Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF EDUCATIONAL MEDIA FOUNDATION

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 2

II. BACKGROUND 4

III. THE ONE-SIZE-FITS-ALL RULE CHANGES PROPOSED IN THE *NPRM* ARE UNNECESSARY AND COUNTER-PRODUCTIVE 9

A. The Increased Administrative Costs of the *NPRM*'s Program-Related Proposals Make Them Utterly Infeasible for Small Broadcasters 10

B. Changes to the Main Studio and Operation Rules Will Impose Unnecessary Costs and Eliminate Economies of Scale 15

IV. THE PROPOSED RULES CANNOT BE JUSTIFIED UNDER APA OR FIRST AMENDMENT PRINCIPLES 18

A. The Proposed Rules are Arbitrary and Capricious 18

B. The Proposed Rules Will Not Withstand Constitutional Scrutiny 24

V. CONCLUSION 30

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Educational Media Foundation ("EMF"), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby submits its comments in response to the *Notice of Proposed Rulemaking* in the captioned proceeding.[1] As the licensee of approximately 220 FM stations,[2] EMF provides noncommercial broadcast services featuring family-friendly music programming, with news and informational content, that caters to unique needs of diverse communities across the country. Though the bulk of programming on many EMF stations may not originate in a given station's community of license, it nonetheless fills audience demands, as witnessed by EMF's over 4.3 million weekly listeners. If this service did not fill compelling local needs of its listeners, the audience for it never would have grown to these levels. While we share the interests of the FCC – and the public – in ensuring that broadcasters, including EMF, serve the needs of individuals residing in each local market where stations are licensed, we are troubled by the FCC directing how each station serves its listeners and the 180-degree policy

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[1] *Broadcast Localism*, 23 FCC Rcd. 1324 (2008) ("*NPRM*"). Concurrently with filing these Comments, EMF is submitting them in the record on the Second Further Notice of Proposed Rulemaking in MM Docket No. 99-325, *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd. 10344 (2007). *See NPRM*, 23 FCC Rcd. at 1329, 1339 nn.14 & 58 ("issues [ ] in other ... proceedings discussed in this [*NPRM*] ... will be resolved with the record of each such proceeding," including potentially requiring that a licensee maintain a physical presence at each of its radio stations during all hours of operation, which "will be resolved in ... MM Docket No. 99-325").

[2] EMF also is the licensee of 350 FM translators and one AM station, and has applied for a construction permit for another AM station as well.

turn it appears poised to execute in the name of "enhanc[ing] localism practices among broadcasters." *NPRM*, 23 FCC Rcd. at 1327.

I. INTRODUCTION AND SUMMARY

As over 100 Members of the House correctly observed in a recent letter of concern addressed to Chairman Martin, the FCC "is set to turn back the clock on decades of deregulatory progress by imposing a series of new and burdensome regulations on broadcasters." [3] Of special concern to EMF are two intertwined themes that seem to run through the whole of the *NPRM*, with the effect of marginalizing the ability of each broadcaster to discern for itself how it can uniquely serve the community in which it is licensed. Many of the "issues for Commission action" and proposed rules in the *NPRM* are redolent with the first theme, the notion that, regardless whether the market demands it, there are certain types of "local" and "public interest" programs every broadcaster should offer, regardless how its station(s) might serve the community of license in other ways, and/or regardless what local needs and desires other stations in the market fulfill.

There is an especially paternalistic air to the *NPRM* in this regard, which suggests broadcasters should carry certain types of programs in specified categories, whether a sufficient audience for them materializes or not. This inexorably leads to the other theme wound about many of the *NPRM*'s proposed policy shifts, *i.e.*, a notion that the FCC can achieve localism objectives through "one-size-fits-all" rules that should apply to all broadcasters the same way, regardless of their size, resources, or market niche. EMF respectfully submits that this approach to enhancing the ways broadcasters serve their communities is artificially contrived, counter-

[3] Letter from Reps. Mike Ross, Marsha Blackburn, *et al.*, to Hon. Kevin J. Martin, in MB Docket No. 04-233, April 15, 2008 ("*House Letter*") at 1.

productive in practice to the goals sought by the Commission, and unjustifiable under basic precepts of administrative and constitutional law.

The proposals that are most troubling in this regard, though by no means the only problematic potential changes the *NPRM* suggests, are as follows: First, the *NPRM* offers a proposal that can be viewed only as a return of formal ascertainment obligations, despite efforts to characterize the proposal otherwise.[4] Next, the *NPRM* proposes to establish detailed reporting requirements, obligations for an on-line public inspection file, mandatory disclosure of how playlists are compiled, and processing guidelines geared to "public interest" programming, all of which carry implicit obligations to provide specific types of content. *NPRM*, 23 FCC Rcd. at 1335-36, 1345, 1361, 1374-75, 1378-79. Finally, the *NPRM* considers reinstatement of the "main studio rule" for all stations. *Id.* at 1338-39, 1345-46, 1364-65. These proposed changes are at odds not only with an easily charted FCC course away from such requirements and trends toward greater, not less, First Amendment protection for broadcasters, but also with, *inter alia*, the D.C. Circuit's observation that any FCC "goal of making a single station all things to all people makes no sense," because it "clashes with the reality of the radio market, where each station targets a particular segment." *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998).

Rather, it is in broadcasters' own self-interests to discern the needs of their communities and to address those needs so as to not become irrelevant to their audiences. To accomplish this, broadcasters need flexibility to decide how determinations of what is important to their audience should be made, and how service to the public is provided. A one-size-fits-all approach, where broadcasters face heightened regulatory scrutiny if they fail to reach some arbitrary level of some

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[4] *NPRM*, 23 FCC Rcd. at 1335, 1338, 1346, 1359, 1361; *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd. 1274, 1275, 1287, 1292 (2008) ("*Enhanced Disclosure Order*").

particular types of programming that someone in Washington, D.C., defines and deems important, does not provide a recipe for creating compelling content in Sacramento, Cheyenne, or Portland. EMF thus respectfully urges the FCC to reject the *NPRM*'s across-the-board proposals that would interfere with broadcasters' business imperatives and editorial discretion in discerning how best to serve their communities of license – instead, it should retain the current framework that affords sufficient regulatory oversight while still allowing competitive market forces and other more nuanced feedback to guide how each broadcast can best serve local needs.

