

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

In the Matter of)
) MB Docket No. 04-233
Broadcast Localism)
)

To: The Commission

COMMENTS OF NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

Margaret L. Tobey
F. William LeBeau
NBC Universal, Inc. & NBC Telemundo
License Co.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for NBC Universal, Inc. and
NBC Telemundo License Co.

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impose regulatory burdens that were found unnecessary in 1984, when the media industry was far less competitive.

Twenty-four years ago, the Commission concluded that marketplace forces would ensure that television stations offered locally responsive programming and engaged in community outreach and that government programming mandates were not necessary or appropriate. The Commission's conclusion was correct then and applies with even greater force today. Despite the vast array of content and distribution choices available to consumers and the intense competition faced by broadcasters today, television stations remain among the most popular, important and relevant sources of information and entertainment because they have the advantage of being local to their viewers. Many television stations consistently deliver far more news and informational programming and conduct more extensive community outreach than the regulations abandoned in 1984 would have required. They do so – despite the substantial and steadily escalating costs of such undertakings – because they know that locally oriented programming and direct engagement with their communities distinguish them from the welter of competing voices in the marketplace. Indeed, focusing on their local communities may be the only competitive advantage enjoyed by television stations in today's media marketplace.

The 26 television stations commonly owned with NBC Universal, Inc., the NBC and Telemundo Networks and NBC Telemundo License Co. (collectively, "NBCU") exemplify the kind of local service and community engagement the Commission seeks to foster. On average, an NBCU-owned station airs nearly 40 hours of news and public affairs programming every week – and that figure does not include programming aired

on 12 digital multicast channels. When these multicast channels are included, the average NBCU-owned station broadcasts more than 90 hours of news, public affairs and other informational programming every week, much of it locally focused. These 26 stations also maintain close ties to their communities through a variety of mechanisms, including long-established relationships with hundreds of community service organizations in their viewing areas. Through these relationships, the stations provide much needed support to cash-strapped non-profit organizations in the form of donated air time for public service announcements, fundraising assistance, direct financial contributions, board service and other involvement by station personnel and coverage of events in news and public affairs programming.

The benefits of community involvement, however, flow both ways. By working closely with these community service organizations, NBCU station personnel learn first-hand of the problems, needs and interests of the people living within their station's viewing area. The average NBCU-owned station interacted with approximately 40 local community organizations during the first calendar quarter of 2008 alone. Scores of these organizations have submitted letters and other statements into the record of this proceeding, describing in detail the support they have received from their local NBCU-owned stations.

NBCU is not alone in its commitment to serving the public interest. In addition to the extensive record of public service previously submitted by other broadcasters in this proceeding, many local officials who testified at the Commission's localism field hearings commended their area broadcasters for their direct involvement with their

communities and for providing locally responsive programming.¹ The Commission itself acknowledges that broadcasters “engage in substantial, inventive, and ongoing efforts to identify the needs and interests of the members of their communities of license as a first step in formulating and airing locally oriented, community-responsive programming that will meet those needs.”² Yet the Commission now proposes to increase the regulatory burdens imposed on all broadcast stations – regardless of their record of public service – by adopting new, one-size-fits-all regulatory requirements.

Among these various proposals, three in particular stand out as both the most onerous and the least justified: renewal processing guidelines based on preferred categories of programming, resuscitation of the pre-1987 main studio rule and mandatory community advisory boards.³ These proposals represent an abrupt, inadequately explained and unjustified departure from the principles that have governed broadcast regulation for the last quarter-century. If adopted, these federal mandates will increase the regulatory burdens on television stations when they can least afford it and will create implicit program quotas “in the constitutionally sensitive area of informational programming.”⁴ Nor would these proposals, if adopted, provide a corresponding benefit to the public in light of the wealth of video programming choices

¹ See *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, __ FCC Rcd __ at ¶ 13 & n.24 (FCC 08-218, rel. Jan. 24, 2008) (“*Notice*”).

² *Notice* at ¶ 13.

³ *Notice* at ¶¶ 25-27, 40-41. For the reasons set forth in these Comments, NBCU believes that broadcasters need less, rather than more, regulation to remain competitive with their unregulated rivals. Therefore, NBCU objects to all of the re-regulatory proposals contained in the *Notice*. In these Comments, however, we focus on the three identified in the text above.

⁴ *United Church of Christ v. FCC*, 707 F.2d 1413, 1432 (D.C. Cir. 1988).

already available to consumers and the many established opportunities for viewers to learn about and communicate with their local stations.

To the extent the Commission is concerned with alleged deficiencies of particular stations, re-regulation of the entire broadcast industry is demonstrably overbroad, unnecessary and constitutionally suspect. Faced with constantly expanding competitive pressures from multiple new and non-local video programming sources, individual stations are more motivated than ever to serve their viewers and to turn their local presence into a competitive advantage. For those few stations who may fail to meet the statutory standards for serving their communities of license in the public interest, the Commission has the legal authority and the regulatory tools to address such shortcomings, including admonitions, hearings, fines, license revocation, non-renewal and short-term renewal. Piling additional regulatory burdens on stations that already satisfy their public interest obligations would simply penalize these stations with no corresponding public interest benefit.

In proceedings conducted in 1984, 1987 and 1998, the Commission correctly chose to rely on competitive market forces – rather than top-down federal mandates – to motivate stations to identify and implement what works best in their communities to attract and retain viewers. The record in this proceeding does not support a reversal of this policy, particularly when viewed in the necessary context of the entire media marketplace. Without compelling evidence of market failure and demonstration of concrete public benefits that outweigh the expected costs of the proposed new regulations, the Commission should not substitute burdensome, one-size-fits-all regulatory mandates for the individual judgments made by thousands of broadcast

station owners and managers based upon their extensive knowledge of and commitment to their communities. Accordingly, the proposals for new regulatory mandates advanced in the *Notice*, whether in the form of programming minimums, more restrictive main studio rules or specific community outreach requirements, should be rejected.

II. REGULATORY HISTORY

In rulemaking proceedings concluded in 1984, 1987 and 1998, the Commission significantly reduced or eliminated a number of federal regulatory burdens imposed exclusively on local broadcast stations. Prior to 1984, any television station renewal application that reflected “less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming” could not be granted without review by the full Commission.⁵ In 1984, in light of increasing media competition, the Commission ruled that these government-imposed programming minimums were no longer necessary to ensure sufficient local station coverage of issues of concern to the community.⁶ The Commission concluded that television station licensees would “continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives.”⁷

The Commission also recognized that the pre-1984 regulatory scheme imposed many “inherent disadvantages, including: potential conflicts with Congressional policies expressed in the Regulatory Flexibility Act and the Paperwork Reduction Act, imposition of burdensome compliance costs, possibly unnecessary infringement on the editorial discretion of broadcasters, and distortion of the Commission’s traditional policy goals.”⁸ Therefore, in lieu of programming thresholds and other specific requirements, the

⁵ *Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076 at ¶ 5 (1984) (the “1984 TV Deregulation Order”).

⁶ *See id.*

⁷ *See id.* at ¶ 8 (citing, *inter alia*, *FCC v. WNCN Listeners Guild*, 450 U.S. 583, 594 (1981)).

