

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

In the Matter of)	
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Broadcast Localism)	MB Docket No. 04-233
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COMMENTS OF GRAY TELEVISION, INC.

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SUMMARY

As the record in this proceeding already demonstrates, localism is thriving in the broadcast services. The Commission's tentative conclusions and proposals for additional regulatory oversight ignore the market's essential role in encouraging locally responsive programming. Today, broadcasters serve a critical need for news, information, and entertainment within their communities; yet, they also compete with a vast supply of content from a myriad of sources. Members of a television station's audience can satisfy their need for national news through dedicated cable news channels and their need for last night's network programming by streaming the content to their computers or downloading it to their iPods. Currently, however, local broadcasters hold the unique position of providing a free, ubiquitous service that appeals to diverse audiences seeking local news and information. To maintain this position, broadcasters must retain the flexibility and freedom to compete for viewers in the manner station licensees deem most appropriate and effective in their local markets. By diverting limited resources to process and paperwork, the proposed regulations will stifle a broadcaster's ability to provide the kind of locally-targeted programming upon which their audiences rely and which distinguish broadcasters from other content suppliers in the marketplace.

Gray is committed to serving the local needs of each of its markets, and because of this commitment, its stations are successful news leaders in each market they serve. In these comments, Gray explains the ways in which its stations assess and satisfy the demands of local audiences. Each of the Gray stations has developed its own policies and procedures to identify and address the unique needs and concerns of the community it serves.

The Commission's proposals in this proceeding perplexingly seem to assume that a station will not engage its local community in an ongoing dialog unless required to do so by the Commission. The record does not support such an assumption. Distilling the issue to its essence, there is simply no economic incentive for a station to ignore the needs of its community, and every incentive to identify and respond to those needs. A station must satisfy the needs of their audiences and sell advertising to survive, and given the glut of available content, broadcasters must make a unique offering to meet these objectives.

The Commission's stated goal of increasing the quantity and quality of local programming is laudable, but some of its proposed methods are archaic. Years ago, the Commission sent the proposed rules relating to formal ascertainment procedures, main studios in the station's city of license, technical staffing of a station 24 hours a day, 7 days a week, and minimum amounts of required programming to the regulatory scrap heap for good reasons. The rules were unnecessary, they did not work and, as demonstrated in well-documented proceedings, they actually hampered broadcasters' ability to provide local programming.

Today's broadcast marketplace bears little resemblance to that of a decade ago. Broadcasters now compete with 24/7 news networks, interactive media, and developing online services, such as YouTube.com, that are rapidly changing consumer habits and challenging the role of traditional over-the-air broadcasting. In this highly competitive news market, broadcasters cannot function effectively if they are restricted by flawed outdated rules and regulations. Broadcasters are on the cusp of the exciting new era of digital broadcasting. Accordingly, stations must retain the freedom and flexibility to use

their resources in the most effective manner so that they can create exciting and informative programming that best captures the attention and interest of their local viewers.

The record is clear. The rules proposed by the Commission are unnecessary, as broadcasters already amply serve the local needs of their communities. The marketplace will reward those broadcasters that serve local needs and will punish any that fail to recognize the power and importance of localism. Gray therefore submits that the Commission should let successful broadcasters continue to do what they do best – serve their communities, unfettered by misdirected and counterproductive regulations.

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Gray Television, Inc. (“Gray Television” or “Gray”) hereby submits its comments in response to the Commission’s *Report on Broadcast Localism and Notice of Proposed Rulemaking* (the “*Localism NPRM*”) in the above-captioned proceeding.¹ Gray Television Licensee, Inc., a wholly owned subsidiary of Gray, is the licensee of thirty-six television stations in thirty markets. For over fifty years, Gray has successfully brought high quality news coverage of local communities to mid-size markets. Gray stations are recognized as news leaders in their markets. In fact, in each market that Gray serves, one of its stations is designated as either #1 or #2 for news, as rated by Nielsen.²

¹ *In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218, MB Docket No. 04-233 (Rel. Jan. 24, 2008) (“*Localism Report*” or “*NPRM*”).

² WVLT-TV, Knoxville, TN (#2), WKYT-TV, Lexington, KY (#1), WSAZ-TV, Huntington, WV (#1), KAKE-TV, Wichita, Kansas (#2), WOWT-TV, Omaha, Nebraska (#2), WMTV(TV), Madison, WI (#2), WNDU-TV, South Bend, IN (#1), KKTU(TV), Colorado Springs, CO (#2), KWTX-TV, Waco, TX (#1), KOLN(TV), Lincoln, NE (#1), WITN-TV, Washington, NC (#1), WCTV(TV), Tallahassee, FL (#1), KOLO-TV, Reno, NV (#1), WILX-TV, Lansing, MI (#2), WRDW-TV, Augusta, GA (#1), WEAU-TV, Eau Claire, WI (#1), WIFR(TV), Rockford, IL (#2), WSAW-TV, Wausau, WI (#2), WIBW-TV, Topeka, KS (#1), WJHG-TV, Panama City, FL (#1), KXII-TV, Sherman, TX (#1), WTVY(TV), Dothan, AL (#1), WHSV-TV, Harrisonburg, VA (#1), WCAV(TV), Charlottesville, VA (#2), WBKO(TV), Bowling Green, KY (#1), WTOK-TV, Meridian, MS (#1), KKCO(TV), Grand Junction, CO (#1), WTAP-TV, Parkersburg, WV (#1), WYMT-TV, Hazard, KY (#1).

Gray is committed to serving the local needs of each of its thirty markets. Each Gray station has found successful methods to reach out to its community, to assess that community's needs, and to provide programming that is responsive to those needs. Gray stations do not provide responsive programming because it is required by regulation, or even because it is strongly encouraged by the corporate office. Rather, each station is a news leader because broadcasters know that localism is the life blood of a successful station.

While Gray understands and shares the Commission's desire to encourage every station to strive to bring high quality local programming to its viewers, the proposals made in the *Localism NPRM* will not serve that purpose. Rather, these proposals will return broadcasters to an era when local programming was inhibited by the need to comply with time-consuming and counterproductive regulation. In this highly competitive news market, where television stations compete not only with other television stations and newspapers, but also with 24/7 cable news networks and the Internet, broadcasters must retain the freedom and flexibility to create programming that can compete for these viewers. Broadcasters are embracing an exciting new era of digital broadcasting and interactive media. This era has no place for outdated rules, already once discarded.

I. COMMUNITY ADVISORY BOARDS.

To Gray and many other broadcasters, the Commission's proposal to require all stations to convene and consult Community Advisory Boards ("CAB") hearkens back to the era of formal ascertainment. Adoption of this proposal would be harmful to broadcasters and the communities they serve, and Gray believes that there are four

compelling reasons against implementing compulsory CABs. First, Gray is confident that this proceeding's record will show that there is no need to revisit the Commission's twenty-five year old repeal of formal ascertainment. Second, a CAB requirement would contradict a longstanding Commission policy against implementing "one-size-fits-all" regulations. Third, while it understands that CABs may be effective for some broadcasters, Gray sees regimented CABs as an outdated concept ill-suited to the realities of today's dynamic media marketplace. Finally, Gray believes that broadcasters must retain the flexibility and discretion to choose the best methods of identifying and meeting their markets' local programming needs, and should not be impeded by artificial and unnecessarily formalized requirements for interaction with community members.

A. The Record Will Not Support a Return to Formal Ascertainment.

The Commission has traditionally attempted to provide broadcasters with the greatest flexibility to serve the needs of their communities. It should do the same in regulating how broadcasters *determine* those needs. Yet, the proposed requirement that every broadcaster convene a permanent CAB contradicts the Commission's earlier decision not to prescribe particular ascertainment methods to broadcasters. In addition, the Commission has not identified a change in circumstances that would warrant the imposition of these new formal requirements.

More than a quarter-century ago, the Commission abandoned its regulations requiring broadcasters to engage in a formalized ascertainment of community interests, needs, and issues according to a government-mandated set of specifications.³ In

³ See *Deregulation of Radio*, Report and Order, 84 F.C.C.2d 968, ¶ 56 (1981) (freeing radio broadcasters from the "ritual of ascertainment" by allowing them to determine community issues "by any reasonable means"); *Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 F.C.C. 2d 1076, ¶ 8

repealing the ascertainment procedures, the Commission made a number of factual findings that are still true—and even more compellingly so—today, following the dramatic expansion of the media marketplace over the past two decades.