II. BACKGROUND

The *NPRM*'s proposals outlined above as most objectionable seek, in short, to re-impose rules and burdens the FCC itself deemed unnecessary as long as a quarter-century ago. In 1981, the Commission eliminated rules and policies that forced radio stations to keep program logs to conduct formal ascertainment of community issues, that imposed non-entertainment program requirements, and that limited the amount of commercial time. [5] It also simplified the renewal process, eliminating detailed questions about specific news and public affairs programming of the licensee and its ascertainment processes. [6] In its place, FCC rules required radio and TV broadcasters to file quarterly reports listing programs that provided a station's most significant treatment of community issues during the preceding three-month period (*i.e.*, an "issues/programs list") and that offered brief narratives describing what issues were given significant treatment and which programs addressed particular needs. The Commission later revised its rules to permit broadcasters to locate their main studios outside their communities of license

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[5] *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *aff'd in part and remanded in part*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The FCC similarly deregulated TV in 1984. *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Requirements Log for Commercial Television Stations*, 98 F.C.C.2d 1076 (1984) ("*Commercial TV Deregulation Order*").

[6] *See, e.g.*, *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983).

anywhere in their city contour, and to eliminate the station program origination rule. [7] Later still, it authorized unattended station operation and expanded allowances to control and monitor station technical operations remotely. [8]

Alleviation of these requirements was significant, because they were quite burdensome, especially for small stations and stations in small markets with limited staffs where, rather than spending time on broadcast operations, stations had to ensure their operations met programming standards reflecting an arbitrary set of government-imposed standards as to what was good for a station's audience. This was so even if the station felt, because of its format or audience demographics, that a particular type of program did not serve its audience. Indeed, as found in the Notice of Inquiry commencing this proceeding, "the Commission deregulated ... in the 1980s," because it "found that market forces, in an increasingly competitive environment, would encourage broadcasters to [serve their local communities], and [such] rules were no longer necessary." *Broadcast Localism*, 19 FCC Rcd. 12425 (2004). *Accord*, *NPRM*, 23 FCC Rcd. at 1329.

However, notwithstanding that it has compiled a "decidedly mixed" record that reflected efforts characterized as "substantial" and "inventive" by some broadcasters to identify and serve the needs and interests of their communities of license under existing rules, *NPRM*, 23 FCC Rcd. at 1330, the *NPRM* proposes to reinvigorate the heavily regulatory approach dismantled decades ago, by suggesting measures that would subject editorial decisions to heightened governmental scrutiny. For example, though the Commission admits it is not "feasible" to reinstate formal ascertainment processes that "impose[ ] specific and detailed formal procedures by which ...

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[7] *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, 3 FCC Rcd. 5024 (1988).

[8] *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Unattended Operation of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, 10 FCC Rcd. 11479 (1995).

licensees were required to consult with community leaders to determine local needs and problems and propose programming to meet those issues," *id.* at 1333; *see also id.* at 1337 (same), it nonetheless proposes to require that "each licensee [ ] convene a permanent advisory board made up of officials and other leaders from the service area of its broadcast station." *Id.* at 1337. In fact, this process might be even more burdensome than prior ascertainment requirements, and could lead to community controversy if a station rejects advisory board programming recommendations, which is a power the licensee ultimately must retain under FCC rules and policy. [9]

In this regard, the *NPRM* further notes the Commission adopted, concurrently with the *NPRM*, a new form for television licensees "to report [their] efforts to identify the programming needs of various segments of their communities, and to provide detailed information about [their] community responsive programming by category," including "that for underserved segments of the community," and is considering subjecting radio licensees to the same requirements. *See, e.g.*, *NPRM*, 23 FCC Rcd. at 1361 (describing form adopted in *Enhanced Disclosure Order*). Even as it describes the form as requiring "detailed information for each such program, including title, dates and times of broadcast, length, and whether it was locally-produced," *id.*, the *NPRM* does not do justice to the intrusiveness and burdensomeness of the obligations that the *Enhanced Disclosure Order* adopted, which require stations to post their public inspection files online, and to file quarterly new FCC Form 355 (in place of quarterly issues/programs lists) detailing their programming in minute detail. This degree of detail is more substantial than that ever required of broadcasters, and is far more probing than the information even required of broadcasters prior to deregulation, in that it requires reporting the average number of hours devoted each week to:

- national news,
- local news produced by the station,

[9] *See, e.g.*, *Ms. Sally Hoskins*, 13 FCC Rcd. 25317, 25340 (MMB 1998) ("The Commission has repeatedly emphasized that the licensee must retain ultimate control of a station ...").

- local news produced by any other entity (which must be identified),
- programming devoted to "local civic affairs," [10]
- coverage of local elections, [11]
- independently produced programming (*i.e.*, that not produced by a company with substantial ownership by a national network),
- "other" local programming,
- public service announcements, and
- paid public service announcements.

Enhanced Disclosure Order, App. B. To comply with this requirement, every day's programming will need to be timed, classified, and recorded to facilitate computation of weekly averages for report to the FCC. *See id.*

The new form also requires licensees to file highly detailed information regarding editorial choices that raise the level of government oversight to entirely new heights, in that it requires broadcasters to report:

- the title, length, and date/time of the airing of all independently produced programming,
- a list of all local programming not otherwise reported, with title, length, and date and time of airing, and whether the station received consideration for airing the program,
- the name of the sponsoring organization for both paid and unpaid PSAs, the number of times each PSA ran, the length, and the percentage of times that each spot ran during prime time,
- details of programming directed to "undeserved communities," [12]
- details of religious services or other local religious broadcasts aired at no charge, and
- details regarding programming for disabled audience members.

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[10] This is defined as programming designed to provide the public with information about local issues, including statements or interviews with local officials, discussions of local issues, and coverage of local legislative meetings. Programming reported in this category must be subtracted from the amount reported for "news" programming.

[11] This also must be subtracted from the amount reported for "news" programming.

[12] *Id.* "Underserved communities" is defined as demographic segments of the community to which little or no programming is directed.

Id. Moreover, for all these programming categories, licensees must describe how they determine the programming meets community needs, which effectively adopts ascertainment-like burdens and fuses them with potential investigation into broadcasters' editorial processes. *Id.* The *Enhanced Disclosure Order* makes clear Form 355 was adopted in anticipation of new public interest mandates to be enforced using the newly compiled information, so that, while it may not impose "quantitative programming requirements or guidelines," it acknowledges such mandates "are being considered ... in other proceedings," specifically, that encompassing the instant *NPRM*. *Id.* at 13453, 13465 & n.96.