⁸ *Id.*

Commission adopted a rule requiring stations to prepare quarterly issues/programs reports that provide examples of programming addressing issues of local concern that had been broadcast by each station.⁹ Because these reports were not required to be comprehensive, but rather representative of the station's issue-responsive programming, and were not routinely submitted to the Commission, they minimized compliance costs for the station as well as the First Amendment implications of governmental oversight of program content. By requiring the reports to be placed in each station's public inspection file on a quarterly basis, the Commission ensured that interested members of the public could review a compilation of the station's representative issue-responsive programming

In the same 1984 proceeding, the Commission also eliminated federally mandated procedures for community outreach by local television stations, known as ascertainment. The Commission's rationale for eliminating these one-size-fits-all outreach mandates was similar to its rationale for abandoning mandatory programming minimums: competitive pressures were sufficient to drive local responsiveness. In addition, the Commission questioned whether the speculative benefits of such mandates outweighed the clear burdens: although government-mandated procedures and recordkeeping clearly imposed costs on licensees, including the loss of "licensee

⁹ See 47 C.F.R. §73.3625(e)(11). In November 2007, the Commission expanded the reporting obligations of stations by requiring these stations to submit a comprehensive quarterly program issues report on a standardized electronic form. The National Association of Broadcasters, among other parties, has challenged these proposed changes and the matter remains pending. See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Reports*, 23 FCC Rcd 1274 at ¶ 7 (2008), petition for review pending, *Nat'l Assoc. of Broadcasters v. FCC* (D.C. Cir. 2008) ("Enhanced Disclosure Order").

discretion,” the Commission had no evidence that these procedures had any “positive” effect on the programming aired by the stations.¹⁰ The absence of demonstrable benefits from government-imposed ascertainment requirements in the face of the unquestionable burdens imposed on licensees by the rules compelled the Commission to adopt the less burdensome quarterly issues/programs reports.

In the wake of the *1984 TV Deregulation Order*, the Commission reviewed other regulatory mandates with respect to their demonstrable net public interest benefits.¹¹ In 1987, the Commission re-examined its main studio rule and ultimately “relaxed the rule to permit a station to locate its main studio outside of its community of license provided it is within the station’s strongest signal area – the principal community contour.”¹²

Eleven years later, the Commission granted further flexibility to stations by permitting a broadcast station to locate its main studio anywhere (i) within 25 miles of the station’s community of license; or (ii) within the principal community contour of the station or any station with the same community of license as the relevant station.¹³ In each case, the Commission’s rationale for increasing the choices available to local stations was similar: “more people use remote rather than face-to-face means of communication for routine contact with their local stations, and . . . permitting stations greater flexibility in locating

¹⁰ See *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶¶48, 53.

¹¹ See, e.g., *Review of the Commission’s Rules regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report and Order, 13 FCC Rcd 15691 at ¶1 (1998) (“*1998 Main Studio Order*”), modified on reconsideration, 14 FCC Rcd 11113 (1999); *Main Studio and Program Origination*, Report and Order, 2 FCC Rcd 3215, 3217-18 (1987) (“*1987 Main Studio Order*”).

¹² *1998 Main Studio Order*, 13 FCC Rcd at ¶3.

¹³ *Id.* at ¶7.

their main studio should not unduly burden the public.”¹⁴ For the past decade, stations have located main studios in reliance on the 1998 formulation of the rule.

Earlier this year, after receiving comments and conducting field hearings in earlier phases of this proceeding, the Commission issued the *Notice*, in which it claimed (despite acknowledged evidence to the contrary) that “stations do not engage in the necessary public dialogue as to community needs and interests and that members of the public are not fully aware of the local issue-responsive programming that their local stations have aired.”¹⁵ Among other matters, the *Notice* tentatively concluded that the following proposed rule changes should be adopted:

- Every local station must meet “prescribed minimum percentages” for locally oriented programming; failure to meet these prescribed minimums will necessitate review of the station’s renewal application by the full Commission.¹⁶
- Every local station must locate its main studio within the geographic boundaries of its community of license.¹⁷
- Every local station must create a permanent advisory board “made up of officials and other leaders from the service area of [the] broadcast station” unless the station already has a similar “formal group[] in place with which it consults.” The *Notice* also proposed that every station should be responsible for affirmative community outreach, including town hall meetings and viewer surveys.¹⁸

¹⁴ *Id.* at ¶ 8.

¹⁵ *Notice* at ¶ 2.

¹⁶ *Id.* at ¶¶ 40, 124. The *Notice* did not propose any specific types of programming minimums at this point, but concluded that some sort of programming minimums were necessary.

¹⁷ *Id.* at ¶ 41.

¹⁸ *Id.* at ¶¶ 26-27, 43.

The *Notice* asserted that the “proposed changes are intended to promote localism by providing viewers and listeners greater access to locally responsive programming including, but not limited to, local news and public affairs matter.”¹⁹

III. THE EXTENSIVE RECORD COMPILED IN THIS PROCEEDING HAS NOT ESTABLISHED A MARKET FAILURE THAT WOULD JUSTIFY RE-REGULATION OF THE BROADCAST INDUSTRY

A. Proposals To Exhume Obsolete, One-Size-Fits-All Federal Regulation of Local Television Stations Ignore The Dramatic Growth Of Competition In The Media Marketplace Since Similar Mandates Were Rejected

Local television stations face unprecedented competition. In 1985, the year after the Commission struck down programming thresholds and formal community outreach mandates because of increasing market competition,²⁰ the average U.S. household had access to fewer than 20 television channels.²¹ In 2006, the average U.S. household had access to more than five times as many – approximately 104 total broadcast and non-broadcast television channels in any given market.²² These 104 channels available to the typical household were themselves the product of staggering wholesale competition: according to the press release for the 13th Annual Video Competition Report, the Commission in 2007 identified 565 satellite-delivered national programming networks serving the United States, which again is a greater than five-fold increase from

¹⁹ *Id.* at ¶ 3.

²⁰ *See 1984 TV Deregulation Order*, 98 F.C.C.2d at ¶¶ 19-20, 54.

²¹ *See* <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=48839bc66a961110VqnVCM100000ac0a260aRCRD> (last viewed April 24, 2008).

²² *See id.*

the 99 competing television networks noted in the Commission's first such annual report in 1994.²³

New video programming choices available to consumers are not limited to new channels, but also include entirely new ways of enjoying video programming. Approximately 20 percent of U.S. households have digital video recorders, which let viewers, not programmers, choose when to watch a program.²⁴ Nearly 73 percent of U.S. Internet households have accessed websites, such as Youtube and NBCU's new joint Internet venture, www.hulu.com, to watch video programming ranging from short clips to complete television programs and recently released movies. In February 2008, 135 million U.S. Internet users viewed more than 10 billion online videos, which represents a 66 percent gain over February 2007.²⁵ According to comScore, the Internet has surpassed television in the number of gross advertising impressions served, now delivering 50 percent more ratings points than television.²⁶

²³ *Compare* FCC Adopts 13th Annual Report to Congress on Video Competition, Press Release, 2007 Lexis 8865, MB Docket No. 05-255, at Appendix (rel. Nov. 27, 2007) *with Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442 at ¶ 21 (1994).

²⁴ *See, e.g.*, <http://www.afterdawn.com/news/archive/11250.cfm> (citing study by Leichtman Research Group predicting DVR penetration to increase to half of U.S. households by 2011) (last viewed April 28, 2008).

²⁵ *See* <http://www.comscore.com/press/release.asp?press=2190> (last viewed April 28, 2008).