In the 1980s, the Commission determined that market forces would provide broadcasters with significant incentives to remain familiar with the needs of their communities. This is still true. In light of market pressures that have only increased over the past twenty-five years, broadcast licensees have continued to use a broad range of informal methods of assessing and responding to community needs.

Cost was another key factor in the Commission’s decision to repeal the formal ascertainment rules. For example, ascertainment-related costs were exceedingly high and exacted almost 67,000 work hours from licensees and over 700 work hours at the Commission. In repealing television broadcasters’ ascertainment obligations, the Commission cited a 1983 study estimating the average cost of compliance as \$6,500 per television licensee.⁴ Adjusting *only* for inflation, the average cost of compliance today would be \$13,935.⁵

Formal ascertainment also imposed indirect costs on broadcasters, all of which are still relevant. In 1984, the Commission noted the increased prevalence of “litigation over trivia.”⁶ Gray believes that the Commission would be hard-pressed to demonstrate that

(1984) (abandoning formal ascertainment based on evidence that “licensees will continue to supply informational, local, and non-entertainment programming in response to existing as well as future market conditions” and because of “potential conflicts with congressional policies expressed in the Regulatory Flexibility Act and the Paperwork Reduction Act”) (“*TV Deregulatory Order*”).

⁴ *TV Deregulatory Order* ¶ 51.

⁵ Calculated at <http://data.bls.gov/cgi-bin/cpicalc.pl>. (last visited on April 23, 2008)

⁶ *TV Deregulatory Order* at ¶ 52.

U.S. culture has become less litigious over the past twenty-five years. As will be discussed in detail below, the Commission's vague CAB mandate would likely expose broadcasters to unnecessary and burdensome litigation over the process of choosing which "community segments" to include in CABs and how to respond to their advice or suggestions.

Finally, the Commission also found that the cost of complying with the formal ascertainment process squandered station resources that could have been devoted to "potentially beneficial activities," such as local programming.⁷ As the Commission is well aware, in the years since 1984 the media market has expanded geometrically; today, television and radio broadcasters compete with an ever-expanding variety of new forms of media. As a result, the broadcast industry vies for a comparatively smaller portion of advertising revenues, and this has stretched many broadcasters' budgets to the breaking point.

The imposition, by Commission directive, of any single method of community ascertainment inevitably will have significant associated costs. Without a concomitant increase in revenues, stations will have to divert resources from other "potentially beneficial activities" to meet an unnecessary new regulatory burden.

B. A "One-Size-Fits-All" Regulatory Approach Does Not Serve the Commission's Localism and Diversity Goals.

The Commission has proposed that all broadcast licensees should be required to convene CABs to affirm that they are serving the needs of their local communities. The CAB proposal marks an unwelcome shift in the Commission's regulatory approach by imposing a rigid, one-size-fits-all rule instead of providing broadcasters with flexibility to

⁷ *Id.* at ¶ 53.

adjust to the changing needs and characteristics of their communities. Gray therefore urges the Commission to exercise restraint and to provide broadcasters with the maximum flexibility to choose the best means of assessing the needs and concerns of their communities.

The Commission has traditionally shied away from addressing discrete issues with a broad regulatory brush. In other contexts, the Commission has recognized that broadcasters face varying sets of challenges that make singular solutions untenable. For example, in the DTV Third Periodic Review, Commissioner Tate recognized that television broadcasters face a dizzying array of technical challenges and noted, “[a] one-size-fits-all approach is not prudent for an industry that serves thousands of diverse communities.”⁸ Commissioner Tate’s sentiment echoes prior proceedings in which the Commission declined to adopt heavy-handed unilateral regulatory approaches.⁹ Outside of the broadcast context, the Commission has noted, “[a] one-size-fits-all approach could deter innovative approaches.”¹⁰

Moreover, in overhauling its EEO regulations following the D.C. Circuit decision in *Lutheran Church – Missouri Synod*, the Commission made two observations that are

⁸ *Third Periodic Review of the Commissions Rules and Policies Affecting the Conversion to Digital Television*, Rep. & Order, FCC 07-228 (released Dec. 31, 2007) (statement of Commissioner Tate).

⁹ See, e.g., *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community Of License in the Radio Broadcast Service*, 21 FCC Rcd 14212 ¶ 32 (2006) (noting that the decision to remove a community’s sole local service is “better suited to a case-by-case analysis than to any ‘one size fits all’ test”).

¹⁰ See, e.g., *Chariton Valley Communication Corporation*, 20 FCC Rcd 7526, ¶ 10 (2006) (stating that “the characteristics of a given licensee’s system . . . affect[s] the suitability of particular variants of location technology, and that there is no ‘one size fits all’ solution”); *The Pay Telephone Reclassification and Competition Provision of the Telecommunications Act of 1996*, 19 FCC Rcd 21457, n. 73 (2004); *2000 Biennial Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 19 FCC Rcd 19078, ¶ 87 (finding that “a ‘one size fits all’ approach to spectrum management is unlikely to yield optimal spectral efficiency”).

particularly relevant here: first, that there is “considerable value in allowing individual broadcasters flexibility to design outreach programs that will work in their communities, and second, that there is no effective ‘one-size-fits-all’ recruitment model.”¹¹ Although it subsequently revised its EEO regulations following a second appellate challenge, the Commission retained its wariness of unilateral regulatory mechanisms and adopted a “menu” of compliance options that give broadcasters “great flexibility to design the types of recruitment activities best suited to their organizations *and communities*.”¹²

Even in the localism context, the Commission has recognized the ineffectiveness of formal, rigid processes. When it abandoned the formal ascertainment process twenty-five years ago, the Commission observed, “to the extent that the licensee is compelled to follow specific procedures, resources are diverted and the opportunity for licensee discretion is foreclosed.”¹³ Accordingly, Gray exhorts the Commission not to force all broadcasters to establish CABs as a formalistic vehicle for community assessments, to the inevitable exclusion of other, more effective, ascertainment methodologies.

C. Compulsory Community Advisory Boards Will Not Meet the Demands of Twenty-First Century Audiences.

While Gray does not dispute that some broadcasters might see CABs as an efficient and effective way to gauge a community’s needs and interests, the Commission

¹¹ See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, *Report & Order*, 15 FCC Rcd 2329, 2369 (2000); *rev'd MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13 (D.C. Cir. 2001).

¹² See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, *Second Report & Order & Third Notice of Proposed Rule Making*, 17 FCC Rcd 24018, ¶113 (2002) (emphasis added).

¹³ *TV Deregulatory Order* at ¶ 53.

should not base its tentative conclusion on the experience of a single broadcast licensee.¹⁴ In some communities, for some stations, a CAB may be an appropriate method of ensuring a station's responsiveness to its community. But what works in Raleigh may be impracticable in Reno. Accordingly, Gray urges the Commission to reject the notion that a CAB would, in all cases, be the best method to ascertain community issues.

Although Gray is not in a position to speak for the entire broadcast industry, it believes that its stations represent a range of effective and established ascertainment practices. At the corporate level, Gray has chosen not to prescribe community ascertainment procedures from on high. Instead, Gray realizes that those who live and work in the communities its stations serve are best suited to know how to assess local needs efficiently and effectively. Thus, Gray has decentralized community ascertainment so that stations – not a distant corporate headquarters – determine the best method for obtaining community input. As a result, each Gray station engages in a variety of activities to ensure that it remains responsive to local needs. While these efforts are community-specific, several trends can be seen across the Gray family of stations. Stations learn about local needs through their own newsgathering efforts and their employees' involvement in community organizations. Many Gray stations also perform micro-ascertainment in order to provide programming that responds to the needs of sub-communities within their coverage area. Further, while they still communicate with audiences through traditional means, such as the telephone, stations are increasingly engaging in an ongoing dialog through newer interactive media.

¹⁴ In the NPRM, the Commission supports its CAB proposal by noting “a number of licensee commenters have reported the benefits” arising from CABs. *See* NPRM ¶ 26. Yet the NPRM identifies only one broadcast station, WTVD-TV, as specifically having an “organized minority board.” *Id.* at ¶ 13.