If this were not enough, the *NPRM* also seeks comment on ways to essentially require carriage of certain additional programming the Commission considers worthy – or even required – of broadcast licensees. For example, the *NPRM* suggests the FCC could require broadcasters to report "data regarding their airing of music and other performances of local artists and how they compile their stations' playlists." *NPRM*, 23 FCC Rcd. at 1375. This, the *NPRM* states, would be used, to "evaluat[e] overall station performance under localism," when "consider[ing] renewal applications," which the *NPRM* chillingly describes in an ensuing paragraph as "perhaps the most significant mechanism available to the Commission ... to ensure that licensees" carry out their public interest duties in a manner the FCC demands. *Id.* In addition, while the Commission purports to reject "proposed processing guidelines that would allow expedited [ ] renewals for stations that air a minimum of three hours per week of local civic/electoral affairs programming, at least half of which air[s] in or near prime time," *id.* at 1377, it nonetheless tentatively concludes it should "reintroduce specific [ ] guidelines for the processing of renewal applications based on their localism programming performance," and seeks comments on just

what the contours of that obligation should be.[13] Finally, the *NPRM* also notes the Commission is "considering" requiring licensees to maintain a physical presence at each broadcasting facility during all hours of operation, based upon a presumption – for which the *NPRM* cites no evidence – that doing so "can only increase the ability of the station to provide information of a local nature," and upon further speculation that it "may increase the likelihood" of "relaying critical life-saving information to the public." *NPRM*, 23 FCC Rcd. at 1339.

III. THE ONE-SIZE-FITS-ALL RULE CHANGES PROPOSED IN THE *NPRM* ARE UNNECESSARY AND COUNTER-PRODUCTIVE

Any implication that the advisory board, reporting, processing guideline, and main studio proposals in the *NPRM* are equally relevant to – or likely to have the same effectiveness for – all broadcast stations regardless of size, resources, or format, is sorely misplaced. As a threshold matter, we respectfully reject the premise that only locally produced programming, created only after consultation with designated individuals in a station's community of license, is the sole or even best way broadcasters can serve local needs. EMF's noncommercial educational programming, which includes family-oriented news, information and contemporary Christian music as part of the K-LOVE or Air-1 radio networks, as well as that of other noncommercial broadcasters with different formats, can serve niche audiences and/or listeners in rural and other areas, with unique formats often overlooked by commercial broadcasters.

Like other broadcasters, EMF's programming is not developed in a vacuum, but instead is crafted by professional programmers who rely not only on their own experience, but also on

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[13] *Id.* at 1379. Stations that fail to meet the minimum quantitative "guidelines" would be subjected to further scrutiny at renewal. In proposing the guidelines, the *NPRM* poses a number of questions, including what categories of standards should be established, how to define programming in each category, whether guidelines should cover particular types of programs such as local news, political, public affairs and entertainment, or just focus on the need for local programs. It also asks if requirements should be established as specific numbers of minutes, or hours per day or per week, or by a percentage of programming, or some other metric, and/or guidelines addressing whether particular types of programs should air at certain times of day. *Id.*

audience feedback, audience research, and other means of determining that programming is responsive to the needs of its listeners. Listeners value EMF's unique programming – even if it does not constitute what is traditionally considered "local" in that it may not cover the specifics of local traffic, school boards, etc. – because it nonetheless addresses family and spiritual issues that listeners find just as vital to their lives as so-called "local" issues. In this regard, EMF garners substantial listener donations that attest to the value they place on EMF's programming, even if it is not locally produced or targeted to "local" issues in a traditional sense.

A. The Increased Administrative Costs of the *NPRM*'s Program-Related Proposals Make Them Utterly Infeasible for Small Broadcasters

Quantitative public interest mandates, permanent advisory boards, enhanced reporting requirements, and preferences for local music and/or reporting of playlist compilation as proposed in the *NPRM* do not make sense for broad swaths of the broadcast industry, including many stations operated by EMF, for a variety of reasons. First, requirements of this nature do not have meaning for all stations, and even where they do have meaning, they do not resonate in the same ways and/or to the same degree for all stations. Some formats lend themselves to some, but not all, of the types of programming on the "checklist" approach the *Enhanced Disclosure Order* adopted and that the *NPRM* proposes, while others do not dovetail at all with any of the specific categories.

This does not mean, however that a station for which all the categories of "local" programming identified in the *NPRM* are not relevant somehow fails to serve its community of license, especially to the extent competitors in the market offer some or all of those categories of programming. It makes no more sense for stations carrying contemporary Christian music, like those EMF programs, to produce specific amounts of news and public affairs programs (though EMF does, in fact, include such material in its programming) than it would, for example, to require an all-talk sports radio station to comply with formalistic procedures relating to "local

civic affairs" or "local elections," or the selection of local or other music, or worse, to feel compelled to alter its programming to encompass such matters. That does not mean these stations are not meeting local needs – they must be, or they would not be garnering audiences to provide the support necessary for the stations to stay on the air. If there truly is demand for "local" programming that a given station does not offer, it will lose its audience to competitors that offer such programming, and/or the station will identify the economic incentives to offer "local" programming no other station in the market offers, or replace its programming that is not "local" with content that is and that can draw a larger audience. But so long as the audience continues to tune in to programming the station offers, in numbers sufficient to provide it support to continue to operate, it cannot be said the station is not "airing programming that is responsive to the needs and interests of [its] communit[y] of license." *NPRM*, 23 FCC Rcd. at 1325.

This highlights one of the fallacies running through the *NPRM* and through this proceeding as a general matter. The *NPRM*'s *raison d'être* is concern that some broadcasters do not offer programming that speaks to the interests of individuals in their stations' communities of license. But part of the problem with this premise is that the *NPRM* prejudges what types programming fit that description, as where, for example, it discusses "community-responsive programming *such as news and public affairs*, and programming *targeted to ... certain segments of the public.*" *Id.* (emphasis added). No one is questioning the value of such content. But at the same time, the needs and interests of all the individuals in a community of license – or, indeed, of each single individual residing therein – are multiple and varied.