²⁶ *See* Keynote Address of FCC Commissioner Robert McDowell, 2008 Quello Communications Law and Policy Symposium (April 23, 2008) (available at <http://www.fcc.gov/commissioners/mcdowell/speeches2008.html>).

What has not changed since the Commission struck down programming minimums, formal community outreach mandates and the most restrictive form of the main studio rule are that: (i) free, local television stations remain a key component of the video choices available to consumers; (ii) more than any other video option available to consumers, television stations focus on local news and events; and (iii) among all video programmers, local television broadcasters face a unique gauntlet of federal mandates.²⁷ These mandates hinder a local station's ability to compete with video programming presented on new platforms, many of which are largely unregulated. Regulatory mandates also can be counterproductive, requiring a station to expend resources to implement mandatory processes and procedures that are no more effective in promoting responsive programming than a station's established initiatives. When it eliminated programming guidelines and ascertainment in 1984, the Commission recognized that these mandates were likely to displace other licensee initiatives, to the detriment of the public.²⁸ The same is true today. For example, new recordkeeping mandates with respect to government-favored classes of programming will place the greatest burden on the very stations that present the most such programming at the risk of diverting limited resources away from developing even more local programming.

The *Notice* fails to explain how these new mandates can be reconciled with the Commission's prior conclusion that the competitive forces present in the 1984 video marketplace were sufficient to protect the public's interest in the availability of specific types of programming. With competition among broadcast, non-broadcast and Internet

²⁷ See, e.g., 47 C.F.R. §§ 73.1206-73.1212, 73.1216-73.1217 (examples of restrictions regulating broadcast programming).

²⁸ See *1984 TV Deregulatory Order*, 98 F.C.C.2d at ¶ 53.

video providers expanding and diversifying in a manner not even imaginable in 1984, the Commission has no basis for assuming that stations will not capitalize on the obvious advantage of their local presence vis-à-vis their cable, satellite and Internet rivals.

The *Notice* also fails to explain how more detailed government regulation would ultimately ensure better results for consumers. As the Commission noted with respect to ascertainment in the *1984 TV Deregulation Order*, the Commission does not have any evidence that federally mandated community outreach procedures – or, for that matter, purely quantitative programming thresholds – had any “positive” effect on the responsiveness of programming aired by a station prior to 1984.²⁹ Finally, the *Notice* does not explain why the obvious burdens of these new proposals – including the costs associated with more detailed recordkeeping, permanent advisory boards and the construction and operation of new studios – should not be of grave concern in light of the unprecedented competitive and cost pressures faced by local broadcasters.

B. The Proposed Mandates Do Not Satisfy Applicable Legal Standards For Imposing Substantial New Regulatory Obligations on Local Stations

The Commission recognizes that a proposed regulation cannot “impose greater costs than the evil it is intended to remedy.”³⁰ Further, when the Commission considers intervening in an area in which it has previously relied on market forces to promote the public interest, it “should refrain from doing so except where (1) there is compelling

²⁹ See *id.* at ¶¶ 48, 53.

³⁰ *Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, Tentative Decision and Request for Further Comments, 94 F.C.C.2d 1019, 1055 (1983).

evidence of market failure; and (2) a regulatory solution is available that will provide a clear net benefit to consumers.”³¹

Although the issues of programming minimums and community outreach mandates have generally been left to market forces since 1984, the *Notice* does not demonstrate that there is compelling evidence of market failure; indeed, the Commission merely refers to some stations’ communications with their communities as “not ideal” or “decidedly mixed.”³² The anecdotal complaints or limited studies submitted in the record several years ago and cited by the *Notice* do not demonstrate that even a significant minority of television stations has failed to serve their communities.³³ As one measure of the success of the Commission’s deregulatory and market-based approach, since January 1985, virtually all television broadcast stations have had their Commission licenses renewed, most without any issue of the station’s local service even being alleged.³⁴ Even in this most recent renewal cycle, the last television applications for which were due more than a year ago, the Commission thus far has held a public hearing relating to only one station’s local service.³⁵

³¹ *See id.*

³² *See Notice* at ¶¶ 2, 13.

³³ *See Notice* at ¶¶ 34-38.

³⁴ A search of granted television station renewal applications in the Commission’s own CDBS database from January 1985 through April 2008 resulted in 5629 records. By comparison, only two station renewal applications during the same period were denied. *See* FCC File Nos. BRCT-19880818KF & BRET-19830801LJ. Another 10 renewal applications had been dismissed. Other television station renewal applications remain pending. Although the Commission may have more complete data, it is indisputable that most stations have been determined to have fulfilled their public interest obligations in this renewal cycle.

³⁵ *See* “Media Bureau Announces Agenda and Witnesses for Public Forum on WWOR-TV License Renewal in New Jersey,” Public Notice, 2007 FCC LEXIS 8820

The *Notice* also fails to explain the “clear net benefit” to consumers expected from the new regulations. Programming minimums measure quantity of coverage, not quality or relevance to particular consumers.³⁶ Mandatory community outreach procedures will not necessarily result in better communication – local stations are far more attuned to the most effective methods of determining the needs and interests of their viewers than are government officials in Washington.³⁷ Nor will such top-down mandates necessarily result in more locally oriented programming. As the Commission recognized in 1984, even if community outreach mandates might result in additional discussion or community interaction in some cases, it is completely speculative to assume that such discussion will lead to programming of greater interest or better service to a station’s community as a whole.³⁸

Proponents of the proposed regulations must bear an even heavier evidentiary burden because they seek to overturn long-standing Commission conclusions about the efficacy of market forces. To survive judicial scrutiny, such dramatic and abrupt changes in Commission policy cannot be based on conjecture or unsupported

(rel. Nov. 23, 2007). During the hearing, the station provided substantial evidence demonstrating its responsiveness to its community.

³⁶ See text accompanying *infra* notes 63-64. See also *Nat’l Black Media Coal. v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (holding that quantitative guidelines do not guarantee improved service).

³⁷ See Keynote Address of FCC Commissioner Robert McDowell, 2008 Quello Communications Law and Policy Symposium (April 23, 2008) (available at <http://www.fcc.gov/commissioners/mcdowell/speeches2008.html>) (“[W]e live in an exciting, market-driven, on-demand world that empowers all of us as consumers. As technologies and consumer habits continue to evolve, we should proceed with a healthy skepticism of regulation. Simply put, government cannot outsmart an unfettered and competitive market”).

³⁸ See *1984 TV Deregulation Order* at ¶ 48.

allegations.³⁹ The current record does not support the proposed rollback of Commission's policies and conclusions set forth in multiple proceedings during the past 24 years.

Finally, the proposed mandates raise troubling First Amendment concerns, especially in light of the transformation of the media marketplace. Programming thresholds or community outreach mandates either require Commission examination of every local station's programming choices or impose specific procedures intended to affect station content. The Commission's oversight of such matters is narrowly circumscribed by statute and the Constitution:

Section 326 of the Act and the First Amendment to the Constitution prohibit any Commission actions that would improperly interfere with the programming decisions of licensees. Because of this statutory prohibition, and because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's Free Press guarantee, licensees are entitled to the widest latitude of journalistic discretion in this regard.⁴⁰

To the extent the Commission has claimed authority to regulate individual licensees' discretion in matters of programming or community outreach, it has based its jurisdiction on a theory of spectrum scarcity established four decades ago in *Red Lion*

³⁹ See, e.g., *Qwest Corporation v. FCC*, 258 F.3d 1191, 1205 (10th Cir. 2001); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 49 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979) (“[W]e must insist on adherence to those principles which assure the rule of law. Thus we must be satisfied that the agency has given reasoned consideration to all the material facts and issues; that its findings of fact are supported by substantial evidence; and that if its notion of the public interest changes, that at least it has not deviated from prior policy without sufficient explanation.”) See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 57 (1983) (noting that agency “changing its course” is arbitrary without “reasoned analysis” or if agency “failed to consider an important aspect of the problem.”)

