

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

In the Matter of
Broadcast Localism

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MB Docket No. 04-233

COMMENTS OF CBS CORPORATION

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SUMMARY

There are few industries with as long and distinguished a record of public service as broadcasting. Throughout their history, broadcasters have donated billions of dollars worth of air time for public service announcements by community and charitable organizations; spearheaded fundraising drives for worthy causes within their communities; devoted large amounts of air time to election coverage, including debates, candidate forums and political conventions, over and above the multiple hours of news programming broadcast by many television stations every day; and provided critical, life-saving information to their communities during times of emergency.

Given this undoubted record of voluntary community service, there would seem to be little need for an extensive re-regulation of broadcasting. Yet the proposals set forth in the *Report and Notice*, taken together with the rules adopted by the Commission in its recent *Enhanced Disclosure Order*, would effectively reimpose the essentials of a regulatory scheme abandoned as unnecessary nearly a quarter century ago. The public benefits that would derive from the extensive record-keeping and paperwork that the rules would once again require of broadcasters – and from the forced relocation of stations' main studios within political boundaries previously found by the Commission to be unrelated to the production of locally-oriented programming -- are at the very best speculative. But there can be no doubt that the costs of compliance, added to those already incurred in connection with existing regulation, would significantly hamper the efforts of free television and radio broadcasters to remain viable in a media landscape marked by radical change, and the warp-speed emergence of new competitors.

The Commission's reinstatement of such rules in the current media environment would be especially incongruous. When the Commission eliminated its quantitative license renewal guidelines in 1984, it concluded that "existing marketplace forces, not our guidelines, are the primary determinants of the levels of informational, local and overall non-entertainment programming provided on commercial television." Moreover, the Commission expressed confidence that the "emergence of . . . new technologies, coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace," and that "these increased levels of competition can . . . only further ensure the presentation of sufficient amounts of such programming." In light of today's media abundance, which would have been the stuff of science fiction in 1984, the Commission's proposed reimposition of rules it then found archaic is simply inexplicable.

In addition to being perplexing from a policy standpoint, the sustainability of such action would be highly dubious as a matter of administrative law. It is, of course, fundamental that "an agency changing its course . . . is obligated to supply a reasoned analysis for the change." In its 1984 *Television Deregulation* order, the Commission relied on an "exhaustive" record, including its own "independent study of the economic incentives for the delivery of video programming" and a "comprehensive study of the levels of informational and local programming on commercial television for the year 1980."

In light of its conclusion in that proceeding, after meticulous examination, that the rules there in issue were burdensome and unnecessary, the Commission would face an extraordinary burden in justifying a decision to reinstate the very same type of regulation

almost twenty-five years later. We respectfully submit that the *Report and Notice* cites to nothing in the record that could sustain a departure of this magnitude from prior Commission policy.

The same is true of the Commission's suggestion that it may resurrect its old main studio rule, first abandoned as "unduly restrictive" in 1987. After a series of rulemaking proceedings spanning more than a decade, the Commission concluded that because "the main studio no longer plays [a] central role in [program] production" its location was of marginal relevance to the community-responsiveness of a station's programming. Apparently based on nothing more than the notion of some commentators that a broadcaster's main studio should be "part of the neighborhood," the Commission proposes to revert to its pre-1987 main studio rule "in order to encourage broadcasters to produce locally originated programming."

Having disavowed any significant connection between the location of a station's main studio and the strength of its locally-oriented programming only ten years ago, the Commission would be hard-pressed now to explain a finding that such a relationship is important or in fact exists at all. Indeed, the costs of a reversion to the pre-1987 main studio rule would so heavily outweigh any conceivable benefit that such action by the Commission would be arbitrary and capricious.

The Commission also proposes reverting to an "attended operation" rule last in effect thirteen years ago – a rule discarded in 1995 "for reasons of efficiency." Although the Commission now suggests that attended operation may "increase the ability of [a] station to provide information of a local nature to [its] community of license," that was never an objective of the attended operation requirement. Rather, the attended operation

rule was directed to the need for constant human monitoring of transmitters, so as to alleviate promptly any interference resulting from malfunctioning technical equipment. In 1995, the Commission eliminated the requirement because there were no longer any “technical obstacles to the automation of any type of broadcast station.”

To the extent that unattended operation may be relevant to “licensees’ ability to serve local needs,” the issue was addressed in the 1995 order, in connection with station participation in the then-new Emergency Alert System (“EAS”). The Commission noted that, unlike the old Emergency Broadcast System, “EAS . . . is specifically designed for unattended operation.” The Commission’s concern over any supposed inability of a station operating unattended to provide information regarding “severe weather or a local emergency” is misplaced, especially in light of the recent strengthening of the EAS requirements, and the Commission’s promise “to address the issues in the currently outstanding EAS Further Notice of Proposed Rulemaking.” Sporadic, anecdotal incidents of EAS problems – or press reports concerning isolated occurrences that may or may not be accurate -- cannot rationally support a mandate that all stations nationwide be “attended” at all hours of operation.

Nor is there any basis for the FCC to regulate voice-tracking, which the Commission describes as “a practice by which stations import popular out-of-town personalities from bigger markets to smaller ones, customizing their programming to make it appear as if the personalities are actually local residents.” Contrary to this description, voice-tracking does not typically involve the “importation” of “personalities from bigger markets.” It is, in fact, most often employed by stations to enable local talent to record programming for broadcast at a later time. Any attempt to

preclude stations from maximizing their local talent in this manner would impose additional programming costs on licensees, and raise substantial constitutional concerns. The same is true of another potential regulation alluded to in the *Report and Notice*, that of “requir[ing] licensees to provide . . . data regarding their airing of the music and other performances of local artists,” which approaches an interference in programming choices.

Indeed, in the context of proposals to reverse so dramatically the Commission’s previous deregulatory course, it is worthy of note that the theory of spectrum scarcity that has long been thought to justify regulation of broadcasting stands on increasingly precarious ground. In light of the almost bewildering array of sources of information and entertainment that are today available to the American public, we believe the Commission has an obligation to review the empirical validity of the spectrum scarcity doctrine before embarking on an extensive re-regulation of broadcasting.

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COMMENTS OF CBS CORPORATION

CBS Corporation, by its attorneys, hereby respectfully submits its comments in response to the Commission’s *Report on Broadcast Localism and Notice of Proposed Rulemaking* (the “*Report and Notice*”) ¹ in the above docket.

