required to relocate under any further amendment of the main studio rule.<sup>18</sup> Among the numerous instances

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<sup>18.</sup> The Commission employs the concept of "grandfathering" in other circumstances. *See, e.g., In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 21 FCC Rcd 5606, ¶¶ 3, 5, 35-36, 43-46 (FCC 2006); *see also Grandfathered Short-Spaced FM Stations*, 12 FCC Rcd 11840 (Aug. 8, 1997).

in which the Commission has chosen to blunt the impact of its changes to rules and policies by “grandfathering” existing uses and licensees, even concerns about the potential for signal interference and contour overlap have caused the Commission to grandfather licensees and uses.

2. Phasing in over a term of years to prevent disruption

Very real threats of disruption to service are tucked away inside the proposal to change the main studio rule. In order to minimize such disruption, the Commission should, in any rule retrenching on the main studio rule, mirror the long view and deliberate pacing that marks the movement of the Nation’s broadcasters toward the mandatory conversion to digital broadcasting from analog signals. Providing for a decade or longer to prepare for that digital conversion, a conversion still nearly a year away, reflected sound administrative judgment. By expressly allowing a term of years for any change in the contour within which a licensee’s main studio may permissibly be located, the Commission will reflect the reality that such a change would create.

No main studio could be moved easily. Too many factors and too many predictable and unpredictable complications present themselves in that kind of project:

- obtaining an appropriate site within the permissible contour or zone set out in any amended rule means investing in the property, whether through purchasing or leasing
- clearing necessary local, municipal regulatory frameworks, of governmental agencies responsible for zoning and land use, planning, soil, and water conservation
- time for construction, whether new or rebuilding, including time for contingencies that occur but cannot be predicted (thus, “contingencies”)
- availability of equipment, fiber optic cabling, rights of access
- transmission down time resulting from removal and reinstallation of equipment from old to new locations
- added costs of purchasing parallel equipment for seamless, “immediate” transition.

Of course, the foregoing short list does not plumb the depths of difficulties and complications that are perfectly normal and integral to construction projects. In any particular circumstance involving a licensee, it may not be possible to predict with certainty which constellation of cost factors and construction contingencies will strike.

The proposal to revert to the former main studio rule threatens doubled economic harm to licensees. First, in reliance on the present form of the rule, a licensee may have relocated its main studio to a location within the larger contour permitted under the rule. In doing so, the licensee will have voluntarily undertaken the costs associated with such a move, both money costs and those regulatory and administrative costs that cannot be avoided in planning and executing such a move. Second, if the Commission retrenches from the present rule to the former, a licensee will be compelled, after relying on the Commission's liberalized current rule, to incur all new costs of moving within a more narrowly drawn zone of permissible locations.

To assist the Commission in comprehending the twin economic harms of its proposal to revert to the former main studio rule, Commentator Trinity submits its ongoing experience with one station. Given the present, larger zone within which a licensee's main studio may be located, Trinity made a pair of business judgments in furthering its ministry purpose. Following its purchase in September 2006 of WHLV-TV (formerly WTGL-TV), Cocoa Beach, Florida, Trinity took title and control of "The Holy Land Experience" near Orlando, Florida.<sup>19</sup> And Trinity is currently in the process of relocating its main studio for WHLV-TV to the Holy Land Experience.

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<sup>19</sup> The Holy Land Experience is a Biblical theme Park recreating the ancient Holy Land, bringing stories from the Bible to life, and housing a museum like display of historical Bibles and important Church figures. *See*, <http://www.holylandexperience.com>.

WHLV is licensed to Cocoa Beach. Because of the enlarged zone within which its main studio could be placed under the current rule (47 CFR § 73.1125), Trinity can presently give effect to its decisions to take control of the Holy Land Experience and to move WHLV's main studio there. If the Commission retrenches on the main studio rule, Trinity forecasts that it will incur between \$ 25 million and \$ 35 million dollars in construction costs to locate and construct a new and comparable studio for WHLV than the one currently planned for the Holy Land Experience. Moreover, one of the most important factors for purchasing the Holy Land Experience – to place WHLV's main studio on the premises – will be lost.

While the final costs of making such a change may ultimately end up being higher, Commentator Trinity considers the estimated cost of such compliance for WHLV alone – \$ 25 - \$ 35 million – to be fairly sound.

Other variables in such a move include the loss of skilled personnel. Removing a studio from one location to another risks that some or many employees choose to reject the commute to what might be a distant workplace for them. Moreover, in the experience of these Commentators, the current climate of many communities is one of intolerance for microwave towers and large diameter satellite antennas. Commentators are deeply troubled that, by such a proposed change, they would be forced to abandon an existing main studio location, constructed in detrimental reliance on the Commission's current rule, in order to remove to a community where contemporary zoning constraints prohibit them. That result is a very likely possibility. Where the Commission's retrenched rule forces licensees into communities in which the constellation of zoning and land use restrictions prevent the co-location of the main studio site and the transmission facilities of the licensee, operating costs will be increased by the need to

install and use expensive fiber optic networking between the main studio and transmitter sites, and between those facilities and distant satellite receiver site. Further compounding this threatened problem of costs and administration is the fact that high capacity fibers are unavailable in smaller communities. That fact alone would leave licensees with no viable option for providing its signal feed from a main studio to a transmitter site.