⁴⁰ *Dr. Paul Klite*, 12 Com. Reg. (P&F) 79, 81-82 (MMB 1998), *recon. denied sub nom.*, *McGraw-Hill Broadcasting Co.*, 16 FCC Rcd 22739 (2001) (citations omitted). See, e.g., *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973); *Hunger in America*, 20 F.C.C.2d 143, 150-51 (1969).

Broadcasting Co. v. FCC,⁴¹ prior to the widespread availability of multiple, competing real-time video programming sources. However, recent and ongoing technological advances, including the rise and rapid expansion of Internet video sites, have undermined the core factual underpinning of *Red Lion*. Consumers today enjoy a wealth of broadcast and non-broadcast video options far beyond the limited choices available in the 1960s. The newest and fastest-growing of these options – Internet video – does not rely on broadcast spectrum, and the Commission recently has decreased, rather than increased, the amount of spectrum devoted to television broadcasting by reclaiming more than 25 percent of all spectrum allotted to the broadcast television service for auction and use by non-broadcast services. These irreversible developments signal that the time has come for the Commission to accept the Supreme Court's long-standing invitation to acknowledge that "technological developments have advanced so far" that greater, not less, flexibility in regulation of local broadcast stations is necessary.⁴² The proposals in the notice represent the antithesis of regulatory flexibility and therefore should be rejected.

IV. MINIMUM PROGRAMMING THRESHOLDS FOR GOVERNMENT-FAVORED CATEGORIES OF CONTENT AIRED BY LOCAL TELEVISION STATIONS ARE CONTRARY TO THE PUBLIC INTEREST AND CONSTITUTIONALLY SUSPECT

A. The *Notice* Lacks "Compelling Evidence" Of Any Failure In The Current Regulatory Scheme That Would Justify Expansive Re-Regulation Of Broadcasting

The *Notice* suggests that many stations do not produce or broadcast a sufficient quantity of locally oriented programming. This suggestion is based principally on a

⁴¹ 395 U.S. 367 (1969).

⁴² *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

handful of outdated surveys – some based on only two weeks’ worth of programming – and anecdotes purporting to show that commercial broadcast stations provide less public affairs programming than noncommercial stations or less such programming than the study’s proponents thought desirable.⁴³ The *Notice*, however, minimizes the substantial evidence in the record demonstrating that many commercial stations continue to exceed the Commission’s former quantitative benchmarks with respect to news, public affairs and other informational programming.⁴⁴

As noted in the Introduction, the average NBCU-owned station airs far more news and public affairs programming than the 16.8 hours per broadcast week of “non-entertainment” programming required by the pre-1984 FCC guidelines.⁴⁵ On average, an NBCU-owned station airs more than 40 hours per week of local and national news and information programming, more than double the pre-1984 requirement. Nearly half of this total consists of local news and public affairs programming. And in contrast to many of the now-outdated studies in the current docket on which the Commission relies to justify re-regulation, these statistics are based on the most recent calendar quarter.⁴⁶

⁴³ *Notice* at ¶¶8, 35-38 (citing comments of several proponents for new regulations out of reported “83,000 written submissions.” Parties cited for their complaints regarding local broadcast stations included those protesting that local news involved such matters as weather coverage and parties that train “individuals in the production” of public, educational and government programming “carried over dedicated cable PEG channels”) (emphasis added).

⁴⁴ *See, e.g., Notice* at ¶13.

⁴⁵ *See 1984 TV Deregulation Order*, 98 F.C.C.2d at ¶ 5.

⁴⁶ *See, e.g., Notice* at ¶38 (citing 2003 study by the Donald McGannon Communication Research Center at Fordham University, which focused on the allegedly insufficient amount of locally produced public affairs programming on local television stations, based on “a two-week random sample in 2003.”)

Yet these numbers do not tell the whole story. When the data for the 26 NBCU-owned stations are expanded to include their 12 operational multicast channels, the typical NBCU-owned station airs in excess of 90 hours per week of news and public affairs programming. These numbers also do not measure the quality of these stations' news offerings, which have earned many prestigious awards, or the stations' efforts to make news and information more readily available to consumers through the stations' websites. The Commission recently concluded that a television station's website is "an effective and cost-efficient method of maintaining contact with, and distributing information to, [television stations'] viewership."⁴⁷ This conclusion is borne out by an examination of the websites associated with the NBCU-owned stations: these websites provide constantly updated national, local and even hyper-local news, weather, traffic, sports and other information of interest to their viewing audiences.⁴⁸

These stations' commitment to their communities does not stop with localized news and public affairs programming, however. Dozens of community groups have attested to these stations' service to their localities in letters submitted in this docket. These and additional submissions also are attached as Appendix A to this filing. The list of supportive community groups includes organizations ranging from large national service organizations, such as the American Red Cross, Latino Diabetes Association, Autism Speaks, and the Salvation Army, to organizations whose mission and scope are

⁴⁷ *Enhanced Disclosure Order*, 23 FCC Rcd at ¶ 7.

⁴⁸ *See, e.g.*, www.telemundo47.com (website of NBCU-owned Telemundo Network affiliate WNJU(TV), Linden, New Jersey); www.knbc.com (website of NBCU-owned NBC Network affiliate KNBC(TV), Los Angeles); www.nbc4.com (website of NBCU-owned NBC Network affiliate WRC-TV, Washington, D.C.); www.telemundo51.com (website of NBCU-owned Telemundo Network affiliate WSCV(TV), Fort Lauderdale, Florida).

focused on particular local problems, such as Alianza, the Los Angeles County Latino Caucus on HIV/AIDS, Alliance for a Drug-Free Puerto Rico and the Chicano Federation of San Diego.⁴⁹

Excerpts from just a few of these letters demonstrate how NBCU stations support their communities and respond to issues of particular concern:

- The American Red Cross, Bay Area Chapter, “thank NBC, and their sister station, Telemundo [(respectively, KNTV and KSTS-TV)] for the media sponsorship of the Northern California 2008 CPR Saturday program. . . . This support enabled the Red Cross to reach out to the Bay Area community, with specific focus to Spanish-speaking populations. As part of that effort we were able to train over 2,700 Bay Area residents across eight counties – a 73% increase from last year’s training numbers. Involvement in programs such as this ensures that our communities are safer and more prepared to deal with emergencies.”
- Autism Speaks in Miami, Florida, “partnered with [NBC Station] WTVJ for Autism Speaks Week. During this week WTVJ not only ran news stories nightly but hosted a live telethon for our benefit on Saturday, March 29, 2008 during prime time. This event not only raised much need[ed] awareness about the life long affects of autism but helped . . . to raise over \$165,000 for the mission of Autism Speaks.”
- The League Against Cancer “would like to emphasize that [Telemundo Station] WSCV has been instrumental in the growth of League Against Cancer through their support during the past nine years . . . Because of WSCV’s on-air support, we have been able to reach the community regarding free preventive programs, as mammograms, PAP smears, etc., as well as educational seminars . . . WSCV has also given the League the opportunity to raise the funds necessary for our organization to provide critical services. WSCV has produced and aired an annual seven-hour telethon during the last nine years which have enabled the League to raise a total of \$36 MM.”
- The Boys & Girls Club of Greater Washington noted that Washington, DC, NBC Station “WRC-TV is a regular resource for [its] Communications department who communicate positive story ideas for BGCGW programming and events. The station has frequently sent reporters to cover stories and recently invited two executives and a Club member to highlight our programming on the Viewpoint show. For the past few years, BGCGW staff and Club members have participated in the NBC4 Health & Fitness Expo highlighting our work done in the

⁴⁹ See Appendix A (compiling examples of these submissions).