1. Station Personnel Are the “Eyes and Ears” of Their Community.

Regardless of other formal or informal ascertainment, a station’s community presence is linked principally to its employees’ active participation in local organizations, such as schools, churches, clubs, charities, and other community groups. For example, Lisa Guill, the General Manager of KOLN(TV), Lincoln, Nebraska, sits on the board of the Child Advocacy Center, a local organization that provides Lincoln “with a coordinated, multi-disciplinary approach to the problem of child abuse.”¹⁵ Through Ms. Guill’s involvement with the Child Advocacy Center, KOLN undertakes an annual campaign to raise local awareness of child abuse. During the month-long campaign, KOLN runs Public Service Announcements (“PSAs”) targeted to the issue of child abuse and produces several in-depth news segments on the issue. These PSAs and news segments provide viewers with specific information, such as how to spot the signs of child abuse, and they also highlight local resources available for child abuse victims and their families. Each year, the station’s campaign culminates in a large community fundraising event hosted in part by KOLN. The station’s relationship with the Child Advocacy Center has benefited the Center and community in less visible ways as well. For example, KOLN produced a five-minute video for the Center to use in its efforts to educate state lawmakers about the need for new legislation addressing child abuse issues. The video, which the station has never aired, has proven to be a tremendously effective tool in the Child Advocacy Center’s legislative efforts.

¹⁵ See <http://www.smvoices.org/mission.htm>

KWTX-TV, Waco, Texas also is representative of this approach and its management and other personnel serve of the board or volunteer for the following organizations and events:

AJ Moore Academy Advisory Board	Knights of Columbus
American Cancer Society	Mentor of a scoliosis patient
Association of US Army	Miracle Match Marathon
Back to School Drive	Muscular Dystrophy Association
Bair Foundation	Parents for Public Schools
Baylor Alumni Organization	PFLAG
Big Brothers/Big Sisters	Planned Parenthood
Bosque Animal Rescue Kennels	Rodeo Youth Scholarships
Catholic Charities of Texas	Salado Chamber of Commerce
Church Meals Volunteer	Selective Service Review Board
Church Youth Group	Society of Human Resource Managers
Copperas Cove Chamber of Commerce	Temple Chamber of Commerce
Cotton Palace Committee	TX DARE Officers Association
Families in Crisis	Waco Chamber Advisory Board
Feeding the Homeless	Waco Chamber of Commerce
Gatesville Chamber of Commerce	Waco Crimestoppers
Go Red for Women	Waco Habitat for Humanity
Greater Waco Interfaith Conference	Waco High School PTA
Historic Waco Foundation	Waco Independent School District Advisory Board
HOT Fair & Rodeo Board	Waco Striders (a running club)
Junior League of Temple	Waco Sunrise Rotary Club
Junior League of Waco	West Independent School District Campus Plan Group
Killeen Chamber of Commerce	YMCA

The diverse and at times opposing agendas of these organizations encourage the KWTX employees to bring a wide-variety of perspectives to the stories the station produces on local issues.

Other stations, such as WKYT-TV, Lexington, Kentucky, have found that one particularly effective method of community ascertainment is to encourage all of their employees – from the most junior staff member to the General Manager – to act as the “eyes and ears” of the community. At monthly staff-wide meetings, employees share

feedback on WKYT's local news coverage, as heard from their neighbors, community groups, places of worship, and around town. Employees also are encouraged to use this opportunity to share with station management the pressing issues in their communities and neighborhoods.

At one recent informal station meeting, a WKYT employee identified an issue of particular concern. The employee learned through her child's parent teacher organization that several unregistered sex offenders had been identified as living near her child's school. Understandably, the parents in the community were concerned. WKYT took this information and partnered with the local police force to launch a special news segment to locate unregistered sex offenders in the community. Once a quarter during the station's 5:30 p.m. news cast, the station provides information on unregistered sex offenders believed by the police to be living in the area. The station broadcasts a hotline number that viewers can call to provide the police with information on the unregistered sex offenders' locations. The police are present at the station to field calls from the hotline for an hour and half. This special segment has been well received by local viewers, who recognize and appreciate the service provided by WKYT in keeping children in the community safe.

2. CABs Would Frustrate Gray Stations' Longstanding Tradition of Micro-Ascertainment Efforts.

In addition to other, broad-based means of assessing the needs and concerns of its audience, numerous Gray stations find "micro-ascertainment" meetings to be a productive method of determining the issues facing a discrete community within its overall service area. These stations use the meetings to produce focused news stories on a particular community, called "Our Town" or "Our Neighborhood" series. WTOK-TV,

Meridian, Mississippi, has produced several “Our Town” community profiles each year. Each of WTOK-TV’s “Our Town” series consists of significant outreach by the station to the profiled community and one week of focused daily news coverage on the selected community.

Several weeks prior to broadcasting an “Our Town” series, members of WTOK-TV’s management team set up meetings with representatives of the selected community (*e.g.*, churches, schools, medical facilities, municipal government, and chamber of commerce). At these meetings, the WTOK-TV managers discuss the needs and concerns of the targeted community and work with local leaders to develop a plan for profiling the community. Typically, an “Our Town” series will be scheduled to coincide with a community event, such as a fair, in order to assist the community with its promotional efforts. During the “Our Town” week, each of WTOK-TV’s evening newscasts features at least two stories about the selected community. The station typically will also produce and broadcast two full newscasts from a site within the subject community.

WTOK-TV’s presence during an “Our Town” week has also spawned numerous non-broadcast community partnerships. For example, following one such series, a local judge, who was involved with a teen anti-smoking campaign, contacted the station. Together, the judge and WTOK-TV developed a plan to sponsor a contest at the local high school in which students would prepare anti-smoking videos. Station staff members served as judges in the contest and provided students with valuable feedback and tips on their productions.

Gray submits that the successful micro-ascertainment of WTOK-TV’s “Our Town” series is incompatible with the Commission’s CAB notions. By targeting specific

micro-communities within the larger, Meridian, Mississippi region, WTOK-TV is able to achieve what may be impossible in an FCC-mandated CAB: consensus in a particular community on local needs, interests, and concerns, and immediate programming responsive to that consensus.

For stations serving large or even mid-size metropolitan areas, a CAB will cast an impossibly wide net. CAB members representing organizations in the northern part of a station's coverage area may want the station to change its approach to reporting on crimes. Likewise, CAB members from a market's southern region may want to see a greater emphasis on education and cultural activities. Eastern leaders may focus on the local economy, while western leaders may want greater programming on healthcare. To be sure, each of these concerns is legitimate and worthy of coverage; however, a mandatory CAB would place a station in the position of trying to be all things to all people.

3. Contemporary Audiences Want To Communicate Directly with Broadcasters, Not Through Intermediaries Appointed to CABs.

In addition to learning of community needs through these traditional means, Gray stations have successfully embraced a multi-media approach to soliciting community input. At the end of many local news stories, Gray stations invite viewers to call a toll-free phone number or visit their websites to comment on the content and coverage of what they have just seen. Gray stations also post both a text and a video version of local news stories on their websites for anyone to read and watch. But the stations do not stop at merely soliciting local comment. They incorporate these comments into their websites for other community residents to read, and they frequently incorporate and respond directly to comments in subsequent broadcasts.

The net effect of this triad of repeated requests for viewer input, direct response, and interaction among viewers cannot be overstated. Instead of hearing from community residents through quarterly meetings of community intermediaries, Gray stations' internet presence provides a direct link to individual community members. In essence, Gray has created continuous virtual town hall meetings. Because of this ongoing dialog, audiences know that Gray television stations are listening and, more importantly, will respond.

The ubiquity of mobile phones and other handheld devices has empowered broadcast audiences to provide stations with real-time input and feedback. As a result, audiences expect immediate responses. For example, in February 2008, there was a very serious traffic blockage in Madison, Wisconsin. Motorists trapped in this backup were unable to obtain any information on the cause or expected resolution of the problem. Several drivers caught in the backup called the police to report the problem, but were rebuffed. Others called WMTV, a Gray station licensed to Madison, Wisconsin. Within two hours of receiving the first telephone call, the station began broadcasting live coverage of the situation. The congestion ultimately lasted more than 18 hours and was only resolved after the National Guard was called in to manage the situation. The official report of the incident cited WMTV's responsiveness and live coverage as the key to prodding local government agencies to untangle this severe and potentially dangerous traffic snarl. A quarterly CAB could not have engendered the same level of community trust and station responsiveness to local needs.