There is no sound and sensible basis to conclude that neither interminable delays nor astronomical costs will not inflict themselves deleteriously on the broadcast functions of licensees. Consequently, there is no sound administrative reason not to build a scale of reality into any proposed main studio rule amendment. That scale of reality ought to include at least a time frame that does not invite abuse and that does not equate reality with abuse of process.

### **III. UNATTENDED OPERATIONS ARE RELIABLE, ADVANCE ECONOMICAL STATION OPERATIONS, AND INSURE SERVICE TO THE PUBLIC**

In 1995, the Commission adopted the *Report and Order in MM Docket 94-130*, 10 FCC Rcd 11479 (1995), which permitted radio and TV broadcast stations to be operated without a person standing by to monitor the transmitter's operation ("unattended operation"). This action was taken to permit licensed broadcast stations to take advantage of advances in station monitoring equipment and the inherent reliability and stability of solid circuit transmission equipment and processing chips. Since then, without any prior Commission approval, stations may decide to operate as either attended or unattended. Either way, licensees are responsible to employ procedures which will ensure compliance with the Emergency Alert System. *See*, 47 CFR § 73.1300

Unattended operation consists of using self-monitoring or automatic transmission system (ATS) monitoring equipment to control the transmission system, or operation in the absence of constant human supervision with equipment that can operate for prolonged periods of time within assigned tolerances. In the first case, equipment must be configured to automatically take the station off the air within the required 3 hour or 3 minute time periods after an out-of-tolerance condition arises.<sup>20</sup> In the second case, the licensee is required to make certain that the station is monitored frequently enough to ensure that station operation is corrected or terminated within the designated 3 hour or 3 minute time limits, but constant human supervision is not required. *See*, 47 CFR §§ 73.1350(c) and 73.1400(b)

Over the last ten years Commentators have progressively operated more and more of their transmission facilities with unattended operations. During that time their ATS monitoring equipment has had virtually no problems, and compliance with the EAS regulations have been properly maintained. On average, Commentators expended more than \$ 100,000 per station to purchase and install the necessary ATS equipment for unattended transmission operation. At the same time ATS equipment is acquired and installed, Commentators have also invested in automated master control operations (AMC), which on average costs approximately \$ 300,000. If the Commission reversed itself and again required human monitoring, it would not only greatly devalue the ATS equipment already purchased in reliance of the 1995 change, but would vitiate the AMC investments altogether. In addition, it would require the hiring of additional

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<sup>20.</sup> Situations requiring termination within 3 minutes are operations posing a threat to life or property, or that is likely to significantly disrupt operations of other stations, such as spurious emissions or operations substantially at variance from the authorized radiation pattern. *See* 47 CFR 73.1350; *Report and Order in MB Docket 03-151*, FCC 07-97, released May 25, 2007

personnel to perform the monitoring function. That would dramatically increase a station's cost of operation,<sup>21</sup> and render useless approximately \$ 400,000 of equipment investment per station (ATS and AMC), all without otherwise increasing service to the public.

The Commission's apparent concern is that without attended transmitter operations, severe weather or local emergency information may not be timely broadcast. *Broadcast Localism RNPRM ¶ 29* However, that concern fails to realize that unattended stations are already obligated to comply with the EAS rules. In this context, compliance with the EAS rules already addresses the matter, and specifies how stations are to operate during emergencies.

The conversion to all digital operations will also enhance the ability of ATS equipment to be remotely programmed to respond to unique local situations or emergencies. In other words, the technology continues to advance. That advancement, however, is likely to be curtailed if the Commission again requires attended operations at all times. Indeed, why invest in innovation when human monitoring (and expense) would still be required, negating the reason (and market) for innovation in the first place? All-in-all, the cost in returning to attended operations, and the disincentive to innovation that it would create, support maintaining the present rules without change.

## CONCLUSION

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<sup>21.</sup> By way of illustration, if an average on-air operator is hired at a minimum of \$30,000 per year (which will certainly vary up depending upon location), a station's payroll would need to include at least three operators, and when benefits and taxes are factored in, the impact could well exceed \$ 100,000.

For the foregoing reasons, Commentators urge the Commission not to reimpose the “only within the city limits” main studio rule, or the attended operations requirement. Nor should the Commission adopt a requirement for a standing Community Advisory Board.

Respectfully submitted,

**TRINITY CHRISTIAN CENTER OF  
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