Health & Life Skills core area . . . BCGGW also benefit from WRC-TV's annual Food 4 Families campaign. . . The station's Camp 4 Kids program benefits area youth who wish to attend Camp Brown, our 168-acre residential summer camp. . . To date, WRC-TV has raised over \$75,000 to cover registration fees for Camp Brown. . . The station's General Manager, Michael Jack, actively sits on our Metropolitan Board while station staff and reporters continuously reach out to BCGGW staff for updates."

- The Salvation Army, National Capital and Virginia Division, has recognized NBC Station WRC-TV, Washington, for the "countless hours" contributed through the Katrina Hurricane disaster telethon and being "media partners in [the Army's] many charitable activities." The Army adds that a "dynamic relationship that has evolved between" the station and the Salvation Army and the station has aired airs public service announcements for "more than three years."
- Mujeres Latinas en Acción, "a nonprofit organization dedicated to provide services to adult victims of domestic violence and sexual abuse," detailed how Chicago Telemundo station "WSNS has played a partnership role in allowing us . . . to promote our activities on their station . . . [and] serve as a resource on breaking news involving violence against women and many other stories which impact Latinas. . . This station is a model for community partnership and a great corporate citizen to the city of Chicago."
- San Diego State University applauds San Diego NBC Station KNSD for keeping SDSU "informed of programming changes and . . . opportunities to use those programs as a forum to share with the community what is taking place at SDSU. Much of KNSD-NBC 7/39's on-air programming is of great benefit to the region: excellent news coverage, several public affairs and community oriented shows and the Spanish-language news program Mi San Diego – all of which serves San Diego's diverse community.
- The famed Lincoln Center of New York has "enjoyed a partnership with [NBC Television Station] WNBC-TV on a number of activities including the creation of enormously effective public service announcements in support of the performing arts presented at the Lincoln Center, as well as coverage of our many activities. WNBC's commitment to the New York community in general, and the arts at Lincoln Center specifically, reflect the station's strong interest in serving the public. . . ."
- Alianza, the Los Angeles County Latino Caucus on HIV/AIDS, "has had a long-standing relationship with Telemundo and its local station KVEA-52," with Telemundo Station KVEA being "one of [its] top financial contributors for the past two conferences," broadcasting "PSAs informing the community about HIV/AIDS prevention and where they can turn for more information," and providing staffing and "technical assistance."
- The Muscular Dystrophy Association, Dallas Regional Office, appreciates the

annual broadcast and promotion (including an on-line auction) of the Jerry Lewis Labor Day Telethon, as well as other promotional activities, by Fort Worth NBC Station KXAS-TV. According to MDA, the Station's newscast also covers its "major events including the Fill-the-Boot drives conducted by Dallas-Fort Worth area firefighters."

The NBCU-owned stations work closely with these community organizations – not because the government compels them to, but rather because this level of community involvement is mutually beneficial and good for the community as a whole. The non-profit organizations benefit tremendously from the support given to them by the stations in the form of donated PSA time, fundraising assistance, participation by station personnel in the organizations' activities and coverage of the organizations' mission and events in news and public affairs programming. The stations benefit because, through their work with these organizations, station personnel learn first-hand the needs and concerns facing their communities and can address these needs and concerns in the station's locally oriented programming. Finally, the viewing audience benefits from the local focus that is brought to bear in the station's programming as a result of the direct interaction between the stations and the community organizations.⁵⁰

Although the Commission acknowledges in the *Notice* that many stations do serve their communities,⁵¹ it also contends that other stations fall short of what the Commission deems "ideal." However, the Commission does not identify a single station that is failing to serve its local community and does not come even close to demonstrating the "compelling evidence of market failure" necessary to re-regulate an area that the Commission previously concluded would be better served by reliance on

⁵⁰ For dozens of additional examples, please refer to Appendix A.

⁵¹ See *Notice* at ¶ 13.

competitive marketplace forces.⁵² Accordingly, in the absence of evidence of widespread deficiencies, the Commission should not substitute federal mandates and government oversight of programming for market forces.

B. The *Notice* Does Not Explain The “Clear Net Benefit” To The Public That Is Expected To Result From New Minimum Benchmarks For Government-Favored Categories of Programming.

In 1984, the Commission recognized that programming minimums are demonstrably counterproductive in fostering locally oriented programming and a diverse menu of choices for the public.⁵³ The Commission has long recognized the “significant” costs involved in requiring stations to keep detailed records of their programming.⁵⁴ Put simply, stations that are more responsive to the Commission’s goals have more information to record, which perversely leads to higher costs imposed on stations that seek to provide more issue-responsive programming to their viewing audiences.⁵⁵

The costs of programming mandates also include the statutory and constitutional concerns repeatedly recognized by the courts and the Commission with respect to government-imposed minimums for categories of preferred programming. As noted, the courts and the Commission have consistently recognized over the past three decades

⁵² See *id.* at ¶ 2.

⁵³ See, e.g., *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶¶25-30.

⁵⁴ See *id.* at ¶26.

⁵⁵ Cf. *Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043, 5057, 5066 (1987) (reiterating conclusion that “in stark contravention of its purpose, [the fairness doctrine] operates as a pervasive and significant impediment to the broadcasting of controversial issues of public importance. In addition, the agency found that its enforcement of the doctrine acts to inhibit the expression of unpopular opinion; it places the government in the intrusive role of scrutinizing program content; it creates the opportunity for abuse for partisan political purposes; and it imposes unnecessary costs upon both broadcasters and the Commission”) (citations omitted), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

that the Commission's authority with respect to programming choices by individual licensees is inherently limited.⁵⁶ The Commission has stated that "[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion," and that "the Commission will not review the licensee's news judgments."⁵⁷ In contrast to the specific and narrow area of children's educational programming, Congress has not instructed the Commission to re-institute quantitative "processing guidelines" for other classes of government-favored programming. Indeed, the congressional policies established in both the Regulatory Flexibility Act and the Paperwork Reduction Act cited by the Commission in 1984 militate against the re-imposition of quantitative programming benchmarks and the associated record-keeping burdens.⁵⁸

Quantitative mandates for government-preferred categories of programming also raise serious First Amendment concerns. The Commission has a duty to regulate in a manner that is consistent with the First Amendment.⁵⁹ As the Commission has explained:

In the delicate area of the First Amendment we have an affirmative obligation to examine our policies in light of the means used to obtain our objectives and whether other less restrictive mechanisms can achieve the same results.⁶⁰

⁵⁶ See, e.g., *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973); *Hunger in America*, 20 FCC 2d 143, 150-51 (1969).

⁵⁷ *American Broadcasting Companies, Inc.*, 83 F.C.C.2d 302, 305 (1980). See also *Dr. Paul Klite*, 12 Com. Reg. (P&F) 79, 81-82 (MMB 1998), recon. denied sub nom., *McGraw-Hill Broadcasting Co.*, 16 FCC Rcd 22739 (2001).