Twenty-first century audiences have new and greater expectations of broadcasters. With the increase in broadband connectivity, broadcast audiences are increasingly likely to interact with their local stations via the internet. This change in the

mode of communication has two profound effects on audience expectations. First, because the internet decreases the lag time between thought and action, viewers and listeners are increasingly empowered to interact directly with broadcast stations rather than funneling their commendations or frustrations through a community leader. Second, communicating over the internet raises the expectation of a response in “internet time.” A community member might be willing to wait for a month for a station to respond to issues raised in a CAB meeting or a week for a response to a letter. That same person might expect to receive a same-day response to an email or an online comment. Given the panoply of emerging media that are willing to tailor content to suit continually changing audience demands, broadcasters must remain sensitive and responsive to audience feedback in order to be successful.

Moreover, the idea of relying only on periodic meetings of community leaders to assess the needs of a community is, to be blunt, antiquated. While courts, commissioners, and commenters quibble over the amount of community news and information available on the internet, internet users are forming communities of their own. In the broadcast realm, one only needs to review the comments posted on a station website following the broadcast of a controversial local story to see the formation of a “micro-community.” Viewers do not stop at providing the station with their opinions; instead, they go on to engage in a viewer-to-viewer dialog, thereby creating their own sense of community. These micro-communities can develop almost instantaneously and might not have a readily identifiable “leader” who could participate in a future CAB meeting. Indeed, the micro-community may no longer exist at the time of the next CAB meeting.

A broadcaster, however, ignores these fleeting micro-communities and the local concerns they express at its own peril. Comments posted on a controversial story may provide a station with valuable feedback, and they may spark a valuable community debate. Moreover, the comments may also serve as a platform to organize dissatisfied viewers to boycott a station or, more dangerously, appeal directly to the station's advertisers.

Ernestine Cornett, WYMT(TV)'s General Manager, succinctly identified the amazing power e-mail and blogs now wield in broadcasting, stating, "why would we not recognize this technology for what it is? – A way to stay emotionally connected to our viewers, a way to keep our finger on the pulse of our communities. With such broad accessibility comes instantaneous, uncensored input Via e-mail we are immediately made aware of how viewers respond to our news and programming. We know what viewers want, what they don't want, what they like, what they dislike, what angers them or what they feel strongly about, and what they believe is right and just I sincerely doubt a planned forum or gathering could match this kind of honest, raw, local communication." Broadcasters should not be required to divert limited resources away from proven, effective methods of communication with their local communities to fund a mandatory CAB, which would be a cumbersome and ineffective method of determining community needs today, as other formal ascertainment requirements were two decades ago.

D. A Community Advisory Board Will Never Truly Reflect the Community It Represents and Will Likely Engender Controversy.

In addition to the foregoing concerns, the Commission's proposal presents several logistical problems that will undermine the ability of a CAB to be an effective guide on

community issues. Specifically, the Commission has provided little guidance on how broadcasters will determine the composition of a CAB. This single issue gives rise to several resource-draining problems.

First, the Commission has not proposed a minimum size for community segments seeking inclusion in a station's CAB. Without this threshold, there will always be objections that a CAB's membership is not sufficiently granular to serve as an accurate proxy for the larger community. The controversy surrounding a station's decision to exclude certain segments of the community will distract attention and resources from the task of promoting a useful dialog between broadcasters and the public on important community issues. Conversely, even if the Commission regulates the threshold size, it is likely that community segments that are not included will seek review, which would squander the Commission's resources and would impede the implementation of whatever localism-promoting measures the Commission ultimately adopts.

Second, broadcasters cannot realistically identify representative community segments that will satisfy everyone. The Commission has not indicated how it will protect licensees from petitions or lawsuits filed by excluded community segments. Similarly, the Commission has not indicated whether all community segments above a threshold size must be given a seat on the CAB, or whether licensees need only extend invitations to a certain percentage of community segments. Indeed, the Commission seems not to have reconciled its CAB proposal with the D.C. Circuit's observation that "making a single station all things to all people makes no sense. It clashes with the

reality of the [broadcast] market, where each station targets a particular [community] segment.”¹⁶

Likewise, the need for each licensee in a market to form its own CAB will quickly deplete the supply of board members who truly speak for substantial segments of the community. The Commission provides no guidance in the NPRM whether a board member could sit on multiple CABs. However, Gray questions how a small or even mid-size community could create enough CABs so that each licensee had a unique group of representative community leaders with which to work. In reality, the same people could end up on each licensee’s CAB, which will not provide broadcasters with fresh perspectives, or unique local opinions. Rather, with every broadcaster being given the same input, the only result will be cookie-cutter local news and other programming.

Finally, the logistics of creating, maintaining and monitoring the CAB will create an overwhelming burden that will only drain broadcasters’ resources from other, more effective means of communicating with their communities and providing responsive programming.

II. REINSTATING THE PRE-1987 MAIN STUDIO RULE WILL NOT ENCOURAGE MORE LOCAL BROADCASTING.

Gray Television strenuously objects to the Commission’s proposal to reinstate the pre-1987 main studio rule. The Commission provides no valid basis for reversing its own decision, twenty years ago, to relax the main studio rule. Indeed, the record fails to provide any reasonable basis whatsoever to support this proposal. Furthermore, the costs to licensees would be staggering—with no off-setting benefits to communities. Gray

¹⁶ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998).

submits that this proposed shift in policy is significantly more likely to harm localism than to encourage broadcasters to produce more local programming. In any event, further regulation is unnecessary, as localism is the key to operating a successful television broadcast station.

A. The Commission Does Not Provide an Adequate Basis for a Rule Change.

The Commission fails to provide a sound basis for modifying the current main studio rule. The Commission provides no data, no anecdotal evidence, and no logical argument to support its proposal. Its only concrete support is a single comment from a single individual expressing her view at a public hearing.¹⁷

At best, this sweeping proposal is based on a well-meaning policy that is ultimately unrelated to the behavior that it seeks to regulate. In asking whether a return to the pre-1987 rule would result in more interaction between stations and their audiences or more local programming, the Commission implicitly suggests that stations located within the city limits of their community of license are in a better position to serve that community. In Gray's experience, however, there is no connection between the amount and quality of local programming provided by stations physically located within their community of license and those stations located outside their community of license. All of Gray's stations – the twenty-eight with main studios located inside their communities of license and the six with main studios outside their communities of license – are news leaders within their markets. For example, WITN-TV, is #1 for News in its combined market of Greenville-Washington-New Bern-Jacksonville, NC. WITN has been located

¹⁷ *NPRM* ¶ 41, citing Testimony of Blanca Zarazua, Chair, Hispanic Chamber of Commerce of Monterey, California (Monterey Tr. 48-49).

in Chocowinity, North Carolina for all of the fifty years it has been on the air. This station is located approximately three miles from its community of license, Washington, North Carolina. It is absurd to think that these three miles have impacted WITN's ability to serve its local community. In fact, station management believes that WITN's location outside the city limits of Washington has allowed the station to be more responsive to broader regional news needs.

The Commission itself, in 1987, specifically rejected the premise that the location of a station's main studio outside its community of license compromises the station's service to the public. At that time, the Commission noted that "the coverage of local issues does not necessarily have to come from locally produced programming,"¹⁸ in part because advancements in technology and "innovative production methods" made the production role of the main studio unnecessary. Rather, these advancements allowed stations to "present programming in numerous ways and from a diversity of locations."¹⁹ Mobile units and remote studios were being used to facilitate "live" shots from locations within the station's coverage area. In an effort to engage the audience in local issues, stations were adding programming that included "live feeds" as well as "immediate reporting" of various local stories. After considered review of the record, the Commission stated that "[w]e no longer believe that main studio facilities within the

¹⁸ *In the Matter of 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*, 2 FCC Rcd 3215 at ¶31 (1987) ("1987 Order"), quoting, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1085 n.28 (1984), recon. denied, 104 FCC 2d 357 (1986), remanded on other grounds sub nom. *Action for Children's Television v. FCC*, No. 86-1425, slip op. (D.C. Cir. June 26, 1987).