Some stations serve some of those needs for some of those individuals, while different stations serve others of those needs. There is no reason, however, to elevate some categories of interests, such as news or public affairs, over religion, sports, music, or other categories, in the name of ensuring favored types of content are available. If there is sufficient audience demand for <u>any</u> given type of programming, market forces will ensure it ultimately becomes available,

and there are, in addition, a wealth of noncommercial broadcasters, like EMF (not to mention myriad new media outlets, including online options), that are dedicated to fulfilling other, overlooked needs. The FCC should not seek to override these organic forces with advisory board, reporting, or quantitative programming requirements, based on notions of what types of content are – or should be – preferable to members of a community (let alone appointed regulators in Washington, D.C.). [14]

Such measures also are inadvisable to the extent they are unduly costly and overburdensome for broadcasters of limited resources, and are likely to be counter-productive as a result. The *NPRM*'s proposals advanced in the name of increasing "localism" contain extensive record-keeping and paperwork requirements that are a particular burden to smaller broadcasters, and to noncommercial broadcasters of limited financial means in particular. Forcing such stations to comply with the extensive requirements in the *NPRM* may well be asking them to do the impossible, as they may lack the means of complying with extensive paperwork requirements.

Gathering information for the new, substantially more detailed quarterly reports will require a significant commitment of resources, as stations will have to monitor all programming (including all network and syndicated offerings) to determine if it contains any significant discussion of important issues of public concern. For any program segment that does, the station will have to identify it, name the topic, time its duration, and note the time of the broadcast. This will require a minute-by-minute review of station operations, and daily updates to be able to provide the necessary reports and, consequently, a major commitment of manpower for FCC-mandated make work. While this may be insignificant, or at least absorbable, for stations with

[14] Nor, for that matter, may the Commission constitutionally pursue such endeavors, in any case, as shown below.

large-scale operations in major markets with scores of employees, it places an extreme burden on noncommercial broadcasters who rely on community support for their operating budgets.

In addition, adoption of detailed, specific reporting requirements can lead only to more complaints that will require the redirection of staff time and economic resources of the station to resolve, and will burden the Commission's own staff with resolving complaints which, for the most part, will involve trivial matters of form over substance. In abolishing the detailed programming and ascertainment requirements in the 1980s, the Commission recognized the burdens such litigation created, without any significant benefits. *See, e.g.*, *Deregulation of Radio*, 73 F.C.C.2d 457, 519 (1979) ("since adoption of the initial Primer in 1971, the cases dealing with ascertainment have been so numerous that just the annotated index of cases covers almost 60 pages," but "[t]he bulk of these cases deal with purely mechanistic aspects of the formal ascertainment procedures"). The Commission has not explained why it believes the rules it now proposes would produce any different result.

Paradoxically, the more programming a station provides of the type the *NPRM* seeks to encourage, the greater its manpower burden – and thus cost – becomes to catalog it for the FCC's benefit. The advisory board the *NPRM* proposes, especially coupled with its associated reporting requirement, is likewise a resource-intensive commitment for small stations with limited staffs. While EMF has community representatives responsible for all communities in which it operates, finding representatives to attend advisory board meetings, much less persons willing to serve on such "permanent" boards, will be incredibly resource-intensive. In small communities, there will be few people to recruit for such boards. In larger communities, with multiple other broadcast groups, there will be great competition for the time of those willing to serve on boards. And for what end? Advisory boards from the community at large are not necessarily likely, in any case, to be representative of members of the community who are listeners of any particular station. If a board of diverse community members convenes, and one member advocates for more polka

(for example), while another seeks more opera, how is the station intended to react under the new scheme the *NPRM* puts forward? It is EMF's experience that most community members are interested in their own personal preferences, rather than what the community generally may desire or need. Convening a diverse board may simply lead to squabbles over whose preferences should win out. Broadcasters are in the business of determining how to serve their audiences. An artificial construct, like a community advisory board, will not aid that process.

In this regard, one thing of which the Commission must not lose sight is that these resources to meet any new obligation must be diverted from somewhere, and there is a high degree of probability it will be from actually producing (or paying to license) the very types of programming the *NPRM* seeks to increase. Noncommercial stations, by nature, have a limited source of funding – donations from their listeners. Meeting any new mandate, whether it be more reporting, production of new types of programs, or manning a studio 24/7, will impose new costs, but will not lead to new revenue from increased donations. Given the costs to meet new burdens such as those that would flow from the rules proposed in the *NPRM*, some stations might well simply opt to cease such operations at all hours, thereby depriving the community of license not just of any "community-responsive programming" that might have aired during those hours, but of all programming carried in those parts of the day. Some may need to cut back on program production. In short, if forced to comply with the rules proposed in the *NPRM*, some stations may not be able to operate, some may not be able to afford to continue to produce issue-responsive programming, and others may not carry programming addressing community issues for which extensive records are required, thereby defeating the entire purpose of the FCC's proceeding.

B. Changes to the Main Studio and Operation Rules Will Impose Unnecessary Costs and Eliminate Economies of Scale

Similar counter-productive economics also plague the prospects of FCC reinstatement of its "Main Studio Rule" restricting placement of a station's main transmitting studio within its community of license, and/or a requirement that licensees maintain a physical presence at each radio broadcasting facility during all hours of operation. As a threshold matter, we note again the above-referenced extent to which these changes reflect assumptions and speculation about how they might result in increased "community-responsive programming," *see supra* at 9, and further note that, with respect to remote operation, the *NPRM* does not cite any *actual* deleterious impact on the provision of "local" programming, but rather only a "*perceived* negative impact" that such operation "*may have* on licensees' ability to determine and serve local needs." *NPRM*, 23 FCC Rcd. at 1326 (emphasis added). This is of particular concern given the significant economic impact these rule changes will have if adopted.

With respect to main studio location, the Commission properly found in relaxing the rule that doing so would "substantially reduce regulatory burdens consistent with the public interest, and [ ] longstanding Congressional and Commission policy," "generate savings that can be put to more productive use for the benefit of the community served by the station" by allowing "licensees ... to operate [ ] stations from a centrally located studio/business office rather than requiring each to maintain a separate main studio," and ameliorate the "disproportionate effect that the previous rule had on owners of smaller stations."[15] Nothing in the *NPRM* suggests the foregoing has changed so as to compel reinstating the earlier, stricter version of the rule, and in particular that allowing resources freed up by foregoing duplicative facilities does not continue to inure to the

[15] *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, 15695-96 (1998) ("*Main Studio/Public File Order*").