INTRODUCTION

There are few industries with as long and distinguished a record of public service as broadcasting. Throughout their history, broadcasters have donated billions of dollars worth of air time for public service announcements by community and charitable organizations; spearheaded fundraising drives for worthy causes within their communities; devoted large amounts of air time to election coverage, including debates, candidate forums and political conventions, over and above the multiple hours of news programming broadcast by many television stations every day; and provided critical, life-saving information to their communities during times of emergency. It can hardly be questioned, as noted by the President’s Advisory Committee on the Public Interest

¹ *Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Docket 04-233 (released January 24, 2008).

Obligations of Digital Television Broadcasters, that “most broadcasters feel a strong commitment to the public interest and their responsibilities as public trustees, and behave accordingly.”²

It is equally beyond question, we believe, that this commitment stems not from any kind of government compulsion, but from the high value that broadcasters have traditionally placed on good corporate citizenship, and from the common sense recognition that having a strong reputation for community service is simply good business. No government rule can require a television station to sponsor a successful campaign to raise money for cancer research, to collect food for the needy at the holidays, or to find permanent homes for foster children within its community. Yet such activities have long been typical of television and radio stations throughout this country.

Given this undoubted record of voluntary community service, there would seem to be little need for an extensive re-regulation of broadcasting. Yet the proposals set forth in the *Report and Notice*, taken together with the rules adopted by the Commission in its recent *Enhanced Disclosure Order*,³ would effectively reimpose the essentials of a regulatory scheme abandoned as unnecessary nearly a quarter century ago. The public benefits that would derive from the extensive record-keeping and paperwork that the

² Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report on the Public Interest Obligations of Digital Television Broadcasters* (1998) (“*Advisory Committee Report*” or “*Final Report*”), Section III at 46.

³ See Report and Order, MM Docket No. 00-168, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, (adopted Nov. 27, 2007) (“*Enhanced Disclosure Order*”). Broadcasters have sought review of the *Enhanced Disclosure Order* in the United States Court of Appeals for the District of Columbia Circuit. See, *National Association of Broadcasters v. FCC*, No. 08-1135 (U.S.C.A., D.C. Cir.).

rules would once again require of broadcasters – and from the forced relocation of stations’ main studios within political boundaries previously found by the Commission to be unrelated to the production of locally-oriented programming -- are at the very best speculative. But there can be no doubt that the costs of compliance, added to those already incurred in connection with existing regulation, would significantly hamper the efforts of free television and radio broadcasters to remain viable in a media landscape marked by radical change, and the warp-speed emergence of new competitors.

The Commission’s reinstatement of such rules in the current media environment would be especially incongruous. When the Commission eliminated its quantitative license renewal guidelines in 1984, it concluded that “existing marketplace forces, not our guidelines, are the primary determinants of the levels of informational, local and overall non-entertainment programming provided on commercial television.”⁴

Moreover, the Commission expressed confidence that the “emergence of . . . new technologies, coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace,” and that “these increased levels of competition can . . . only further ensure the presentation of sufficient amounts of such programming.”⁵ In light of today’s media abundance, which would have been the stuff of science fiction in 1984, the

⁴ Report and Order, MM Docket No. 83-670, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, ¶ 19 (1984) (“*Television Deregulation*”), *recon. denied*, 104 FCC 2d 358 (1986), *rev’d in part*, *Action for Children’s Television v. FCC*, 821 F. 2d 741 (D.C. Cir. 1987).

⁵ *Id.* at ¶ 21.

Commission's proposed reimposition of rules it then found archaic is simply inexplicable.

In addition to being perplexing from a policy standpoint, the sustainability of such action would be highly dubious as a matter of administrative law. It is, of course, fundamental that "an agency changing its course . . . is obligated to supply a reasoned analysis for the change."⁶ In its 1984 *Television Deregulation* order, the Commission relied on an "exhaustive" record, including its own "independent study of the economic incentives for the delivery of video programming"⁷ and a "comprehensive study of the levels of informational and local programming on commercial television for the year 1980."⁸

In light of its conclusion in that proceeding, after meticulous examination, that the rules there in issue were burdensome and unnecessary, the Commission would face an extraordinary burden in justifying a decision to reinstate the very same type of regulation almost twenty-five years later. We respectfully submit that the *Report and Notice* cites to nothing in the record that could sustain a departure of this magnitude from prior Commission policy.

⁶ *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.")

⁷ *Television Deregulation*, *supra*, at ¶ 2.

⁸ *Id.* at ¶ 4.

The same is true of the Commission’s suggestion that it may resurrect its old main studio rule, first abandoned as “unduly restrictive” in 1987.⁹ After a series of rulemaking proceedings spanning more than a decade, the Commission concluded that because “the main studio no longer plays [a] central role in [program] production” its location was of marginal relevance to the community-responsiveness of a station’s programming.¹⁰ Apparently based on nothing more than the notion of some commentators that a broadcaster’s main studio should be “part of the neighborhood,” the Commission proposes to revert to its pre-1987 main studio rule “in order to encourage broadcasters to produce locally originated programming.”¹¹

Having disavowed any significant connection between the location of a station’s main studio and the strength of its locally-oriented programming only ten years ago, the Commission would be hard-pressed now to explain a finding that such a relationship is important or in fact exists at all. As discussed below, the costs of a reversion to the pre-1987 main studio rule would so heavily outweigh any conceivable benefit that such action by the Commission would be arbitrary and capricious.

In the context of proposals to reverse so dramatically the Commission’s previous course, it is also worthy of note that the theory of spectrum scarcity that has long been thought to justify regulation of broadcasting stands on increasingly precarious ground. In light of the almost bewildering array of sources of information and entertainment that

⁹ Report and Order, MM Docket No. 86-406, *Amendment of Sections 73.1125 and 73.1120 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations, Report and Order*, 2 FCC Rcd 3215, 3218 (1987) (“1987 Order”) (emphasis added).

¹⁰ *Id.* at 3219.

¹¹ *Report and Notice* at ¶ 41.

are today available to the American public, we believe the Commission has an obligation to review the empirical validity of the spectrum scarcity doctrine before embarking on an extensive re-regulation of broadcasting.

In Section I of the discussion that follows, we briefly review the many forms of service to the public – on air and in the community -- which have long characterized broadcasting in this country. In Section II, we set forth the reasons why the Commission should not adopt the measures proposed in the *Report and Notice* including, in addition to those specified above, a reversion to its former attended operation rule and its proposals regarding the use of “voice-tracking” and reporting on play lists by radio stations. Finally, in Section III, we discuss the ways in which time and technology have eroded the continued validity of the spectrum scarcity doctrine traditionally cited to justify the imposition of unique obligations on broadcasters.