¹⁹ 1987 Order at ¶ 30.

political boundaries of the community of license necessarily promote responsive programming.”²⁰

The Commission also identified a host of other reasons why relaxing the constraints on the location of a station’s main studio would not impact the accessibility of stations to local viewers. For example, the Commission noted that the record indicated that listeners typically communicated with stations via telephone or mail rather than visiting the main studio, and that accessibility concerns were mitigated by improvements in roads and public transportation.²¹ Today, the prevalence of cell phones, together with access to the Internet and e-mail, have only increased viewers’ opportunities to communicate with stations.

Based on its findings of significant changes in the media marketplace, the Commission relaxed the main studio rule. It specifically noted that this flexible policy would allow a licensee to realize cost efficiencies “without affecting the station’s ability to meet its local service obligations.”²² In 1998, the Commission again scrutinized the rule and found it could relax it still further while continuing to ensure that broadcasters “maintain[] a close connection to the community.”²³ Gray agrees with the Commission’s well-supported conclusion that the current main studio rule “strikes the appropriate balance in the public interest”²⁴ between “ensuring that the public has reasonable access

²⁰ *Id.* at ¶ 32.

²¹ *Id.*

²² *Id.* at ¶ 33.

²³ *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, Report & Order, 13 FCC Rcd. 15691 ¶ 7 (1998) (“1998 Order”).

²⁴ *Id.* at ¶ 16.

to each station's main studio and public file and minimizing regulatory burdens on licensees.”²⁵

Significantly, the Commission in this NPRM does not even attempt to explain why the plethora of reasons provided by the Commission in support of the main studio rule in 1987 are no longer valid. Gray submits that each justification advanced in support of relaxing the rule in 1987 remains true today. Viewers enjoy an unprecedented level of access to their local broadcast stations today through better transportation options, phone service and, most significantly, the Internet. Today viewers continue to provide their feedback through station visits, letters, and phone calls, but overwhelmingly, the majority of viewer communication is conducted via the Internet in the form of e-mails, blogs and on-line bulletin boards that allow viewers to post comment on individual stories on station websites.²⁶ Since January of this year, Gray stations have received over 233,000 comments through their station websites. This averages out to approximately 55 viewer comments on local stories, per website, per day.²⁷ This count does not include the e-mails sent by viewers directly to station employees. As discussed earlier, Gray stations maintain a dynamic and ongoing dialogue with their viewers, regardless of the location of a station's main studio.

In sum, the Commission has provided no justification to revive a rule it found obsolete in 1987. To the contrary, changes in the broadcast market further support the

²⁵ *Id.* at ¶ 5.

²⁶ *See, e.g.*, WOWT Blog page, <http://www.wowt.com/blogs> (last visited April 28, 2008); WKYT/WYMT Blog page, <http://www.wkyt.com/webblogs> (last visited April 28, 2008); KAKE Blog page <http://www.kake.com/blogs> (last visited April 28, 2008); WNDU Blog page <http://www.wndu.com/masterblogspage> (last visited April 28, 2008); WIFR Blog page <http://www.wifr.com/blogs> (last visited April 28, 2008).

²⁷ Clickability, as of April 24, 2008.

Commission's 1987 decision to relax the main studio rule. Indeed, because such a change would be a reversal of Commission policy, the Commission would be required to provide a "reasoned analysis indicating that prior [decisions] are being deliberately changed, not casually ignored."²⁸ The Commission cannot possibly supply this analysis based on the record or the current state of the industry.

B. Reinstatement of the Pre-1987 Main Studio Rule Would Result in Staggering Costs to Licenses, With No Offsetting Benefits.

Reinstating the pre-1987 main studio rule will not increase local programming. Rather, it would require stations to redirect already limited financial resources away from local programming efforts and toward the costs of relocating specialized main studio facilities.

In reliance on the current rules, many stations invested significant funds in constructing state-of-the-art studios to facilitate the digital transition. For example, in 2006, Gray's WCTV invested more than \$8 million in the purchase of property and the construction of a new state-of-the-art studio near Tallahassee, Florida. Requiring WCTV to move its main studio to Thomasville, Georgia, its community of license, would squander Gray's \$8 million investment in this station's studio.

The consequences of this policy change would be financially ruinous for many licensees. Many broadcasters are already struggling to finance their programming as well as other expensive policy initiatives, including, most notably the digital transition. Broadcasters simply cannot afford to abandon the investment made in their existing studios, even assuming they could find appropriate locations within their communities of license. However, the cost will not be the licensee's alone to bear. Should the

²⁸ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Commission pass such a rule, it would most certainly be flooded with well-justified waiver requests, resulting in high administrative costs to the Commission.

In assessing its proposal to return to the old regulatory regime, the Commission also must account for the fact that, as it has explicitly acknowledged in promulgating numerous other broadcast rules, TV is a regional service. For the purpose of many other FCC rules and regulations, television stations are evaluated by DMA, not merely city of license.²⁹ TV broadcast stations must serve their entire viewing audiences to survive, not merely their communities of license. In fact, directing a station's programming and access to only its city of license would frequently leave many TV viewers disenfranchised.

The Commission cannot refute its earlier finding in the 1987 Order that a main studio is frequently more accessible to more people by being located outside the city of license. WCTV, the Gray station used in an earlier example, is licensed to Thomasville, Georgia, a community assigned to the Tallahassee (FL)-Thomasville (GA) DMA. Only 11% of the households in the Thomasville Metro area are located in Thomas County, where Thomasville is situated. Meanwhile, Leon County, where Tallahassee is located, holds 67% of the metro area's households. If Gray moved WCTV's main studio to its community of license, it would become less accessible to the majority of its viewers. For this very reason, WCTV's main studio has not been located in Thomasville since 1976. Even prior to 1976, the station operated dual main studios, with one located in Thomasville and the other in Tallahassee. Importantly, WCTV has always maintained a

²⁹ See, e.g., 47 C.F.R. §73.3555(b) (using Nielsen's Designated Market Area (DMA) to determine a television station's market for the purposes of the local television multiple ownership rule); §73.624(d) (using DMA to define a television market for purposes of the digital television build-out rule); §76.55(e) (using DMA to define a commercial broadcast television station's market under the must carry rule).

news bureau in Thomasville to facilitate its on the spot news coverage. The flexibility to locate its main studio outside its community of license has not resulted in the reduced coverage of local issues. Instead, it has made it easier for WCTV to address local issues and provide live local coverage of news occurring throughout its DMA.

The Commission also asks if reinstating the pre-1987 rule would increase local programming. The simple answer is no. Stations must remain close to the heart and soul of their business – their viewers and their advertisers. A successful station cannot isolate itself from its community. If a station is located outside its community of license, it is because that location allows it to be more responsive to its viewers needs, not less.

Furthermore, forcing stations to abandon their investments in those main studios located outside the station’s city of license will impose an overwhelming cost on broadcasters, requiring broadcasters to further divide an already small budget pie to cover the cost of the studio relocation. Unfortunately, these budget cuts *would* likely impact staffing or local programming—either of which would compromise a station’s ability to invest in the production of quality local programming.

III. THE REQUIREMENT TO STAFF A MAIN STUDIO 24 HOURS A DAY, 7 DAYS A WEEK WILL BE IMPERMISSIBLY BURDENSOME TO BROADCASTERS.

Gray Television disagrees with the Commission’s suggestion that the timely communication of emergency information is compromised when a station does not have technical staff on duty 24 hours a day, 7 days a week. The public record provides numerous examples of the how stations are responsive to the need to provide timely and relevant emergency information.³⁰ Even the parties who raised concerns as to the

³⁰ See *Localism NPRM* at nn. 220-224.

effectiveness of the current emergency system provided helpful suggestions for improving the system.³¹ All of these suggestions could be implemented without a return to outdated, burdensome regulations. As noted by various members of Congress in their recent letter to Chairman Martin, “[i]f there is a concern about emergencies, then it seems that focusing on reforming emergency training and education would be a more rational approach than penalizing every local broadcaster in the country with unnecessary labor costs.”³²

For example, WTVY, a Gray station in Dothan, Alabama, has three different emergency communication plans in effect with city officials. First, the police department in Dothan uses a paging system that calls and texts emergency information to certain phone numbers, including five WTVY cell phone numbers. These cell phones are carried by the assignment editor, the nighttime reporter, the weekend reporter, and two different daytime reporters. This arrangement assures that WTVY is always aware of an emergency situation and key personnel can react quickly to bring viewers breaking news.