⁵⁸ See *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶ 25.

⁵⁹ See *id.* at ¶ 27 (citing *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978)).

⁶⁰ See *id.* at ¶28 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)).

The D.C. Circuit addressed this obligation when it upheld the Commission's decision to eliminate quantitative programming guidelines and formal ascertainment for radio in 1981:

In modifying its policy, the Commission has chosen to value most highly the goal of preserving licensee discretion and flexibility in selecting the types of programming which are responsive to community issues. Seeking to maximize the journalistic discretion of licensees, especially in the sensitive area of informational programming, is clearly consistent with the Commission's statutory duty to "chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media."⁶¹

The Commission applied the court's teaching in 1988 when it rejected a request by the United Church of Christ for a ruling requiring applicants for new station authorizations or for consent to assignments and transfers of control to submit detailed information concerning issue-responsive programming proposed to be aired on the station. The Commission, citing the D.C. Circuit's decision in *United Church of Christ v. FCC*, pointed to "the limitations placed upon Commission regulation of programming by the First Amendment and the prohibition against censorship contained in Section 326" and concluded that the existing requirement to provide a concise program service statement in such applications reflected concerns about impinging on licensee discretion.⁶²

These concerns are not hypothetical: in eliminating programming minimums, the Commission recognized that a station that wishes to "alter its mix of non-entertainment programming" may effectively be compelled "to present specified levels of non-

⁶¹ *United Church of Christ v. FCC*, 707 F.2d at 1432 (emphasis added).

⁶² *Request for Declaratory Ruling Concerning Programming Information in Broadcast Applications for Construction Permits, Transfers and Assignments*, 3 FCC Rcd 5467, 5469 (1988).

entertainment programming that it would not otherwise air.”⁶³ Because agency selection of favored programming categories *and* the threat of Commission review of the renewal application of any station that fails to satisfy government-established minimums in these categories impinge on a local station’s editorial discretion,⁶⁴ the proposed minimums should be rejected as inconsistent with the Commission’s obligation to respect and uphold the First Amendment rights of broadcasters. As Commissioner McDowell observed in his recent keynote address before the Quello Communications Law and Policy Symposium, by “foist[ing] upon local stations its preferences regarding categories of programming, . . . [the Commission] is headed on a collision course with the First Amendment.”⁶⁵

C. The *Notice* Does Not Justify The Implied Reversal Of Established Commission Policies Relating To Issue-Responsive Programming

Beyond the failure of re-regulation proponents to meet the evidentiary burden required to justify Commission mandates in lieu of marketplace solutions and the statutory and constitutional issues presented by such mandates, the *Notice* fails to satisfy other fundamental prerequisites for proposed re-regulation. A basic tenet of administrative law is that an agency must thoroughly explain and justify abrupt changes in agency policy.⁶⁶ The analysis and tentative conclusions set forth in the *Notice* do not

⁶³ See *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶ 28.

⁶⁴ See, e.g., Keynote Address of FCC Commissioner Robert McDowell, 2008 Quello Communications Law and Policy Symposium (April 23, 2008) (available at <http://www.fcc.gov/commissioners/mcdowell/speeches2008.html>) (noting that requiring broadcasters to identify categories of programming they have aired is “regulating with a wink and a nod.”)

⁶⁵ *Id.* at 5-6.

⁶⁶ See *supra* note 39.

meet this exacting standard and therefore cannot justify the proposed reversal of Commission policies adopted 30 years ago.

First, the *Notice* does not explain what recent changes in the media marketplace now require government intervention instead of reliance on competitive forces to ensure that locally oriented programming will be presented by broadcast stations.⁶⁷ Beyond scattered anecdotal evidence, the *Notice* points to a few studies regarding the quantity of programming offered during a very limited study period. However, any reliance on these studies, which focus, for example, on a “random two-week sample” out of station’s eight-year license term, would contradict established Commission policy that analysis of a station’s public service must take into account all available programming aired by individual stations during a license term.⁶⁸ Similarly, under Commission precedent, a study that fails to analyze all of a station’s programming or that excludes network and syndicated programming cannot support an allegation of insufficient public affairs programming.⁶⁹

⁶⁷ See *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶ 29.

⁶⁸ See, e.g., *Harrisclope of Chicago, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 1209 at ¶ 20 (1989) (affirming that renewal expectancy is based on station’s programming throughout relevant license term).

⁶⁹ See, e.g., *Philadelphia Television Stations*, 5 FCC Rcd 3847, 3855 (1990), *recon. denied*, 6 FCC Rcd 4191 (1991) (rejecting study that excluded non-local or other potentially responsive programming and affirming that Commission “will not interfere with the broadcaster’s judgment without a showing that the broadcaster was unreasonable or discriminatory in its selection of issues or that the licensee has offered such nominal levels of responsive programming as to have effectively defaulted on its obligation to contribute to the discussion of issues facing its community.”); *National Broadcasting Co., Inc.*, 47 F.C.C.2d 803, 807 (1974) (explaining that syndicated programming may be responsive to local concerns). See also *Renewals of Certain D.C. Broadcast Stations*, 77 F.C.C.2d 899, 905-06 (1980) (noting that responsive programming includes categories other than local programming).

Second, the *Notice* does not explain its singular focus on the quantity of particular categories of programming. As the Commission explained in 1984, “[q]uantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee’s programming.”⁷⁰ Yet the *Notice* focuses on quantity of government-preferred categories of programming as the sole means to determine whether a station’s renewal application can be granted without full Commission review. And the *Notice* does not recognize that, from a local consumer’s perspective, programming minimums risk repetitive programming, rather than innovative or varied content, because stations – erring on the side of caution – may prefer to air the same types of programming that have previously been approved by the Commission.⁷¹

Third, and contrary to assertions in the *Notice*, the license renewal process remains robust, with hundreds of stations still awaiting approval of pending renewal applications. Indeed, during the most recent television renewal cycle, the Commission has not shied away from sanctioning renewal applicants for rule violations and has even

⁷⁰ *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶ 29 (citing *United Church of Christ v. FCC*, 707 F.2d 1413, 1433 (D.C.Cir. 1983) (noting that “quantity alone cannot be a measure of a licensee’s responsiveness”).

⁷¹ *See, e.g., Hubbard Broadcasting, Inc.*, 48 F.C.C.2d 517 (1974) (affirming that local station, in choosing what issues to address, “may take into consideration factors such as the format of its station, the composition of its audience, and the programming offered by other stations in the community.”) (Citation omitted and emphasis added.) For example, one study cited in the *Notice* that complains about the lack of local public affairs programming of local commercial stations acknowledges that noncommercial stations were providing additional hours of the sort of local public affairs programming favored by the analyst. *See Notice* at ¶ 38. What the *Notice* does not clarify is how consumers or the public interest would be served by requiring commercial stations to provide what would have been, at least based on the narrow categories of programming defined by the cited study, redundant programming.

convened a hearing to assess one renewal applicant's service to its home area.⁷² The ready availability of information regarding complaints, renewal applications and the newly updated "The Public and Broadcasting" on the Commission's website also demonstrates that concerned consumers can access more information about renewal applications without leaving their homes than ever before.⁷³

The Commission reviewed the specific issue of programming minimums nearly a quarter-century ago, prior to the rise of myriad new ways for consumers to access video programming. Without clear and compelling reasons to reverse the Commission's decisions with respect to market forces and the costs of focusing solely on quantity or categories of a station's programming, the Commission should not re-impose programming mandates on local stations that have become one of many consumer video programming options.