DISCUSSION

I. REGULATION IS UNNECESSARY TO ENSURE THAT BROADCASTERS WILL SERVE THEIR LOCAL COMMUNITIES.

A. The Marketplace Has Provided – and Will Provide – Ample Amounts of Issue-Responsive Programming.

At the outset of the *Report and Notice*, the Commission acknowledges that the “voluminous record” in this proceeding demonstrates that many broadcasters devote “significant amounts of time and resources” to airing programs that respond to the “needs and interests” of their communities. Nonetheless, noting the concerns expressed by some commentators that broadcasters’ efforts “fall far short” of what those parties regard as optimal performance, the Commission proposes to remedy the situation through a return

to long-discarded regulations -- which, it may be observed, hardly resulted in universal satisfaction when they were in effect.

Much the same pattern is evident in the Commission's discussion of broadcasters' coverage of political issues and elections. Thus, while saying that "[m]any broadcasters take very seriously their responsibility to inform their viewers and listeners about political issues," the Commission laments that "not all stations do as much as they can and should."¹²

In a society that enjoys an unprecedented profusion of media, it is not misplaced to ask why "all" television stations must do "more" to present such programming, when "many" stations are devoting "significant amounts of time and resources" to political coverage and other issue-responsive programming. Indeed, in eliminating its license renewal processing guidelines almost twenty-five years ago, the Commission was not troubled by the possibility that some individual stations might not meet the program percentages that the guidelines specified. Such a development, the Commission noted, would not be inconsistent with the public interest, since the record it had compiled showed that "the failure of some stations to provide programming in some categories [would be] offset by the compensatory performance of other stations."¹³

¹² *Id.* at ¶ 66.

¹³ *Television Deregulation, supra*, at ¶ 22. Of course, *Television Deregulation* did not relieve each individual licensee of its bedrock obligation under the public interest standard to contribute *some* issue-responsive programming to the "overall information flow" in its market. *Id.* at ¶ 31 *et seq.* That basic obligation is a far cry from dictating minimum amounts of particular types of programming that must be presented by all broadcasters, regardless of the availability of ample amounts of such programming in the marketplace taken as a whole.

In fact, the levels of issue-responsive and other non-entertainment programming presented by the typical television station, as determined by the Commission in *Television Deregulation*, were impressive. The Commission found that, during the six year period from 1973 to 1979, commercial television broadcasters allocated an average of 13.7 percent, 10.3 percent and 24.3 percent of their broadcast time to informational (news and public affairs), local and overall non-entertainment programming, respectively.¹⁴ These levels far exceeded those required to meet the Commission's then-existing license renewal guidelines.¹⁵

The *Report and Notice* cites no data indicating that the amounts of such programming presented by commercial television stations have declined. Indeed, market incentives are in precisely the opposite direction. Given the exponential increase in competition in the video marketplace since 1984 – including the explosive growth in MVPD subscribers, the proliferation of hundreds of cable networks, the rapidly growing penetration of DVRs, the popularity of DVDs, and the increasing availability of movies and current television programming over the Internet -- the imperative for over-the-air televisions stations to distinguish themselves has never been greater. The greatest advantage that broadcast stations enjoy, in their fierce daily competition for the attention of consumers, is their local identity and ability to respond to the concerns and needs of their communities. As one local television manager put it:

¹⁴ *Id.* at ¶ 10.

¹⁵ The guidelines provided that any license renewal application reflecting less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming could not be granted by the FCC staff, but required action by the full Commission. *Id.* at ¶ 5.

[W]e . . . know that, in this era of six nationwide TV networks, 80 cable channels, high-speed Internet, and all the other sources of information out there, we have to differentiate ourselves if we're going to be able to attract and hold the attention of our viewers. And the best way to do that is to be closely involved in our communities, and responsive to the concerns of our local audience.¹⁶

Our experience at CBS closely tracks these observations, and is reflected in the emphasis our owned television stations place on service to their local communities. Those stations dedicate hundreds of hours of airtime each week and spend hundreds of millions of dollars providing their viewers with high quality local news, in addition to the national CBS News broadcasts aired each week on those of our owned stations affiliated with the CBS Television Network. Specific examples of local news and public affairs commitments include:

- WCBS-TV (CBS), New York, NY, airs 28.5 hours of local news per week, representing about 17% of its weekly programming schedule. It spends more than \$40 million annually producing its local newscasts. WCBS-TV also broadcasts “Eye on New York,” a weekly public affairs program featuring discussions on community issues including politics, religion, and culture.
- KCBS (CBS) and KCAL (Ind.), Los Angeles, CA, together air almost 40 hours of local news per week.
- WBBM-TV (CBS), Chicago, IL, broadcasts 25 hours of local news each week, averaging almost 15% of its weekly schedule. WBBM-TV also broadcasts a weekly, Emmy-award winning public affairs program, “Eye on Chicago.”
- KYW (CBS) and WPSG (CW), Philadelphia, PA, together offer almost 50 hours of local news each week. WPSG also airs a weekly program titled “Speak Up on CW Philly,” featuring discussions of public affairs.

¹⁶ Testimony of James M. Keelor, President, Liberty Corporation, at FCC Localism Hearing in Charlotte, NC, October 22, 2003, cited in Comments of National Association of Broadcasters, MM Docket No. 04-233, at 9 (filed November 1, 2004).

- KPIX-TV (CBS), San Francisco, CA, provides some 28.5 hours of weekly local news. KBCW (CW) broadcasts a daily half-hour news program in prime time. In addition, KPIX broadcasts two weekly, local interview and discussion programs, and a daily prime-time program focusing on life in the Bay Area.
- WBZ-TV (CBS) Boston, MA, airs some 31 hours of local news each week, representing 18.5% of the station's broadcast schedule. The station also airs a half-hour magazine program, "Sunday with Liz Walker," consisting of features about the Boston area, discussions, and special reports. WSBK-TV (Ind.) provides viewers in the market with a half-hour newscast at 9 p.m.
- KTVT (CBS), Dallas, TX, airs about 25 hours of local news per week, while its sister station, KTXA, airs 14.
- WCCO-TV (CBS), Minneapolis, MN, provides 25.5 hours of local news each week, comprising almost 16% of its schedule.
- WFOR-TV (CBS) and WBFS (MNTV), Miami, FL, have invested more than \$15 million in their local news and together air 40 hours per week of local news. In the fall of 2004, WBFS added a daily two-hour morning news program. Additionally, WFOR airs "4 Sunday Morning," a weekly program featuring interviews and discussions concerning public affairs.
- KCNC-TV (CBS), Denver, CO, airs 30 hours of local news per week, representing 18.5% of the station's total programming.
- KOVR-TV and KMAX-TV (CW), Sacramento, CA, together offer *more than 60* hours of local news each week, including KMAX's morning show, *Good Day, Sacramento*, which airs five hours per day on weekdays and an six additional hours on weekends.
- KDKA-TV (CBS), Pittsburgh, PA, airs more than 40 hours of local news each week, representing almost one-quarter of its program schedule, while sister station WPCW (CW) contributes an additional 8.5 hours of weekly local news. KDKA also presents a weekly half-hour talk show hosted by KDKA-TV reporter Lynne Hayes-Freeland, which features both local and national celebrities discussing local African-American issues and entertainment.
- WJZ-TV (CBS), Baltimore, MD, offers 35.5 hours, or 21% of its program schedule, of local news each week. WJZ also broadcasts "On Time," a weekly community-affairs discussion program