The second system used by WTVY is operated through the local branch of the Alabama Emergency Management Agency (“Alabama EMA”). The Alabama EMA obtained a Homeland Department security grant to set up two-way radios in local newsrooms – including that of WTVY - to ensure that EMA can communicate emergency situations to those newsrooms if cell phones or pagers are not working.

Finally, WTVY ensures that all city officials involved in emergency services have the

³¹ *Id.* at nn. 227, 228.

³² Letter to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission re: *Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Docket No. 04-223 (exhorting the Chairman to reconsider the actions proposed in the Report and not “turn back the clock on decades of deregulatory progress by imposing a series of new and burdensome regulations on broadcasters.”)

cell and home phone numbers of several WTVY news managers. These three emergency communication systems ensure that Dothan city officials can always communicate with WTVY in the event of an emergency. And likewise, this system ensures that WTVY can immediately relay breaking news and emergency information to its viewers.

The Localism NPRM ignores the very significant advancements in technology which have occurred since the staffing rules were abandoned.³³ The technical operations of a television station can be remotely monitored and operated using specialized software. The prevalence of cell phones, pagers, and text messaging devices means that station management and key personnel are essentially on-duty 24 hours a day, 7 days a week. Advancements in technology no longer require a station to maintain a human presence 24/7 in order to ensure that its community is brought up-to-date emergency information. With proper use of emergency alert systems and good communication with local emergency officials, a station can bring its community breaking news coverage regardless of whether anyone is physically present at the station.

While it is unusual for a Gray television station ever to be without any staff on site, certain stations do not have technical staff on the premises during the middle of the night. Rather, during those hours after the station's late-night newscast and before the morning newscast, the station's technical operations are monitored remotely from another Gray station. The consolidation of technical operations, however, has not compromised the communication of emergency information.

³³ See *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).

For example, WRDW(TV), Augusta, Georgia, is part of a consolidated technical operation unit, a so-called “Hub and Spoke System,” whereby the technical operations of WRDW, the “Spoke” station, are remotely monitored and controlled from WCTV(TV), Tallahassee, Florida, the “Hub” station, between the hours of 11:00 p.m. and 5:00 a.m. In order to ensure that WRDW’s viewers receive up-to-the-minute emergency information during those hours when technical staff is not present, WRDW has developed a comprehensive emergency communication system. First, WRDW ensures that its EAS is set to auto forward. Next, WRDW ensures that all first responders in its viewing area have WRDW management’s “off-hours” contact information, whether that is home or cell phone numbers. Finally, WCTV, as the Hub station, created an additional redundant emergency communication system for use by its Spoke stations. WCTV has trained the news staff in the various Spoke stations that it monitors to prepare crawls and breaking news postings to ensure that emergency information is broadcast without delay, even when technical staff is not on duty.

WJHG(TV), licensed to Panama City, Florida, also participates in the Hub and Spoke System. Although not usually staffed 24/7, the station has redundant emergency procedures in place to ensure that emergency information is broadcast in a timely manner. WJHG is located on the Gulf Coast in Florida, a region particularly susceptible to hurricanes. WJHG maintains a full staff presence at the station when the region is under a severe weather alert. Participating in the Hub and Spoke System has allowed WJHG to recognize a significant savings in employee costs. Yet, WJHG realizes it serves as a vital link for its viewers to information that can and does save lives. In fact, following its coverage of Hurricane Ivan in 2004, WJHG’s meteorologist, in addition to

numerous commendations and awards, received an e-mail from a viewer who credited WJHG's continuous coverage of the storm with saving the life of his grandparents, sister, brother-in-law, and their two children. The up-to-the-minute tracking of this massive storm showed a tornado heading straight toward the grandparents' home. They were watching WJHG and thus had sufficient warning of the need to seek shelter. Their lives were spared, even though everything around their home was destroyed. WJHG would never allow its participation in the Hub and Spoke System to compromise the vital service it provides to its community, which is why it has created and implemented these redundant emergency procedures.

In sum, the lifeblood of a television station is serving the needs of its local community, whether that need is for news, emergency information or entertainment. Television stations which fail to serve the community in a time of crisis will not survive in this highly competitive multi-media marketplace. In this environment, stations need the flexibility to employ the most cost effective means to ensure responsiveness to community concerns, including emergency situations. Reinstating an outdated regulatory requirement will not further that objective.

IV. THE COMMISSION HAS NO LEGITIMATE BASIS FOR ADOPTING LOCAL PROGRAMMING RENEWAL APPLICATION PROCESSING GUIDELINES.

In the NPRM, the Commission cites an alleged paucity of locally oriented programming as the basis for its tentative conclusion that it should adopt license renewal application processing "guidelines." As with the Commission's proposal to impose Community Advisory Boards, however, the proposed renewal processing guidelines represent another attempt to return to anachronistic forms of regulation that the Commission wisely abandoned nearly a quarter-century ago. In addition, the proposed

guidelines are a premature and unnecessary measure in light of broadcasters' demonstrated record of providing substantial community-oriented programming. Moreover, the proposed guidelines are inconsistent with the First Amendment and would tread unnecessarily on broadcasters' constitutionally protected editorial discretion.

Moreover, the proposed renewal guidelines are simply bad public policy. If homogenized, "cookie-cutter" national programming is the problem, "suggested" programming minima are not the solution. Instead of promoting creativity and experimentation in locally oriented programming, the renewal guidelines will quash incentives to innovate and will promote homogeneity by forcing all broadcasters in a market to cover the same types of stories and the same local events. Accordingly, the Commission should refrain from adopting any quantitative programming guidelines.

A. Gray Broadcasts Substantial Quantities of High Quality Locally-Oriented Programming.

The record already amassed in this proceeding overwhelmingly demonstrates that Gray and most other broadcasters air substantial amounts of high-quality news, public affairs, and other local programming.³⁴ More specifically, as the Commission itself recognized in the *NPRM*, many of today's broadcasters air significant amounts of local news programming relevant to their communities—including programs covering politics,

³⁴ See, e.g., Comments of Belo Corp., MB Docket No. 04-233, at 3-13 (filed Nov. 1, 2004); Comments of Bonneville International Corp., MB Docket No. 04-233, at 3-11 (filed Nov. 1, 2004); Comments of Buckley Radio, MB Docket No. 04-233, at 1-3 (filed Oct. 27, 2004); Comments of Citadel Broadcasting Company, MB Docket No. 04-233 (filed Nov. 1, 2004); Comments of Clear Channel Communications, Inc., MB Docket No. 04-233 (filed Nov. 1, 2004); Comments of Delmarva Broadcasting Co., MB Docket No. 04-233, at 1-2 (filed Nov. 1, 2004); Comments of Gannett Broadcasting, MB Docket No. 04-233 (filed Nov. 1, 2004); Comments of Greater Media, Inc., MB Docket No. 04-233, at 2-7 (filed Dec. 13, 2004); Comments of the National Association of Broadcasters, MB Docket No. 04-233, at 13-21 (filed Nov. 1, 2004); Comments of National Public Radio, Inc., MB Docket No. 04-233, at 8-13 (filed Nov. 1, 2004); Comments of Sarkes Tarzian, Inc., MB Docket No. 04-233, at Ex. 1 (filed Nov. 1, 2004); Comments of The Walt Disney Company, MB Docket No. 04-233, at 2-19, Attach. C (filed Nov. 1, 2004).

community events, sports, crime, weather, health, consumer advocacy, and myriad other topics³⁵—as well as an abundance of local public affairs programming.³⁶

Gray has a long history of commitment to the communities its stations serve, and each of its stations is a market leader in local news programming. But Gray's commitment to its communities does not stop with daily news coverage, and several examples illustrate this point.

Each year KOLN(TV) in Lincoln, Nebraska, devotes two entire Saturdays each year to the back-to-back broadcast of the state high school basketball championship games. On one Saturday KOLN airs the six men's games; on the other Saturday, the station broadcasts the six women's games. Then, over the next twelve weeks, the station uses its digital multicast capabilities to rebroadcast the games at a rate of one per week.