V. A MAIN STUDIO REQUIREMENT THAT COMPELS THE STUDIO TO BE LOCATED WITHIN A STATION'S COMMUNITY OF LICENSE IS UNJUSTIFIED, COUNTERPRODUCTIVE AND CONTRARY TO THE PRINCIPLES OF LOCALISM

A. The Location Of A Station's Main Studio Never Has Been Demonstrated To Affect The Quality Or Nature Of The Station's Programming Or The Strength Of The Station's Relationship With Its Viewing Audience

The Commission-mandated functions of a main studio are limited.⁷⁴

Commission precedent requires a television station's main studio to be the home base

⁷² See "Media Bureau Announces Agenda and Witnesses for Public Forum on WWOR-TV License Renewal in New Jersey," Public Notice, 2007 FCC LEXIS 8820 (rel. Nov. 23, 2007).

⁷³ See, e.g., www.fcc.gov/cgb/complaints.html ("Filing a Complaint with the FCC Is Easy"); www.fcc.gov/localism/renew_process_handout.pdf (detailing broadcast station renewal process); www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html (revised Commission manual outlining means of public participation).

⁷⁴ 1998 Main Studio Order, 13 FCC Rcd at ¶ 1.

of at least two full-time employees and to maintain sufficient program origination and production equipment to transmit video programming to the station's transmitter, as well as to provide toll-free or local telephone access to the station's home community.⁷⁵

Unless a waiver has been granted, the main studio is also the home of a station's public inspection file. None of these threshold requirements for a main studio determines the quality of a station's interaction with its community or the nature of the station's programming. Accordingly, the Commission has long recognized that the location of the main studio does not "alter the obligation of each broadcast licensee to serve the needs and interests of its community."⁷⁶

In 1998, the Commission recognized the importance of two primary goals in determining an appropriate main studio requirement in light of the changes required by the 1996 Telecommunications Act: first, "to strike a reasonable balance between ensuring that the public has reasonable access to each station's main studio and public file and minimizing regulatory burdens on licensees"; and, second, "to adopt clear rules that are easy to administer and understand."⁷⁷ Pursuant to these goals, the Commission concluded that the options currently available for the location of a station's main studio were "limited enough to assure accessibility to the remaining public through mass transit or modern highways."⁷⁸ The Commission added that the change was

⁷⁵ *See id.* at n.9.

⁷⁶ *Id.* at ¶ 1.

⁷⁷ *Id.* at ¶ 5.

⁷⁸ *Id.* at ¶ 3.

reasonable because “the public is increasingly likely to contact the station by phone or mail rather than in person.”⁷⁹

The current rule, which has been in place for a decade, has not been shown to adversely affect a station’s dialogue with its home community or access to the station by the community. No change in circumstances since the Commission’s action in 1998 has made it demonstrably harder for viewers to access station information or communicate with a station. To the contrary, a station’s audience now has additional, more convenient and more immediate means of contacting the station or researching the station’s records without traveling to the station’s main studio, wherever located. For example, with respect to viewer-station interaction, virtually all consumers and broadcast stations now have access to electronic mail, which was far less prevalent in 1998 when the Commission last addressed this requirement. Viewers now communicate with local stations far more often by email than by regular mail. Similarly, many stations have created websites in order to facilitate consumer input. Viewers even can upload video for direct access by station personnel and others, either via email or the Internet. Home videos that capture newsworthy events, such as severe weather, are frequently incorporated into stations’ newscasts. As the Commission concluded just last year, “the Internet is an effective and cost-efficient method for maintaining contact with, and distributing information to, [television stations’] viewership.”⁸⁰ Accordingly, the Commission cannot now disregard how the Internet also can facilitate a station’s interaction with its viewers, wherever they may be physically located.

⁷⁹ *Id.*

⁸⁰ *Enhanced Disclosure Order*, 23 FCC Rcd 1274 at ¶7.

In further contrast to 1998, viewers have many new tools and resources for obtaining information about a station. For the past few years, viewers can access many components of a broadcast station's public inspection file through the Internet.

According to the Commission's own recent finding:

“[a]most half of the items that are required to be placed in a licensee's public file are also available on the Commission's website. These include authorizations, applications, including renewal applications, ownership reports, EEO reports, a copy of *The Public and Broadcasting*, and children's television programming reports.”⁸¹

Any consumer, wherever located, also can review a station's annual EEO reports and Digital Television Consumer Education reports, as well as other materials voluntarily added by the station, on the station's own website, to the extent the station maintains a website.⁸² Alternatively, pursuant to the Commission's own rules, a viewer within the geographic service area of a station that locates its main studio outside of its community of license may request by telephone any public file materials (except the political file) from the station, and the station is obligated to mail photocopies to the viewer. All of these means of access, most of which were not available prior to 1998, continue to support the Commission's conclusion that a licensee should have greater discretion (within prescribed limits) to determine the main studio location that will best serve its station's operations and the public.

Finally, there is no evidence that the location of a television station's main studio within its community of license affects the quantity of the station's locally originated or locally responsive programming. News and other public affairs programming that responds to local needs and interests is not limited to the events occurring within the

⁸¹ See *id.*, ¶ 9 n.27.

⁸² See, e.g., *id.*, ¶ 10.

limited geographic area of a station's community of license. A station for which the community of license is New Britain, Connecticut, for example, may better serve its viewers by locating its main studio in or closer to Hartford, which is Connecticut's state capital and the principal economic center for New Britain and surrounding communities. Conversely, a station's main studio may be located outside the boundaries of its home community without adverse impact on the production of locally oriented programming. NBCU-owned Station WCAU, Philadelphia, Pennsylvania, locates its main studio in the nearby community of Bala Cynwyd; yet it produces a weekday local news and entertainment program responsive to the needs and interests of Philadelphia audiences. NBCU-owned Station KNBC, Los Angeles, provides another example: KNBC maintains its main studio in Burbank, California, yet the station broadcasts a digital multicast channel 24 hours per day, seven days a week that covers news and events relevant to its home community of Los Angeles. Other examples abound, but the fundamental point is clear: the licensee of a television station located in a particular area is far more knowledgeable about how to serve its viewers and far better suited to determine where best to locate its main studio within that region than government officials in Washington seeking to impose a one-size-fits-all mandate.

B. Reversal of Two Decades Of Commission Policy Strengthening Local Discretion As To Main Studio Location Will Impose Significant Costs Without Any Demonstrable Public Benefit.

Because stations have been able to rely on the established main studio rule, many stations have invested significant resources in developing a main studio near, but outside, the boundaries of their communities of license. The *Notice* makes no reference to permanently grandfathering existing studio locations. Any change in the main studio rule that would force station licensees to relocate existing main studios will impose

significant costs on these stations without any demonstrable public benefit in terms of changes in the station's programming or community awareness.