In addition to their daily news coverage, many CBS owned stations are equipped and staffed to provide their communities with critical emergency-related programming.

Stations have invested tens of millions of dollars in acquiring ENG microwave, satellite trucks and helicopters to enable them to gather local news on the scene and to cover local natural and other disasters. CBS owned stations also have purchased and installed costly weather systems, including Doppler radar, to track and report local weather events.

As an example of what these investments mean for local viewers, in Los Angeles, KCBS (CBS) and KCAL (Ind.) aired one week of around the clock coverage of Southern California's October 2007 firestorm, including vital information about evacuations. In Sacramento, KOVR (CBS) and KMAX (CW) provided 15 hours of live coverage of the storms and power outages that wracked the area last winter

When a series of tornadoes inflicted extensive damage to the small Illinois town of Utica, the weather anchor of WBBM-TV (CBS) in Chicago was on air with continuous coverage of the weather emergency. And investment in newsgathering and weather equipment enabled WFOR-TV (CBS) and WBFS (MNTV) to provide wall-to-wall coverage of four hurricanes that threatened or struck their Miami-area viewing communities. This coverage included up-to-date information about area closures, evacuation orders and live reports from local and state governments, as well as on-the-scene reports. Moreover, the fact that the CBS Miami stations own some of the most technically advanced weather reporting equipment in the area has enabled their team of meteorologists to pinpoint exact areas of weather disturbances so that they can keep their viewers informed and prepared.

These are only examples of the CBS owned television stations' locally-oriented programming. In addition, each of our news operations has individuals or teams devoted to local investigative reporting, consumer issues or health news. Special coverage of

political issues and election campaigns, including candidate debates and issue forums, has aired outside of regular newscasts in each of our markets. In nine of our 13 markets, CBS owned stations have invested in satellite news bureaus to allow for better coverage of local issues in parts of their viewing areas.

And as proud as we are of these stations' performance, we do not suggest that it is in any way unique. For local television stations, community service is a key element of business success.

B. Broadcasters Have Traditionally Been Among the Most Public-Spirited Citizens in Their Local Communities.

Programming is only one aspect of broadcasters' local service. Throughout their history, broadcasters have been among the leading corporate citizens in their communities, routinely donating large amounts of air time for public service announcements and serving as particularly effective fund raisers for charitable causes. Television and radio stations have traditionally sponsored holiday initiatives, such as the collection of toys for children and dinners for the poor; education initiatives, such as the creation and funding of scholarships for high school students and the raising of funds for school supplies; health initiatives, such as the sponsorship of immunization campaigns, blood drives, and medical screenings; and law enforcement initiatives, such as campaigns to raise funds for bulletproof vests for police officers and for gun buyback programs.¹⁷

In times of emergency or disaster, stations preempt normal commercial programming for extended periods of time to offer around the clock coverage, apprising

¹⁷ See generally, "A National Report on Local Broadcasters' Community Service," Comments of National Association of Broadcasters, MM Docket No. 04-233, Exhibit A (filed November 1, 2004).

the community of dangers and where help can be obtained. Stations have also been essential participants in community recovery efforts, raising money and gathering food and other supplies.¹⁸

CBS is particularly proud of the record of community involvement compiled by its owned television and radio stations. The following are a few examples illustrative of the deep commitment of the CBS stations to a wide variety of projects that have made a difference in the stations' communities:

- WFOR-TV/WBFS, Miami: WFOR-TV created Neighbors 4 Neighbors in the aftermath of Hurricane Andrew as a relief effort that consisted of a 15-line phone bank, staffed 18 hours a day by volunteers and station personnel. News reporters and anchors broadcasting live from the phone bank told viewers to call if they needed help or wanted to help. Special reports profiling affected families and volunteer efforts also served to motivate viewers into action. The response was overwhelming and the phone bank quickly became a community asset for assisting those in crisis.

As South Florida recovered, station management opted to continue Neighbors as a resource for all those in need. In partnership with community leaders, the station organized Neighbors 4 Neighbors as a 501(c) (3) non-profit entity, funded through foundation grants and corporate donations. With the power of television as one of its greatest assets, the organization quickly expanded its services beyond hurricane relief and evolved into one of the most effective vehicles for connecting those in need with people willing to help. Most recently, the Neighbors 4 Neighbors Family Fund has provided financial assistance and food vouchers to local families in crisis. In addition, WFOR and WBFS sponsor a Neighbors 4 Neighbors Adopt a Family for the Holidays campaign, which matches donors with families in need during the Thanksgiving and December holidays, and collects toys, gift cards and cash donations for families that are not directly adopted.

- KYW-TV/WPSG-TV, Philadelphia: KYW-TV is a founding sponsor of the annual Komen Philadelphia Race for the Cure, organized locally by the Breast Health Institute since 1991. The 2007 Race, which KYW covered live in its Sunday morning newscast, raised \$3.5 million in support of breast cancer research and education. Both KYW and WPSG promoted the Race in advance

¹⁸

Id.

with public service announcements and news stories about the latest medical breakthroughs in breast cancer research and detection.

- KPIX-TV/KBCW-TV, San Francisco: In 2007, KPIX and KBCW produced and aired public service announcements for Students Rising Above, an organization dedicated to helping low income high school students attend college by providing them with financial assistance and mentoring support. Nearly \$750,000 dollars was raised during the year. In addition to broadcasting PSAs, KPIX reported on air about 12 of the 124 students currently in the program. Participants come from severely disadvantaged backgrounds: nearly half of the students are not living with their parents; 75 percent live below the poverty level; 40 percent are or have been homeless; 35 percent were abandoned; 25 percent are raising siblings; and 20 percent have physical or learning disabilities. Despite these formidable challenges, eighty percent of program participants graduate, earning four year college degrees.
- WBZ-TV, Boston: In 2007, the WBZ 4 Kids campaign raised more than \$90,000 for Children's Hospital Boston. The campaign consists of public service announcements, news features, participation in an annual walk, and an interactive website with information on Children's Hospital Boston. In addition to supporting Children's Hospital through this campaign, the station was the media sponsor for the 2007 Miles for Miracles Walk, which raised over \$1,000,000.