"benefit of the community served by the station," which is the precise objective of the *NPRM.* EMF, like many noncommercial stations, operates a series of satellite stations across the country, allowing it to bring its noncommercial programming into many markets where listener support would not allow EMF's unique format to exist otherwise.[16] There is no doubt the costs of operating main studios for stations in each community of license require noncommercial broadcasters to commit resources to redundant physical plants that they could otherwise plow into additional, diverse, improved, or otherwise valuable programming or related purposes. As the *House Letter* recognized, "[r]everting to out-of-date rules would impose significant costs on [ ] licensees that have made good faith investments based on rule changes" and these costs "will harm [their] ability to serve the public interest." *House Letter*, *supra* note 3, at 1

In addition, the current rule does not undermine the accessibility of programmers such as EMF, or in any manner adversely affect interactions between a station and its community of service, *see NPRM*, 23 FCC Rcd. at 1346, especially given that, in all its markets, EMF maintains local toll-free telephone lines, and has designated representatives who regularly determine the local needs of all the communities EMF serves. First, nothing in the *NPRM* provides grounds to doubt findings that "the public is increasingly likely to contact the station by phone or mail rather than in person," *Main Studio/Public File Order*, 13 FCC Rcd. at 15697, which has only been bolstered by FCC rule changes that enable community members to contact stations online. *See, e.g.*, *NPRM*, 23 FCC Rcd. at 1335 (citing *Enhanced Disclosure Order*). The flexibility that noncommercial broadcasters currently enjoy siting their main studios, facilitates their ability to deliver high-quality programming. Meanwhile, modern technology still allows them to be immediately responsive to the communities they serve.

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[16] Many NPR and other public radio stations use a similar model, forming networks that operate statewide – or over even greater areas – to disseminate their unique programming.

The proposal to require that stations maintain a physical presence during all hours of operation is likewise contrary to the *NPRM*'s objective to "promote both localism and diversity." *NPRM*, 23 FCC Rcd. at 1326, 1337, 1399. Broadcasters like EMF, and those carrying EMF's offerings, rely on automation to air various types of "diverse" shows, including those the Commission is likely to consider "community-responsive programming." Any requirement that, if a station is on-air somebody is there, is likely to lead to stations shutting down rather than incurring more in personnel costs than they ever can hope to recover through underwriting or donations, or to subsidize from any other sources, if they maintain operations. *See also supra* at 14. For broadcasters like EMF, the costs, in gross, are staggering. The proposal to have all stations that broadcast round-the-clock staffed round-the-clock (which, the proposal above that each station have its own main studio multiplies many times over) would be well north of ***$20 million*** for EMF.[17] A cost spike of this magnitude would jeopardize its entire operation and would likely, at a minimum, force it to curtail operations at dozens of stations.

EMF has noted in recent years the increasing costs of many educational institutions and other nonprofit groups to fund operations of stand-alone noncommercial stations. Imposing greater economic burdens, like 24/7 staffing requirements, will likely drive even more out of operation. Imposing such requirements on groups like EMF that rely on networks of satellite stations likely will lead to many noncommercial stations ceasing their operations altogether. Of

[17] This is based on a EMF's experience and a relatively low rate of $8 per hour for labor, multiplied by 24 for each hour of the day, with an additional twenty percent for payroll taxes and other incidental employee expenses, plus modest rent and utilities of $1,000 per month. This adds up to $96,000 per station – or, for EMF's 220 stations, over $21 million. And that is only the beginning of the additional costs the instant proposal promises, as it includes only recurring expenses, and not any of the upfront costs of establishing new facilities and finding and hiring personnel to staff them.

course, if the rules have that effect, the communities served by such stations are denied all programming, including any that might be "local" or "diverse." [18]

IV. THE PROPOSED RULES CANNOT BE JUSTIFIED UNDER APA OR FIRST AMENDMENT PRINCIPLES

In addition to being overly burdensome, and counter-productive in significant regards, reinvigoration of the rules as proposed in the *NPRM* would be subject to invalidation under basic legal precepts under the Administrative Procedure Act ("APA") and/or the First Amendment. Significantly, as shown below, the Commission's action promises to be arbitrary and capricious and/or unconstitutional in ways it cannot simply analyze away or develop a record to overcome. Accordingly, the Commission should retreat from the intrusive approach it has proposed for attempting to bolster broadcast localism.

A. The Proposed Rules are Arbitrary and Capricious

The proposed rules suffer several APA infirmities, including that they depart from FCC precedent in ways the relevant facts do not support, are arbitrary and capricious because they likely will not advance their stated objectives, and are supported by agency explanations that do not bear close scrutiny. While it is well-settled that "[a]gencies are of course free to revise their rules and policies" as the *NPRM* proposes, they must "give[ ] sound reasons for the change" and "provide a reasoned analysis for departing from prior precedent." [19] Here, the *NPRM* falls far short of even attempting to explain why prior considerations cited in FCC precedent to cease imposing the kinds of rules the *NPRM* seeks to reinvigorate, no longer support the prevailing hands-off approach. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (agency

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[18] On one final, related point, we agree with the *House Letter* that "[i]f there is concern about emergencies," *see NPRM*, 23 FCC Rcd. at 1339, "focusing on reforming emergency training would be more rational than penalizing every local broadcaster in the country with unnecessary labor costs." *House Letter*, *supra* note 3, at 2.

[19] *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2d Cir. 2007) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)).

"failure to come to grips with conflicting precedent constitutes an inexcusable departure from the [ ] requirement of reasoned decision making") (internal quotes omitted).

In this regard, it is notable that, even in originally regulating in the intricate manner that deregulation in the 1980s foreswore, the FCC afforded broadcasters greater latitude than will the *NPRM*'s proposed neo-ascertainment advisory board and reporting mandates. For example, the Commission's 1960 en banc programming inquiry listed 14 categories of programs generally deemed necessary to serve the public interest, [20] as reinforced (in part) through use of formal ascertainment requiring interaction with community leaders in 19 specified categories ranging from agriculture to religion. [21] But even there the Commission held the listed programming types, provided in some reasonable mix, demonstrated a licensee operated in the public interest, [22] while emphasizing that "[i]n considering the extent of [FCC] authority in the area of programming it is essential [first] to examine the limitations imposed ... by the First Amendment ... and Section 326." *Id.* at 2306.

Upon doing so, the Commission concluded the required balance barred the government from implementing overly specific programming requirements:

> With respect to [arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than to abridge it,] we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of

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[20] *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960) ("*En Banc Programming Inquiry*"). These included programs that provided opportunities for local self-expression, that used local talent, children's programs, religious programs, educational programs, public affairs programs, editorials, political broadcasts, agricultural programs, news, weather and market reports, sports programs, service to minority groups and (finally) entertainment programming. *Id.*

[21] *See Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

[22] *En Banc Programming Inquiry*, 44 F.C.C. at 2314.

> it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise.