KKTV, Colorado Springs, Colorado, secured a My Network affiliate for its multi-cast channel, thus bringing another source of entertainment programming to its community. However, KKTV also is committed to using its multi-cast channel as another source of local news and information for its community. In addition to six hours each week of live, local news broadcasts, KKTV uses this channel to highlight public service announcements, many of them specifically targeted to local issues, promote community events, and draw attention to the contributions of local non-profit organizations.

WHSV, a station licensed to Harrisonburg, Virginia, and serving the Shenandoah Valley, made a significant investment in its digital multi-cast capabilities in order to bring

³⁵ See *NPRM* ¶¶ 31-32, 61, 83.

³⁶ See *NPRM* ¶ 33.

a local news channel to the Northern Shenandoah Valley city of Winchester. WHSV now has a Winchester studio location that is home to a 22-strong news staff, a sales staff, and an engineering staff. From its Winchester studio, WHSV provides 2.5 hours each weekday of targeted local news, including both a morning and evening newscast. WHSV has quickly become the go-to station for local news and information in Winchester. WHSV is a stellar example of a station which voluntarily chose to use its digital capabilities to better serve the needs of its community. There is no need for the Commission to dictate restrictive rules and regulations to ensure that stations serve the local community. The success of a broadcaster is inextricably tied to its value to the community it serves. Stations across the country are using their new digital capabilities to make themselves more valuable to viewers by providing increased local programming on their multi-cast channels.

B. The Commission’s Rationale for Eliminating Programming Guidelines Remains True Twenty-Five Years Later.

The proposed local programming “guidelines” are not new, and many broadcasters still harbor painful memories of the compliance burdens that existed prior to the deregulation of radio and television.³⁷ The proposed resuscitation of the local programming guidelines contradicts all of the bases supporting the Commission’s decision to scrap a similar regulatory regime in the early 1980s. Moreover, the record today fails to provide the Commission with a basis to reverse its prior conclusion that local programming guidelines represent ineffective and unsound public policy.

In the 1980s, the Commission discovered that, despite its best intentions, market forces – not regulatory guidelines – most effectively drove broadcasters’ programming

³⁷ See *TV Deregulation Order* at ¶ 7; *Deregulation of Radio* at ¶ 24.

decisions.³⁸ Then, as now, the record demonstrated that “stations will continue to present [local] programming as a response to market forces,” and that audience demand “will assure the continued provision of news programs in amounts to be determined by the discretion of the individual broadcaster guided by the tastes, needs, and interests of its [audience].”³⁹

The programming guidelines interfered with natural market forces and, by “requiring [licensees] to present programming in all categories,”⁴⁰ promoted homogenized content at the expense of targeted niche programming.⁴¹ In eliminating the programming guidelines in the 1980s, the Commission acknowledged that, while it might “make good business sense” for a broadcaster in a small community to offer a wider range of local programming, broadcasters located in more competitive markets often have to target their programming to specific audiences within a community to remain viable.⁴² Particularly in larger media markets, it was and is unreasonable to insist that each broadcaster attempt to be all things to all people. Moreover, the Commission realized that prescribing programming guidelines shifted licensees’ attention away from the needs of their local communities and towards the demands of federal regulators in Washington, D.C.⁴³ The Commission thus rescinded its programming guidelines so that each

³⁸ See *TV Deregulation Order* at ¶¶ 19, 23; *Deregulation of Radio* at ¶¶ 24, 26, 34.

³⁹ *Deregulation of Radio* at ¶ 26.

⁴⁰ *TV Deregulation Order* at ¶ 23.

⁴¹ See *Deregulation of Radio* at ¶ 24.

⁴² *Deregulation of Radio* at ¶ 26.

⁴³ *Id.*

broadcaster could respond to market forces and “consider the programming of other . . . stations in its market in fulfilling its programming responsibilities.”⁴⁴

C. The Record Before the Commission Does Not Demonstrate That Broadcasters Fail to Serve Local Communities.

As broadcasters face increasing challenges in today’s dynamic media market, they must stand out in order to survive, and locally targeted programming is often the best – if not the only – way to do this. While the record is now filled with specific examples of broadcasters’ service to their communities, the Commission’s tentative conclusion to revive local programming requirements stems only from the comments of “others [that] *feel* . . . broadcasters are not complying with their obligation, as public trustees, to air sufficient programming that is responsive to local needs and interests.”⁴⁵ In other words, the Commission relies on a record consisting only of a few parties’ vague perceptions, contentions, claims, and “feelings” that broadcasters are neglecting their communities, rather than on any concrete evidence about levels of local service.⁴⁶

⁴⁴ *TV Deregulation Order* at ¶ 34.

⁴⁵ *Localism Report* at ¶ 34 (emphasis added).

⁴⁶ *Id.* at ¶¶ 36-37. Indeed, pro-regulatory parties point to a single piece of substantive evidence: a study by Michael Yan and Phillip Napoli, which purports to disassociate market conditions from the provision of local public affairs programming. *Id.* at ¶ 38. However, this study, has come under considerable scrutiny by other academics and should not be relied on by the Commission as a basis for regulation in this proceeding. See Daniel Shiman, *The Impact of Ownership Structure on Television Stations’ News and Public Affairs Programming*, FCC Media Study 4, at I-27 to I-28 (July 24, 2007) available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A5.pdf (criticizing Yan’s use of a small, limited data set); Jeffrey Milyo, *Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News*, FCC Media Study 6, at 3-4 (Sept. 2007), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf (finding fault in Yan’s use of a nontraditional econometric method and describing Yan’s study as “dubious,” “disconcerting,” “nonsensical,” and “odd”). Yan’s study is therefore a poor basis for finding a failure in the market for locally-oriented programming. Indeed, the Commission itself has already expressed skepticism with the validity of Yan’s conclusions. See *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, FCC 07-216, MB Docket No. 06-121, *et. al.*, ¶ 45 (Rel. Feb. 4, 2008) (noting that the

When it eliminated programming guidelines in the 1980s, the Commission also found that the guidelines had imposed a significant administrative cost on licensees.⁴⁷ Broadcasters incurred substantial costs – both in the formal ascertainment process as well as in the recordkeeping necessary to demonstrate compliance with the Commission’s programming guidelines.⁴⁸ The same would be true today under the Commission’s proposal. Ironically, the costs of record keeping would be greatest for stations producing the *most* local programming – they simply have more programming to track. In light of the Commission’s professed goal of encouraging licensees to air more locally-oriented programming, this correlation between local service and extraneous recordkeeping costs is jarringly incongruous and imprudent.

The proposed programming guidelines are also problematic because they establish implicit programming quotas. As the Commission stated in 1984 –

“Our final concern with the present regulatory scheme focuses on the way in which it operationally defines a licensee’s programming obligation in quantitative terms [T]he Commission has consistently sought to avoid this type of regulatory approach. . . . Instead, a licensee’s programming obligation has always been described in terms of providing programming that responds to the needs of the community.”⁴⁹

The Commission recognized that its “paint by numbers” method was antithetical to past Commission precedent. Moreover, the D.C. Circuit has expressed its disfavor with such

Commission submitted the Yan Study to peer review, which confirmed that “Yan’s econometric work does not support his conclusion[s]”).

⁴⁷ *TV Deregulation Order* at ¶ 26.

⁴⁸ *Id.*

⁴⁹ *Id.* at ¶ 29.

a regulatory approach, noting “quantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee’s programming.”⁵⁰

More than twenty-five years ago, the Commission recognized the flaws in its local programming regulatory regime. The programming guidelines contradicted Commission and court precedent, and they proved an inferior substitute for an efficient, deregulated market for locally-oriented content. The Commission therefore acknowledged that the “specific problem” addressed by the programming guidelines no longer existed and that maintaining them would be capricious under the circumstances.⁵¹ Given the geometric expansion in the number and types of media competing for audiences in the past twenty-five years, the Commission’s prior reasoning remains true today. Accordingly, the Commission should abandon the proposal to adopt quantitative local programming guidelines.⁵²

⁵⁰ *Id.* (citing *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983).

⁵¹ *Id.* at ¶ 25 (citing *HBO*, 567 F.2d at 36).