WBZ-TV also stepped in when, in December 2007, a tanker truck carrying hazardous materials flipped over, caught fire and forced the evacuations of dozens of families in the town of Everett, Massachusetts. Eighteen homes were totally destroyed. WBZ joined with the American Red Cross to create a Disaster Relief Fund to assist the Everett victims and regularly aired related information in newscasts and in public service announcements.

- KCNC-TV, Denver: For more than 25 years, the Station has teamed up with the Salvation Army to collect and distribute canned and non-perishable food items. The month-long 2007 campaign, which included a day-long drive at local groceries stores in which KCNC personnel participated, collected nearly 200,000 food items.

KCNC is also a partner of The Adoption Exchange, a non-profit 501(c) (3) that works to find permanent adoptive homes for foster children. Each Wednesday, the station airs a segment in its news broadcasts featuring a child or sibling group in need of an adoptive family. The station also participates in a special one day program in which success stories of former "Wednesday's Children" are aired throughout the day, and viewers are introduced to more children still looking for homes. Viewers have the opportunity to make a donation online or by telephone, or to request additional information about adopting children with special needs.

- WCCO-TV, Minneapolis. In 2007, WCCO's phone bank program, which gives viewers the opportunity to call in to make donations or get information in connection with related news stories aired in the station's 10 PM news broadcast, raised \$8,000 for the local Animal Humane Society; provided free or low-cost mammograms for uninsured or underinsured women; distributed 600 free NOAA weather radios and 19,000 weather radios at a significant discount; gave away 500 carbon monoxide detectors; and provided doctors to answer questions about the symptoms of heart disease in connection with its news feature "Inside A Heart Attack," which one woman credited with saving her husband's life by prompting them to seek treatment at a hospital emergency room.
- KTVT/KTXA, Dallas-Fort-Worth: KTVT and KTXA joined with the Autism Treatment Center, the Dallas Cowboys Charities, CBS Radio, Time Warner Cable and Dallas Child magazine to host "Stephanie's Day," an event designed to help parents with special needs children (especially those with autism) find out more about the various therapy options, educational programs and support groups available to them. More than 1,000 people attended the event at a local mall, where they also enjoyed face-painting, music, balloons, costumed characters, prizes, and autographs from station personalities and local celebrities, including the Dallas Cowboys Cheerleaders.
- KDKA-TV, Pittsburgh. For 54 years, KDKA has been a fund-raising partner of Children's Hospital of Pittsburgh, which in 2007 dispensed more than \$15 million in free care to the families of area children. Each year, during the week before Christmas, KDKA produces and broadcasts a fund-raising program for the hospital, and mobilizes hundreds of volunteers to take telephone donations. In addition to airing an extensive schedule of public service announcements in support of the hospital, during the week leading up to the program the station's news broadcasts present stories featuring the doctors, nurses, families and kids at the hospital. KDKA's daily morning talk show also features stories about the work being done at the hospital and the people doing it. On the day of the benefit show, KDKA promotes the phone bank number starting in its 4 p.m. newscast and carries it all the way to the program in prime time. In 2007, KDKA-TV helped Children's Hospital raise over \$1.4 million; the total raised over the history of the program exceeds \$50 million.
- WBMX, Boston: The station annually conducts a Radiothon for Children's Hospital which raises over \$3.5 million in two days of live broadcasts at the hospital featuring local families.
- WPEG, Charlotte: WPEG raised more than \$30,000 to open a Men's Shelter for the Salvation Army during a 28-hour radiothon hosted by Morning Show personalities.

- KLUV, Dallas: KLUV's sponsorship of Tarrant County's Race for the Cure, which includes promotion through PSAs, email blasts, website coverage and live broadcasts for the duration of the event, helped to raise over \$150,000.
- WOMC, Detroit: For 19 years, the station has hosted the Dick Purtan Radiothon, an all day event, to benefit the Salvation Army. In just sixteen hours in 2006, the Radiothon raised \$1.8 million for the Detroit Salvation Army Bed and Bread Club Program.
- KVMX, Portland: KVMX created its own "Truckload of Coats" event as a response to an increase in local homeless families, and has filled a moving truck each year with coats and goods for local shelters.
- KINK, Portland: Over the last decade, the station has released a biennial charity music CD compilation to benefit the Oregon Food Bank, raising over \$1.5 million.
- WPGC/WPGC-FM, Washington, DC: The stations create and host annual AIDS awareness and education events, including recent night time testings at local venues that resulted in 1,500 people learning their HIV status.

As should be evident from the above discussion, the opposition of CBS and other broadcasters to the *Report and Notice* and the *Enhanced Disclosure Order* does not stem from a failure to respond to the needs of their localities or from a meager record of community service. Rather, we object to the reimposition of regulation that the Commission itself has previously found to be unnecessary, which will result in no evident public benefit, and which will serve only needlessly to burden television and radio stations. The chief effect of such regulation would be to require the diversion of significant broadcaster resources to record-keeping and the preparation of government-mandated reports from more productive endeavors, including meaningful interaction with members of broadcasters' communities and the production of responsive programming. And, inevitably, the rules will increase broadcasters' costs at a time when all traditional

media, electronic and print, are financially stressed, thus impeding their efforts to serve the public while remaining economically robust.

We turn now to a detailed discussion of the proposals set forth in the *Report and Notice*.

II. THE RE-REGULATORY INITIATIVES ADVANCED BY THE COMMISSION SHOULD NOT BE ADOPTED.

A. The Scope of the Commission's Action.

The Commission's proposals in this proceeding cannot be viewed in isolation. Taken together with the reporting requirements imposed by the *Enhanced Disclosure Order*, they represent a return to a bygone era of hyper-regulation of broadcasting. After a 25 year period during which the imposition of such burdens on television stations was thought unnecessary to protect the public interest, the Commission has proposed to resurrect substantially similar requirements at the very time when television stations are occupied with the final stages of the digital transition – on which they have spent hundreds of millions of dollars -- and face an economic environment that is already challenging.