Id. at 2308 (citation omitted). Such considerations led the Commission to conclude it could not "condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program," *id.*, as doing so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)). It found that "as a practical matter, let alone a legal matter, [its role] cannot be one of program dictation or program supervision," *id.* at 2309, and that "standards or guidelines should in no sense constitute a rigid mold for station performance, nor should they be considered as a Commission formula for broadcasts in the public interest." *Id.* at 2313. Yet this is exactly what the new "localism" requirements proposed in the *NPRM* would require, without so much as a mention why these prior conclusions – made while the FCC still regulated in the manner to which it contemplates returning here – no longer preclude the kinds of programming oversight the *NPRM* proposes.

Nor does the *NPRM* explain why the reasons the FCC gave for *de*regulating broadcasters are no longer valid grounds for continuing to forego such intrusive oversight of programming practices. In this regard, the Commission correctly held then that regulating broadcasters so granularly was a poor substitute for market forces, and unduly intrusive into their editorial discretion. *Deregulation of Radio*, 84 F.C.C.2d at 977, 978-82. The economic incentive of potential loss of audience to competitors who better served the public was deemed enough to ensure broadcasters acted responsibly. *See, e.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 588 (1981). Indeed, twenty years ago, as the FCC neared the end of its deregulatory efforts, there were 10,175 radio stations and 1,651 TV stations vying for audiences, while today, the number of radio stations has grown by forty-five percent to 14,754 stations, and the number of

TV stations has nearly doubled (taking Class A and LPTV stations into account).[23] In other words, at a time when the FCC plans to reimpose onerous programming and related obligations, there are almost twice as many broadcast stations competing than there were when it removed those obligations on the ground that competitive forces rendered them unnecessary.

And that is without even considering the many other forms of competition for audio and video services broadcasters did not face when the Commission deregulated, the rise of which, the Commission has found, "transformed the [media] landscape."[24] Indeed, the Commission has noted how "the modern media marketplace is far different than just a decade ago," given the ways traditional media "have greatly evolved," and "new modes of media" are "providing more choice, greater flexibility, and more control than at any other time in history." *Id.* at 13647-48. In this regard, the public – including in all "local" markets – enjoys an "extraordinary level of abundance in today's media marketplace" and realistically "have come to expect immediate and continuous access to news, information, and entertainment." *Id.* at 13648.

In a world with both radio and TV provided over cable, satellite and the Internet, and other digital entertainment choices as well, broadcasters are forced, if for no other reason than self-interest, to address what local audiences find relevant, or they will have that audience abandon the station for some other medium. This cuts directly at the contradiction that lies at the heart of the *NPRM*'s proposed unnecessary FCC oversight of broadcast content in the name of ensuring that "localism" is promoted – with so many competing platforms vying for audience attention, one of the principal means broadcasters have of distinguishing themselves from a field

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[23] *Compare Broadcast Station Totals as of September 30, 1987*, News Release (Oct. 6, 1987), with *Broadcast Station Totals as of September 30, 2007*, News Release (Oct. 18, 2007).

[24] *See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13623 (2003) ("*Biennial Regulatory Review*").

of competitors more crowded than at any point in history, is their presence in and ability to assess and serve the interests of their local markets.

Hence, to the extent there have been changes since the FCC backed away from the type of regulations the *NPRM* proposes, they only have *strengthened* the reasons why such rules are unnecessary. Moreover, insofar as the changes affect the degree to which a broadcaster might consider more locally tailoring its programming, the unique manner in which over-the-air broadcasting among all competitors can most directly target local interests, serves only to *strengthen* the incentives for broadcasters to do so. Yet the *NPRM* breathes not a word why this evolution of the media marketplace – which cut against the types of regulation at issue here in the 1980s, and cuts even more so against it now – does not favor continued restraint. Such failures to "explain why the original reasons for adopting the rule or policy are no longer dispositive," and to provide "reasoned explanation why the new rule effectuates the statute *as well as or better than the old rule*," are fatal to the kind of about-face the *NPRM* proposes. [25]

It does not help matters that, where the Commission does attempt to distinguish the prior "formal ascertainment" requirements from the present "permanent advisory board" approach, it relies upon "distinctions without a difference" that may be found arbitrary and capricious under the APA. *See Warner-Lambert Co. v. Shalala*, 202 F.3d 326, 330 (D.C. Cir. 2000). There is no difference between the old requirement that licensees meet with "'representative cross-sections' of community leaders 'who speak for the interests of the station's service area'" and who come from categorically identified "institutions ... found in the community," and the new "permanent advisory board comprised of local officials and other community leaders" including representa-

[25] *Fox Television*, 489 F.3d at 456-57 (quoting *N.Y. Council, Ass'n of Civilian Techs. v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)) (emphases original in *Fox*).

tives of "various segments of the community, including underserved groups." [26] It also is hard to square the Commission's observation that "each broadcast station is not necessarily required to provide service to all such groups," *id.* at 1357 (citing *Radio Deregulation Order*, 84 F.C.C.2d at 997), with the fact that any failure to satisfy the demands of the "permanent advisory board" surely risks that failure being raised by the board, or a dissatisfied representative or faction thereof, at renewal time.

As a final APA matter, the extent to which the proposed rules and/or the support offered for them is counter-productive, self-defeating, or internally inconsistent, risks their being invalidated as arbitrary and capricious. [27] First, the above-noted to the extent the costs that the rules proposed in the *NPRM* will impose on small stations and stations in small markets with limited staffs will cause them to *curtail* rather than increase their locally responsive programming, the rules are arbitrarily and capriciously counter-productive. *See, e.g., Aeronautical Radio, Inc. v.*

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[26] *Compare NPRM*, 23 FCC Rcd. at 1337 & n.14 (quoting *Ascertainment of Community Problems By Broadcast Applicants*, 57 F.C.C.2d 418, 442 (1976) ("*Renewal Primer*")) (internal edit omitted), *with id.* at 1346 (describing permanent advisory board). Similarly, though the categories into which public interest programs break down may differ somewhat between the *En Banc Programming Inquiry* (for example) and Form 355, they use largely the same categorical approach of "one from column A, one from column B," etc.

Furthermore, the FCC claims the advisory aboard mechanism will "enhance the ability of licensees to determine those issues that they should treat in their local community," but it is difficult to see how this (a) does not simply require the licensee to cede editorial control to various community factions, and (b) will result in anything more than each faction seeking special treatment for its interest group, which already is happening in this proceeding. *See id.* at 1358 (citing public comments by disparate interest groups seeking increased programming commitments to, variously, "issues important to minorities, "farm news," "PSAs produced by the Catholic dioceses," "interests of children, low-income individuals, the blind, and ... Asian-Americans, Hispanics, and Native Americans") (footnotes and citations omitted). EMF does not dispute the worthiness of such programming. But the point is there is a natural tendency for each community segment to seek programs tailored to its own needs rather those of the public at large.