⁵² The Commission expressed an intent to initiate a separate proceeding to “remedy the infrequent but significant situations in which cable and satellite subscribers often do not receive” the signals of television stations located in the states in which they live. *Localism Report* at 46. The Commission claims that reception of an out-of-state station “may weaken localism,” but provides no evidence to suggest, much less demonstrate, that out-of-state stations fail to address the local needs of communities located within their television markets but across a state line. Indeed, it would be folly for a station to ignore a critical part of its economic market. And, as the Commission rightly acknowledged, Congress has already created a process to modify television markets with respect to cable carriage of particular stations, pursuant to which the FCC is specifically obligated to “afford particular attention to the value of localism.” 47 U.S.C. § 534(h)(C)(ii).

If, despite the dearth of evidence of any actual problem, the Commission launches a new proceeding intended to grant additional carriage rights to particular stations based on state boundaries, it must give serious consideration to the drastic changes such proposals would bring to the television marketplace generally. Far from affecting only a “small group of identifiable cases,” the Commission’s proposals would radically alter the structure of stations’ economic markets across the country. In addition, restructuring the television marketplace could severely disrupt stations’ existing relationships with their program suppliers, who generally confer rights to program distribution and exclusivity on the basis of DMAs.

D. Local Programming Guidelines Are Inconsistent With the First Amendment.

In proposing to reintroduce “specific procedural guidelines for the processing of renewal applications for stations based on their localism programming performance,” the Commission did not solicit comment on the guidelines’ potential constitutional ramifications.⁵³ Yet, in another context, the D.C. Circuit has noted that FCC licensing “screening device[s],” such as the programming guidelines, create “strong incentive[s] to meet the numerical goals,” and therefore tend to devolve into *de facto* quotas.⁵⁴ Rational broadcasters will tend to view “guidelines” as quotas, lest they meet with the collective “raised eyebrow” of the full Commission during license renewal.⁵⁵ It is therefore appropriate to treat the guidelines as an outright programming edict in analyzing the constitutional implications of the Commission’s proposal.

Although the NPRM avoids raising the programming guidelines’ constitutional frailties, such issues were not lost on the Commission in 1984. Indeed, in deciding to eliminate a prior era’s programming guidelines, the Commission has observed “that the present regulatory structure raises potential First Amendment concerns.” Further, the Supreme Court has also observed that the Commission’s “public interest standard necessarily invites reference to First Amendment principles.”⁵⁶

⁵³ *Localism Report* at ¶ 124.

⁵⁴ *Lutheran Church*, 141 F.3d at 353.

⁵⁵ See *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (commenting on the Commission’s “long history” of using “raised eyebrow” regulation to influence licensee behavior).

⁵⁶ *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973).

The Commission’s stated interest in reviving its programming guidelines is “to ensure that all broadcasters . . . provide some locally-oriented programming.”⁵⁷ Although the Commission speaks in terms of programming quantity, its proposed guidelines would purportedly measure stations’ “localism programming performance”⁵⁸ with the goal of encouraging stations to increase the amount of locally-responsive programming that they air. As such, the Commission’s proposed guidelines are decidedly content-based inasmuch as they express a governmental preference for “local” content over other types of content.

The law on this point is firmly established: broadcasters are “entitled under the First Amendment to exercise the widest journalistic freedom.”⁵⁹ This right includes the broadcaster’s ability *not* to speak. As the Supreme Court has made clear, “[g]overnment action that . . . requires the utterance of a particular message favored by the Government, contravenes this essential right.”⁶⁰ Even if it were to presume that the spectrum scarcity doctrine of *Red Lion Broadcasting Co. v. FCC* remains applicable in today’s media marketplace, the Commission would still bear the burden of demonstrating that its guidelines are narrowly tailored to further a substantial government interest.⁶¹

⁵⁷ *See id.* at ¶ 40.

⁵⁸ *See NPRM* at ¶ 124.

⁵⁹ *League of Women voters*, 468 U.S. at 378 (internal citations and quotations omitted).

⁶⁰ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

⁶¹ *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969)). As noted by other commenters in this proceeding, given the technological advances over the past forty years, *Red Lion*’s scarcity doctrine ought not to apply. Indeed, the Supreme Court may soon clarify the appropriate standard of review for the Commission’s regulation of broadcasters. *See FCC v. Fox Television Stations, Inc.*, No. 07-582 (cert. granted Mar. 17, 2008). Thus, it is conceivable that any proposed programming guidelines would be reviewed under a more stringent standard.

Here, the Commission can point to no such substantial governmental interest.⁶² Moreover, both the Supreme Court and the Commission have held that the Commission may neither dictate nor strongly suggest the types of programming that broadcasters should or should not air.⁶³ Moreover, other than references to the perceptions of a few isolated parties, the Commission is unable to cite any substantive evidence in the record that demonstrates a drought of locally oriented programming sufficient to overturn precedent and to intrude upon broadcasters' First Amendment freedoms. Given the current record, the Commission cannot reasonably assert that it has a substantial interest in regulating broadcasters' speech for localism's sake.

Even if it could find such an interest, the Commission lacks any evidence that it could *ever* tailor local programming guidelines in a sufficiently narrow manner to protect broadcasters' freedoms while furthering localism. The *Localism Report* fails to establish any basis for disturbing the Commission's reasoning when it jettisoned the same guidelines in the early 1980s. In that proceeding, the Commission repeatedly found local programming guidelines *harmed* localism. Specifically, the guidelines emphasized certain quantities of programming over quality, and they diverted station resources from programming to paperwork.⁶⁴ Today's proposed guidelines would have the same effect by creating a set of incentives that are orthogonal to the Commission's stated localism

⁶² *Turner*, 512 U.S. at 680 (noting that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations").

⁶³ *Elimination of Unnecessary Broadcast Regulation and Inquiry into Subscription Agreements Between Radio Broadcast Stations and Music Format Service Companies*, 54 Rad. Reg. 2d (P&F) 1043, ¶ 9 (1983) (recognizing that "policies [cautioning] broadcast licensees not to engage in certain programming practices or establish[ing] rigid guidelines within which such programming should be conducted . . . raise fundamental questions concerning the constitutional rights and editorial freedom of broadcast licensees").

⁶⁴ See *TV Deregulation Order* at ¶¶ 26, 29; *Deregulation of Radio* at ¶¶ 24, 26.

goals. Specifically, the proposed programming guidelines would once again distract licensees' attention from local needs in order to satisfy the Commission's preconceptions of what those needs should be.⁶⁵ Even ignoring the Commission's prior findings on the ills of programming guidelines, the net effects of the Commission's proposed guidelines are speculative, at best.

The proposed programming guidelines are also unconstitutionally vague. In tentatively concluding that guidelines are necessary to evaluate "localism programming performance," the Commission fails to propose any definition of "local programming."⁶⁶ Moreover, in other circumstances, the Commission has acknowledged that "local" programming can take a variety of forms.⁶⁷ This recognition, coupled with the diverse needs and interests of communities around the country, suggest that it is unlikely that the Commission will be able to draft definitions of "locally-oriented programming" or "localism programming" that are both constitutionally acceptable and a meaningful guide for broadcasters.

V. CONCLUSION

The record overwhelmingly demonstrates broadcasters' dedication and drive to serve the local needs of their communities. The rules and regulations proposed by the Commission in this proceeding are a flashback to a simpler time, but one that has long since been overtaken by the explosive growth of the modern information marketplace.

⁶⁵ *Deregulation of Radio* at ¶ 26.

⁶⁶ *Localism Report* at ¶ 124.

⁶⁷ See *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rule for Radio and Television Broadcast Stations*, 2 FCC Red. 3215, ¶ 31 (1987) ("*Main Studio Order*").

Today, broadcasters do not have the luxury of looking back in time for guidance; rather they must always be one-step ahead of their competitors: a myriad of ever-changing new media sources. Television stations compete with an increasing number of alternative players in the communications industry, some which are only minimally regulated, if at all. The Commission's proposals to impose new rules and regulations in this proceeding overlook the significant contributions that broadcasters voluntarily make to their communities and would compromise their ability to continue to bring quality local programming to their viewers. Gray Television encourages the Commission to recognize broadcasters' exceptional efforts to bring meaningful local programming to their viewers. Accordingly, Gray urges the Commission to examine this proceeding's record carefully and to refrain from adopting backward-looking regulations that will impede, rather than promote, localism.

Respectfully Submitted,

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