The *Enhanced Disclosure Order* has already been adopted by the Commission. Absent reconsideration by the FCC, whether it becomes effective will be decided in other venues – specifically, by the United States Court of Appeals for the District of Columbia Circuit and at the Office of Management and Budget, where it will be challenged, *inter alia*, under the Paperwork Reduction Act. Nonetheless, because of their close relation to

the proposals in this proceeding -- which were released on the very same day -- the mandates of the *Enhanced Disclosure Order* require some discussion.

The new, standardized form adopted by the *Enhanced Disclosure Order* would greatly increase the quarterly reporting -- and therefore the record-keeping -- obligations of television stations. In addition to reporting "each program or program segment aired [during the] quarter that . . . includes significant treatment of community issues," the FCC's new standardized form would require broadcasters to compile the average number of hours of programming per week they had broadcast in each of the following categories: high definition programming; national news programming; local news programming produced by the station; local news programming produced by an entity other than the station; local civic affairs programming; local electoral affairs programming; independently produced programming; other local programming; public service announcements; and paid public service announcements.¹⁹ In reporting the time devoted to national and local news programming, licensees would be required to deduct the running time of any reports concerning "local civic affairs" and "local electoral affairs" -- presumably to avoid any possibility that "credit" would accrue to the station twice.²⁰

Further, broadcasters would be required to list each program aired in these categories:

- Independently produced programming aired during prime time.
"Independently produced programming" is defined as programming

¹⁹ See *Enhanced Disclosure Order, supra*, Appendix B, Standardized Television Disclosure Form (FCC Form 355) Question 2 ("Standardized Disclosure Form") (emphasis added).

²⁰ *Id.* at notes 136 and 137.

“produced by an entity not owned or controlled by an owner of a national television network, including but not limited to ABC, CBS, NBC, and Fox.” (In applying this definition, licensees would be required to determine whether a network “owns or controls more than a one-third financial interest in the program, acts as the distributor of such program in syndication, or owns the copyright in such program.”)²¹

- Each public service announcement aired between 6 am and midnight.²²
- Each “paid” public service announcement aired between 6 am and midnight.²³
- Programs aimed at “underserved communities” (defined as “demographic segments of the community of license to whom little or no programming is directed”).²⁴
- Locally-produced religious programming.²⁵

The form would also require that stations (1) “describe [their] efforts to determine the programming needs of its community . . . and how they “design[ed] . . . programming to address the needs identified”; (2) list programs that were not close-captioned and the claimed basis for exemption from the captioning requirement; and (3) whether they have provided any programs with “video description” – this last in the face of a D.C. Circuit decision that the Commission exceeded its authority in adopting regulations requiring that such programs be aired.”²⁶

²¹ *Id.* Question 2(f) and Instructions.

²² *Id.* at Question 2(h).

²³ *Id.* at Question 2(i).

²⁴ *Id.* at Question 2(j), and Instructions.

²⁵ *Id.* at Question 2(k).

²⁶ *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir 2002). Throughout the *Enhanced Disclosure Order*, the Commission is at pains to deny that its new “standardized disclosure form” imposes new substantive

In this proceeding, the Commission proposes to take the next steps toward restoring the regulations of the 1970s and early eighties by reinstating program percentage renewal guidelines, mandating that broadcasters establish “Community Advisory Boards” to help guide their editorial judgments, and reversing the liberalization of the main studio rule on which many broadcasters have relied in locating their studio facilities. As we now show, not only would proceeding further down this path be profoundly unwise, but such rules could not be sustained.

B. Adopting the Proposals of the *Report and Notice* Would Constitute a Dramatic Reversal of Prior Commission Policy that the Record is Inadequate to Sustain.

As we have emphasized throughout, the Commission’s proposals in this rulemaking proceeding are fundamentally at odds with steps it took in the mid-1980s to significantly deregulate television broadcasting.

In its 1984 *Television Deregulation* order, the Commission eliminated the quantitative guidelines for informational, local and non-entertainment programming that it had previously used in processing license renewal applications. In a complete reversal of the position the Commission then adopted, the *Report and Notice* now tentatively concludes that program percentage guidelines should be reimposed.

programming requirements on broadcasters. Rather, it justifies the new reporting obligations by saying they will allow viewers to better "participate" in the license renewal process. *Enhanced Disclosure Order, supra*, 23 FCC Rcd. at 1287, 1292, 1293. This, of course, begs the question of how information concerning things the licensee is not required to do can be relevant to such “participation.” Whether or not so intended, the very fact of the Commission’s requesting this information is coercive. *See Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc) (broadcasters’ exposure to the license renewal process subjects them “to a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content); *see also* discussion at note 64, *infra*.

In *Television Deregulation*, the Commission found the logging requirements imposed by its previous rules to be burdensome and unnecessary.²⁷ In contrast, the reporting requirements adopted by the *Enhanced Disclosure Order*, and the processing guidelines now proposed by the *Report and Notice*, would once more require broadcasters to keep detailed records of precisely how much of certain kinds of programming they had presented. And although the Commission in *Television Deregulation* made clear that it was interested in the programs broadcast in response to issues of community concern rather than the means by which they had “ascertained” what those issues were,²⁸ the standard quarterly reporting form adopted by the *Enhanced Disclosure Order* requires broadcasters again to provide information concerning their “ascertainment” efforts,²⁹ and the *Report and Notice* proposes imposing on television stations a mandatory “Community Advisory Board” to opine on the subjects they should treat in their programming.³⁰

In eliminating its quantitative license renewal guidelines in 1984, the Commission relied on two “fundamental considerations.” First, the Commission found, based on studies of station performance, that broadcasters were providing public interest programming in quantities greater than those prescribed by the regulations, and concluded that “licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace

²⁷ *Television Deregulation, supra*, 98 FCC 2d at ¶¶ 69-79.

²⁸ *Id.* at ¶ 54.

²⁹ Standardized Disclosure Form, Question 3.

³⁰ *Report and Notice* at ¶ 25.

incentives, thus obviating the need for the existing guidelines.”³¹ Second, the Commission found disadvantages “inherent” in the regulatory scheme for a variety of reasons, including that it infringed on the editorial discretion of broadcasters, conflicted with the Commission’s traditional effort “to avoid this type of [quantitative] regulatory approach,” and imposed burdensome compliance costs.³² In the latter regard, the Commission also repealed its requirement that television licensees retain detailed logs concerning the sources and categories of all programs they broadcast, citing a 1978 GAO report calling the regulation “the largest government burden on business” in terms of total hours expended.³³

The Commission also eliminated formal ascertainment requirements in its 1984 deregulation order, explaining that “[c]ommercial necessity dictates that the broadcaster must remain aware of the issues of the community or run the risk of losing its audience.” Finding that market forces would provide “adequate incentives for licensees to remain familiar with their communities,” the Commission concluded that “the need for our ascertainment regulation has declined and will continue to decline, and that the [requirement] should [be] eliminate[d].”³⁴

In proposing to eliminate its license renewal processing guidelines, ascertainment requirements and logging rules, the Commission took particular note of the risk that, in an increasingly competitive video marketplace, these regulations could “impede the

³¹ *Television Deregulation, supra*, 98 FCC 2d at ¶ 8.