Moreover, such studio relocation costs are likely to fall disproportionately on smaller, weaker, newer and less established stations, because these stations have been allotted more frequently to smaller communities within a market. For example, out of the 10 NBC affiliates owned by NBCU, only one – Station WVIT, New Britain, is not assigned to one of its market's two leading cities. In contrast, out of the 14 Telemundo affiliates owned by NBCU, seven of the stations' home communities have been assigned to smaller communities outside of their respective market's major cities.⁸³ This is not a coincidence: less established television stations tend to have been assigned to communities outside of a market's central metropolis in part because of long-standing Commission station allotment policies, which establish a preference for later allotments to be assigned communities that do not already have a similar transmission service.⁸⁴

In light of these risks of increased regulatory burdens on local stations, and absent compelling evidence that requiring a main studio to be located within the geographic boundaries of a station's community of license measurably improves a station's ability to provide locally responsive programming, the Commission should not

⁸³ These seven include communities of license in Linden, New Jersey; Corona, California; Merrimack, New Hampshire; Galveston, Texas; Longmont, Colorado; Paradise, Nevada; and Merced, California.

⁸⁴ *Cf. Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, 41 FCC 148, 167 (1952) (articulating Commission allotment principles such that smaller communities will have opportunity to be assigned later-assigned allotments).

reverse its established policy in favor of limited licensee discretion as to the siting of a station's main studio.

VI. COMMUNITY ADVISORY BOARDS OR OTHER MANDATED STATION COMMUNITY OUTREACH PROCEDURES ARE REDUNDANT AND UNNECESSARY IN THE CURRENT COMPETITIVE ENVIRONMENT

A. Community Boards – Or Other Mandated Outreach Procedures – Are Needed Even Less Today Than When The Commission Struck Down Ascertainment Requirements In The 1980s

In 1984, the Commission recognized that there was “no evidence” that federally imposed procedures by which stations were to identify “the problems, needs, and issues facing their communities” had any “positive[] influenc[e on] the programming performance of stations.”⁸⁵ Since 1984, the public has gained access to many additional means by which to interact with local television stations. Mobile phones and electronic mail are among many new technological advances that facilitate informal communications between stations and their communities. In particular, and as the Commission concluded just last year, “the Internet is an effective and cost-efficient method of maintaining contact with, and distributing information to, [television stations] viewership.”⁸⁶ Similarly, websites maintained by local organizations provide stations a means to review the activities and concerns of these organizations, even without specific meetings or interactions with these groups. The *Notice* does not explain why, in light of these technological advances, stations now should be obligated to implement additional government-mandated community outreach mechanisms. The Commission has no basis to assume that government proposals will better serve an individual community than those developed by local stations.

⁸⁵ *1984 TV Deregulation Order*, 98 F.C.C. 2d at ¶48.

⁸⁶ *Enhanced Disclosure Order*, 23 FCC Rcd at ¶ 7.

B. Commission-Mandated Community Boards Will Impose Substantial Costs On Stations Without “Compelling Evidence” Of Pervasive Failures

The Commission’s conclusion in 1984 that “licensees become and remain aware of the important issues and interests in their communities for reasons wholly independent of” government-mandated procedures has even greater force today. To succeed amid unprecedented levels of competition in the video delivery marketplace, a station must be responsive to the concerns and interests of its community or “run the risk of losing its audience.”⁸⁷ The diversity and intensity of competition faced by local stations today emphasize the importance of localism for stations, many of which have few competitive advantages beyond their presence and relationships within their communities. This reality was pointedly underscored by Commissioner McDowell in his recent keynote address to the Quello Communications Law and Policy Symposium:

If market incentives were sufficient in 1984 to motivate broadcasters to stay in touch with their communities, today’s much-more competitive market will certainly drive stations to respond to local interests. Localism is the market advantage that broadcast stations have over other programming competitors.⁸⁸

Even in the absence of any federal requirements, local television stations routinely conduct outreach within their communities. As an example, personnel from the 26 stations owned and operated by NBCU have interacted with more than 1,000 organizations in their home markets in the first calendar quarter of 2008 alone. As noted, many of these groups have submitted comments in this proceeding attesting to these stations’ commitment to their home communities.⁸⁹

⁸⁷ *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶ 49.

⁸⁸ Keynote Address of FCC Commissioner Robert McDowell, 2008 Quello Communications Law and Policy Symposium at 5 (April 23, 2008) (available at <http://www.fcc.gov/commissioners/mcdowell/speeches2008.html>).

⁸⁹ See Appendix A.

Although the *Notice* proposes that existing station outreach will be deemed to have satisfied any new “community board” requirement,⁹⁰ the *Notice* does not explain why these independent licensee activities will be adequate when other stations that may want to adopt similar initiatives in the future will continue to be required to maintain a “permanent” board. In addition, the *Notice* does not explain what possible public interest benefit can obtain from the addition of government oversight to what, at least in some cases, were apparently sufficient station practices, and such oversight will necessarily impose additional recordkeeping, litigation and other costs on stations.⁹¹

As the Commission explained in 1984, “[t]he resources which the licensee is forced to expend to satisfy procedural requirements are lost from other potentially beneficial activities, such as program production in response to determined needs.”⁹² In particular for Spanish-language or other stations serving a smaller population, the costs of maintaining a “permanent” advisory board, potentially including additional insurance, stipends, expense reimbursements and other compensation will impose a significant burden on the station’s other operations, including programming development. In light of today’s hyper-competitive video marketplace, such costs, which will be substantially higher than in 1984, outweigh any speculative benefit to be derived from new government-mandated community outreach procedures.

VII. CONCLUSION

⁹⁰ See *Notice* at ¶73.

⁹¹ See, e.g., *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶¶51-53. As an omen of such inevitable new costs, the *Notice* asks for comment on “what circumstances” these established practices must satisfy in order to qualify. See *Notice* at ¶73.

⁹² *1984 TV Deregulation Order*, 98 F.C.C.2d at ¶53.

The historic marketplace dynamics on which broadcast regulation traditionally rested have fundamentally and irreversibly changed. If it is to survive, the broadcast television industry needs a regulatory environment that is suited to 2008 and beyond, not 1948 or even 1998. Perversely, the Commission has chosen this time – when television stations can least afford a regulatory disadvantage vis-à-vis their unregulated competitors – to roll back the clock and re-impose regulatory burdens that were found unnecessary in 1984, when the media industry was far less competitive. To justify such a dramatic departure from established policies and the imposition of burdens of this magnitude on broadcasters, the Commission must show compelling evidence of a market failure that would warrant such radical re-regulation. The Commission has not made – and cannot make – the required showing. Competition in the delivery of video programming has never been more intense, particularly with the rapid rise of video programming on the Internet.

Nor has the Commission demonstrated that its re-regulation proposals would not impose greater costs on broadcasters than the harms intended to be remedied. As a threshold matter, the proposal to adopt renewal processing guidelines based on categories of government-preferred programming impinges on a station's editorial discretion and is constitutionally suspect. Moreover, broadcasters are already highly motivated to deliver locally oriented programming to their audiences because they know this programming distinguishes them from the welter of competing voices in the marketplace. If individual stations fail in their obligation to serve the public interest, the Commission has the authority and the tools to address such situations on a case-by-case basis. Imposing a new burdensome regulatory scheme on all stations –

regardless of their records of public service – merely serves to penalize the vast majority of stations that take their public interest obligations seriously at a time when they can least afford the additional burdens.

Respectfully submitted,

NBC UNIVERSAL, INC. AND
NBC TELEMUNDO LICENSE CO.

By: /s/ Margaret L. Tobey

Margaret L. Tobey
F. William LeBeau
NBC Universal, Inc. and
NBC Telemundo License Co.
1299 Pennsylvania Avenue, NW, 9th Floor
Washington, DC 20004
202.637.4535

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