[27] *See, e.g., Castaldo v. United States Parole Comn'n*, 554 F.Supp. 985, 987 (D. Colo. 1983) ("internally inconsistent action [can] not even pass the 'arbitrary and capricious' standard of review accorded administrative actions"); *Southern New England Tel. Co. v. MCI WorldCom Communications, Inc.*, 353 F.Supp.2d 287, 295 (D. Conn. 2005).

FCC, 642 F.2d 1221, 1237-38 (D.C. Cir. 1980) (Wilkey, J., dissenting in part) (noting that where "FCC has discretion to choose within a range of minimum rate standards that are rationally related to preventing cross-subsidization," if it "sets minimum rates at a level higher than is rationally related to the goal of preventing cross-subsidies, [it] impairs competition without rational justification, and is subject to judicial reversal for arbitrary and capricious action" which application of the "standard of review is nothing more than a specific application of the general principle ... that the agency's authority is to be measured by its purposes"). Similarly, the extent to which the rules are literally nonsensical in some contexts, as shown above, [28] will support a finding that they are arbitrary and capricious. The rules also would be deemed arbitrary and capricious where even the Commission recognizes (albeit unwittingly) they will not advance its localism objectives, *see Aeronautical Radio, Inc. v. FCC, supra*, such as where it is unclear how increased reporting obligations will serve any purpose given the credit the Commission gives to claims that self-reported broadcaster estimates of the hours they devote to news and public affairs programming are "inflated." [29]

B. The Proposed Rules Will Not Withstand Constitutional Scrutiny

Even if the reporting, advisory board, and other requirements could satisfy the APA, any FCC proposal to re-insert itself into broadcasters' editorial decision-making, and to do so to a greater extent than ever before, would be unconstitutional under the First Amendment. It is easy to "call for aggressive policy" that does not rely on "deregulated markets [to] provide society with ... diverse local broadcast matter" yet that also "does not conflict with First Amendment

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[28] *See supra* at 10-11 (questioning logic of, *e.g.*, all-sports stations being forced to meet with local officials to identify local concerns, or to report on how they compile playlists).

[29] *NPRM*, 23 FCC Rcd. at 1340 n.60. Without the Commission inserting itself much more directly in what licensees view as newsworthy or otherwise of interest to the local public, there is no reason to believe that it will not continue to view as suspect even the reports submitted under the new requirements.

principles,"[30] but as shown by the *NPRM* (and the *Enhanced Disclosure Order*), it is much harder – impossible, we submit – to accomplish without trenching on broadcasters' editorial discretion and constitutional rights. As a threshold matter, the FCC's ability to even consider regulating in ways that directly affect program content, as will the proposed rules, arises only under the differential level of First Amendment protection afforded broadcasters, based on notions of "spectrum scarcity."[31] However, the extent to which (i) the Commission has found that "the scarcity rationale, which historically justified content regulation of broadcasting ... is no longer valid,[32] and that the media landscape has changed drastically,[33] (ii) its staff has reached similar conclusions,[34] and (iii) courts have pondered *Red Lion*'s ongoing validity,[35] all may serve to "obviate the constitutional legitimacy of the FCC's robust oversight" of broadcasters in the manner the *NPRM* proposes. *See Fox Television*, 489 F.3d at 466.

In any event, regardless whether this "differential level" of constitutional protection for broadcasters can be sustained, the public interest standard remains the "touchstone of authority" for the Commission, *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940), and will continue to "necessarily invite[ ] reference to First Amendment principles." *CBS, Inc. v. DNC*, 412 U.S. 94, 122 (1973). Additionally, where new rules regulating broadcast content such as the *NPRM*'s proposals necessarily implicate the First Amendment, reviewing courts are not required to defer

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[30] *See NPRM*, 23 FCC Rcd. at 1342.

[31] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[32] *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987) (citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985)).

[33] *See supra* at 21 (citing *Biennial Regulatory Review*).

[34] John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005) at 8, 11.

[35] *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("*Turner I*") (impliedly questioning validity of "rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation"); *Time Warner Entmt. Co. v. FCC*, 105 F.3d 723 (D.C. Cir.) (Williams, J., dissenting in 5-5 denial of rehearing).

to FCC findings.[36] While obvious tensions between traditional First Amendment precepts and regulations like ascertainment and reporting mandates previously were muted so long as the FCC approached broadcast licensees with sensitivity to the competing values at stake,[37] the Commission appears poised to abandon that restraint.

It is particularly notable in the present context the extent to which the D.C. Circuit has observed that the notion of "diverse programming" may be "too abstract to be meaningful" while "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment." *Lutheran Church-Missouri Synod*, 141 F.3d at 354. This is echoes the FCC conclusion – *fourteen years earlier* – that "concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance" when it comes to obligations such as those the *NPRM* proposes.[38] The manner in which the FCC must "walk a 'tightrope' to preserve the First Amendment values written into the [ ] Act" is matter "of great delicacy and difficulty," but even so it must "maintain – no matter how difficult the task – essentially private broadcast journalism."[39] Thus, "although 'the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve,

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[36] *See, e.g.*, *United States v. Playboy Entmt. Group*, 529 U.S. 803, 817-818 (2000); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

[37] *See supra* at 19-20 (citing *En Banc Programming Inquiry*, 44 F.C.C. 2303).

[38] *Commercial TV Deregulation Order*, 98 F.C.C.2d at 1089 (citing *Office of Communication of the United Church of Christ*, 707 F.2d at 1430; *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978)). *See also id.* (citing *CBS v. DNC*, 412 U.S. 120; *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978)). *Cf. PIRG v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (expressing "doubts as to the wisdom of mandating ... government intervention in the programming ... decisions of private broadcasters"); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) ("the First Amendment demands that [the FCC] proceed cautiously [in reviewing programming content] and Congress ... limited [FCC] power in this area"). The extent to which the adoption of the rules proposed in the *NPRM* would effectively repudiate prior FCC holdings under the First Amendment would be another departure from precedent the Commission must justify. *Cf. Fox Television, supra* at 456-57.

[39] *CBS v. DNC*, 412 U.S. at 120.

[it] may not impose upon them its private notions of what the public ought to hear,'"[40] which is what the current proposals, despite FCC protests to the contrary,[41] appear poised to do.