³² *Id.*

³³ *Id.* at ¶ 69.

³⁴ *Id.* at ¶ 49.

ability of commercial television licensees to compete with other, unregulated or less regulated technologies, thereby inhibiting their ability to serve the public fully and to grow.”³⁵ Along similar lines, the Commission observed that the rules appeared to be in conflict with “Congress’ expression of a strong national policy against government over-regulation.” Citing the Regulatory Flexibility Act³⁶ and the Paperwork Reduction Act,³⁷ the Commission noted that “[t]he paperwork burdens imposed by our rules . . . suggest that the costs of retaining [them] may not be justified in relation to their benefits.”³⁸

The present record is devoid of evidence supporting a departure from these findings. With regard to community-responsive programming, for example, the Commission concludes, based on the comments submitted, that

³⁵ Notice of Proposed Rulemaking, MM Docket No. 83-670, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 94 F.C.C.2d 678, 693 (1983) (“*Deregulation Notice*”).

³⁶ Regulatory Flexibility Act, PL 96-354, 5 USC § 601 et seq.

³⁷ Paperwork Reduction Act of 1980, PL 96-511, 44 USC §§ 3501 et seq.

³⁸ *Deregulation Notice, supra*, 94 FCC at 695. Since issuance of the Commission’s *Television Deregulation* order in 1984, Congress has spoken directly to the desirability of a deregulatory approach in the area of telecommunications. Thus, the stated purpose of Congress in enacting the Telecommunications Act of 1996 (“Telecom Act”), as reflected by the accompanying Conference Report, was to “provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening up all telecommunications markets to competition.” H.R. Conf. Rep. No. 104-458, at 113 (1996). And the Telecom Act expressly directed the FCC to review its broadcast ownership rules every two years, and “repeal or modify any regulation it determines to be no longer in the public interest.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202 (h) (1996). In light of these deregulatory directives related specifically to telecommunications, it is difficult to understand the Commission’s proposal now to reinstate regulations it found to be at odds with the deregulatory mandate of the more general legislation on the books in 1984.

Some broadcasters transmit substantial amounts of local news programming relevant to the issues that face their communities of license. In addition to breaking stories, many such broadcasts also include information concerning, crime, investigative features, consumer advocacy issues and segments focused on politics, sports and community events. Stations also provide vital weather information, particularly in emergency situations.³⁹

While noting that “certain groups have long complained that broadcasters do not air enough community-responsive programming,” the *Report and Notice* cites to *nothing in the record* that would support a conclusion that television stations are today providing less than the amount of such programming that the FCC found sufficient to warrant deregulation in 1984. Indeed, the *Report and Notice* does not appear even to quote an *assertion* by any party that this is the case. Instead -- and without itself attempting to independently assess the extent of broadcasters’ efforts in this area, as it did in 1984 -- the Commission cites a litany of mostly subjective complaints:

- The Commission notes the conclusion of the Consumer Federation of America and Consumers Union that “deregulated markets will not provide society with the responsive diverse local broadcast matter that our democracy needs to thrive.” No supporting data are cited.⁴⁰
- The Commission refers to the complaint of the American Federation of Television and Radio Artists and the American Federation of Musicians that broadcasters are not helping sufficiently in “developing and promoting local artists and in fostering musical genres.”⁴¹ By what definition of the “public interest” would they be obligated to perform this role?

³⁹ *Report and Notice* at ¶ 31.

⁴⁰ *Id.* at ¶ 35.

⁴¹ *Id.*

- Without providing supporting data, the Commission quotes the observation of “three groups involved in community production of local television programming” that broadcasters “are improperly scaling back their news and public affairs programming” and that “the amount of local and network broadcast news coverage of substantive campaign and election issues” has been in “continual decline in recent years.”⁴² If these assertions are backed by statistics, they do not appear in the *Report and Notice*.
- The Commission cites a study of broadcast localism in one market, Binghamton, New York. While the sponsors of the study argue that area licensees overstate the amount of locally-oriented news programming they offer by including “time spent on commercials, weather, sports, entertainment, video news releases, and redundancy,” they nonetheless praise two Binghamton area television stations and two area radio stations for their coverage of local news and public affairs.⁴³ At worst, this would seem to be a confirmation of the Commission’s 1984 prediction that “the failure of some stations to provide programming in some categories [would be] offset by the compensatory performance of other stations.”⁴⁴
- The Commission cites the finding of a study by the McGannon Foundation that 59 percent of the surveyed commercial stations provided no local public affairs programming during a two-week sample period. However, the study also found that, on average, commercial broadcast stations provided 45 minutes of such programming during the period, which would seem to indicate that some commercial stations provided a goodly amount. And, notably, the study also found that public stations aired an average of 3.5 hours of public affairs programming *per week*.⁴⁵ In assessing whether a “market failure” now requires a return to regulation, does the Commission mean to exclude the contribution of public stations to the availability of community-responsive programming to the public?

⁴² *Id.* at ¶ 36.

⁴³ *Id.* at ¶ 37.

⁴⁴ *Television Deregulation, supra*, at ¶ 22.

⁴⁵ *Report and Notice* at ¶ 38.

The Commission quotes similar criticisms of broadcasters' programming about politics and election campaigns, which seem in significant part directed at the news judgments made by stations in providing such coverage (e.g., not enough coverage of local races as compared to presidential campaigns).⁴⁶ The record discloses that these studies have been criticized on methodological grounds, but the more significant point for present purposes is that the Commission never specifies the conclusions of these studies that it believes support the tentative conclusion that more regulation is necessary.

Once again, we must note that the Commission is not writing on a blank slate. If it is to return in substantial measure to a regulatory regime that it found outmoded in 1984 – based on a comprehensive review of the levels of informational and local programming on commercial television and the economic incentives to provide it – it will have to present “a reasoned analysis indicating that [its] prior policies and standards are being deliberately changed, not casually ignored.”⁴⁷ We respectfully submit that the Commission will not be able to carry this burden.