Insofar as the creation of "permanent advisory boards," detailed reporting of "local" or public-interest programming, and new renewal processing guidelines insert the FCC into broadcasters' editorial decisions to a greater extent than ever before, such regulations are incompatible with basic First Amendment tenets. As the D.C. Circuit has observed, the "power to specify material which the public interest requires or forbids to be broadcast . . . carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike." *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968). Public interest requirements relating to specific program content create a "high-risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments," and "must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship."[42] It is for these reasons the D.C. Circuit has, *inter alia*, disapproved "a more active role by the FCC in oversight of programming" on educational stations because it "threaten[s] to upset the constitutional balance struck in *CBS v. DNC*,"[43] and invalidated having noncommercial broadcasters maintain audio recordings for 60 days of all programs discussing issues of public importance, as it "place[d] substantial burdens on [them] and present[ed] the risk of direct governmental interference with program content."[44]

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[40] *Turner I*, 512 U.S. at 650 (1994) (citing *En Banc Policy Statement*) (citation omitted).

[41] *See infra* note 45 and accompanying text.

[42] *Id.* at 1096. *See also PIRG v. FCC & Anti-Defamation League*, *supra* note 38.

[43] *Accuracy in Media v. FCC*, 521 F.2d 288, 296-297 (D.C. Cir. 1975). *See also Community-Service Broad. of Mid-America v. FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978) (*en banc*) (FCC and courts generally eschew "program-by-program review" due to constitutional dangers).

[44] *Community-Service Broad.*, 593 F.2d at 1105. Although the decision in *Community-Service Broadcasting* turned on equal protection grounds because of the special requirement for noncommercial broadcasters, it also emphasized that the taping requirement "in its purpose and

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Gathering information as detailed as the proposed rules will require is not a neutral act, nor is it intended to be. When it adopted Form 355 and related mandates for television, the FCC disclaimed to be "altering in any way broadcasters' substantive public interest obligations," adopting "quantitative programming requirements or guidelines," or requiring broadcasters "to air any particular category of programming or mix of programming types."[45] That claim cannot be made now, as those mandates are proposed in the instant *NPRM*. Even if the mandates are not specifically adopted, the reporting requirements themselves have as a goal subjecting broadcast programming to greater oversight. The Commission may disavow any intent to create programming quotas, but the D.C. Circuit has recognized the various ways the FCC can pressure regulatees, "some more subtle than others," and in particular observed the FCC "has a long history of employing ... 'a variety of *sub silentio* pressures and "raised eyebrow" regulation of program content.'"[46] In this regard, investigations based on data filed on a form pose "a powerful threat, almost guaranteed to induce the desired conduct," *id.*, and it is clear that a station "would be flatly imprudent to ignore any one of the factors it knows may trigger intense review." *Lutheran Church-Missouri Synod*, 141 F.3d at 353. Such concerns are particularly acute where the change in FCC procedures reinforces the government's ability to supervise content more intensively. Adopting renewal processing guidelines or substantial programming reporting obligations such as those in Form 355 clearly places the FCC in the business of program regulation.

The foregoing First Amendment infirmities aside, if the Commission adopts the advisory board, reporting, and processing rules the *NPRM* proposes, there is no doubt the practical effect

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operation serves to burden and chill the exercise of First Amendment rights by noncommercial broadcasters." *Id.* at 1110.

[45] *Enhanced Disclosure Order*, 23 FCC Rcd. at 1275, 1287, 1292.

[46] *MD/DC/DE Broad. Ass'n,* 236 F.3d 13, 19 (D.C. Cir. 2001) (quoting *Community-Service Broad.*, 593 F.2d at 1116).

would be indistinguishable from programming quotas. As the D.C. Circuit noted with regard to the FCC's EEO rules in rejecting arguments such quantitative guidelines do not have a quota-like impact on licensees: it "cannot be seriously argued" such a guideline "does not create a strong incentive to meet the numerical goals. No rational firm – particularly one holding a government-issued license – welcomes a government audit."[47]

It is quite clear from the *NPRM* (and *Enhanced Disclosure Order*) that the information obtained via the new reporting requirements will be fodder for citizen complaints and petitions to deny, *NPRM*, 23 FCC Rcd. at 1336, and will be used to evaluate broadcasters' performance for purposes of license renewal. *See id.* at 1336, 1345. The whole point of the exercise is to effect changes in current editorial practices. Just the fact that new processing guidelines will remove some renewal applications from Bureau approval in the ordinary course, and instead refer them for full Commission action if certain prerequisites are not met in precisely the one-size-fits-all way the new rules demand, will produce the kinds of costs and uncertainties that "exert a chilling effect on the licensee's willingness to court official displeasure." *Community-Service Broad.*, 593 F.2d at 1110. This chilling effect can exist even when a new rule "neither creates any new content restrictions ... nor establishes any new mechanism for enforcement of existing standards," which is not the case here in any event, if such measures are adopted for the purpose of exerting control over content, as the *NPRM* seeks to do. *Id.* at 1115. In such cases, the "ultimate concern is not so much what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves. *Id.* at 1116. This chilling effect, and the extent to which the Commission seeks to interfere with

[47] *Id.* at 353. *Cf. House Letter* at 1-2 ("the stated goal of the reregulation [of main studios] to 'encourage broadcasters to produce locally originated programming' requires a [misplaced] logical leap ... and is a thinly guised method of controlling broadcast content").

broadcasters' editorial discretion in the name of "localism," raise serious constitutional red flags that the Commission cannot ignore.

V. CONCLUSION

All things considered, there is no justification for the type of content-intensive FCC rules proposed by the *NPRM* in the name of "broadcast localism." Broadcasters have served their communities of license for decades, and are better positioned than any non-local competitor – or Washington, D.C. regulator – to determine what will best serve local interests. The competition the Commission cited in recognizing as much has only blossomed, and thereby increased the pressure on broadcasters to respond to local concerns to set themselves apart in the market. The Commission cannot easily abandon its precedent of the last quarter-century, nor lightly interfere with broadcasters' editorial discretion in that regard without violating long-settled First Amendment precepts. Moreover, on a practical level, many of the proposals are so burdensome that they will adversely affect the ability of broadcasters, such as EMF, to produce the very public interest programming the FCC is attempting to foster through the proposed rules. Accordingly, EMF respectfully submits that the Commission should reject the proposals discussed herein that would serve only to hamstring broadcasters in exercising their discretion regarding the best ways to serve their communities of license given a station's resources and its niche in the market for broadcast programming.

Respectfully submitted,

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