C. The Commission Should Not Adopt License Renewal “Processing Guidelines” Based on the Broadcast of Minimum Percentages of Programming in Particular Categories

As discussed above, there is nothing in the record to suggest a decrease in the amount of community-responsive programming presented by commercial television stations that might be thought to call for the reinstatement of quantitative programming guidelines in the license renewal process. The Commission's tentative conclusion that such rules should be adopted is therefore particularly puzzling, since they would

⁴⁶ *Id.* at ¶ 63.

⁴⁷ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

manifestly conflict with the Commission’s long-standing reluctance to quantify broadcasters’ public interest obligations,⁴⁸ and strain the limits of the Commission’s authority generally “to interest itself in the kinds of programs broadcast by licensees.”⁴⁹

From the earliest days of broadcasting, the Commission has been chary of specifying exactly how much of particular types of programming a licensee must present in order to meet its public interest obligations. Thus, in its 1949 *Report on Editorializing*, which first set forth the responsibility of broadcasters to devote a reasonable amount of time to the coverage of controversial public issues, the Commission was careful to emphasize that “[i]t is the licensee ... who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting.”⁵⁰ The FCC showed similar concern for the editorial discretion of licensees when it declined, in 1977, to adopt program percentage standards for determining what constituted “substantial service” in the context of a comparative renewal proceeding. Because all licensees would feel compelled to meet such standards, the Commission found, their adoption would “artificially increase the time most television stations devote to local, news and public affairs programming,” a result that would “represent a restriction on licensees’ programming discretion.” Saying that it was “not convinced that that

⁴⁸ See, *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). The only quantitative standards adopted by the Commission which are currently in force are the Commission’s license renewal processing guidelines regarding children’s programming, which were adopted in response to the enactment of the Children’s Television Act.

⁴⁹ *Id.* at 526.

⁵⁰ *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1247 (1949).

government should impose on broadcasters a national standard of performance,” the Commission concluded that quantitative program standards were “a simplistic, superficial approach to a complex problem.”⁵¹

The Commission expressed similar distaste for quantitative program standards in *Television Deregulation*, where it found the replacement of numerical guidelines with a more flexible standard to be “more consistent with underlying First Amendment values.”⁵² The only programming obligation of a licensee, the Commission stated, should be “to provide programming responsive to issues of concern to its community of license,” emphasizing that a licensee should be able to address issues “by whatever program mix it believes is appropriate.”⁵³

⁵¹ *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 FCC 2d 419, 428-29 (1977). The Commission also found that program percentage standards could threaten program quality:

It is apparent that the value of a program to the viewing public is dependent on many variables, including the resources committed to its production and its relation to audience needs and interests. Those stations that increased their support for local and informational programming might well upgrade their service. However, others through choice or necessity might only spread their resources thinner, and reduce the quality and value of such programming. In short, increasing the amount of this programming would not necessarily improve the service a station provides its audience.

Id. at 427.

⁵² *Television Deregulation, supra*, 98 FCC 2d at 1090.

⁵³ *Id.* at 1092.

The courts have been no less sensitive to the First Amendment issues that would be raised by Commission regulations specifying the precise amounts of different types of programming which a broadcaster must present. For example, in *National Association of Independent Television Producers and Distributors v. FCC*,⁵⁴ the court upheld against constitutional challenge the exemption of certain categories of network programming from the former prime time access rule (“PTAR”), but expressly cautioned that “mandatory programming by the Commission even in categories [might] raise serious First Amendment questions.”⁵⁵

Similarly, in *National Black Media Coalition v. FCC*,⁵⁶ the court affirmed the Commission’s decision not to adopt quantitative standards for use in comparative renewal proceedings. Rejecting the argument that the First Amendment required such standards in order to objectify the comparative renewal process, the court observed that such an approach “would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission.”⁵⁷

Most recently, in *Turner Broadcasting System v. FCC*,⁵⁸ the Supreme Court gave further indication that quantitative programming requirements would not survive constitutional scrutiny. In *Turner*, the Court considered the argument that the

⁵⁴ 516 F.2d 526 (2d Cir. 1975).

⁵⁵ *Id.* at 536.

³¹ 589 F.2d 578 (D.C Cir. 1978).

⁵⁷ *Id.* at 581.

⁵⁸ 512 U.S. 622 (1994).

Commission's must-carry rules were content-based because the rules' "preference for broadcast stations *automatically* entails content requirements."⁵⁹ The basis for this contention was that the Commission allegedly regulates the content of broadcast licensees' programming, but not cablecasters' programming, and that by forcing cablecasters to carry broadcast signals, the rules imposed content-regulated broadcast programming on cable companies.

The Court acknowledged that broadcast programming "is subject to certain limited content restraints imposed by statute and FCC regulation," giving as its example the Commission's authority under the Children's Television Act to consider the "extent to which [a] license renewal applicant has 'served the educational and informational needs of children.'"⁶⁰ But the Court rejected the contention that the must carry rules were content-based, explaining that this argument "exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming." Noting that the Commission "is barred by the First Amendment and [§326 of the Communications Act] from interfering with the free exercise of journalistic judgment," the Court concluded:

In particular, the FCC's oversight responsibilities *do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations*; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may

⁵⁹ *Id.* at 649 (internal quotes omitted).

⁶⁰ *Id.* at 649 & n.7. Two years after the Court's decision in *Turner*, the Commission adopted a three-hour per week license renewal "processing guideline" to implement the Children's Television Act. The constitutionality of its action has never been tested.

not impose upon them its private notions of what the public ought to hear.”⁶¹

The Court reiterated this point with respect to noncommercial educational stations, which it said “are subject to no more intrusive content regulation than their commercial counterparts”:

What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of “educational” programming or any particular “educational” programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve “the public interest, convenience or necessity.”⁶²

To conclude its explanation of why FCC and Congressional exercise of control over programming offered by broadcast stations was – and has to be – “minimal,” the Court unequivocally stated:

our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.⁶³

It is clear, then, that the Commission’s adoption of quantitative program requirements – in the form of express mandates or so-called “processing guidelines”⁶⁴ –

⁶¹ *Id.* at 650 (quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7293 (1960)) (emphasis added).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ There can be no question that license renewal “processing guidelines” are the functional equivalent of direct mandates, since no rational licensee will risk having its renewal application singled out for special scrutiny by the Commission by virtue of its having failed to meet such a “guideline.”

would raise serious constitutional questions. There is no need for the Commission to embark on this path. Since 1984, the quarterly issues/program report adopted by the Commission in *Television Deregulation* has served to document the compliance of

The courts have long recognized the constitutional implications of such “raised eyebrow” regulation. For example, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc), the United States Court of Appeals for the D.C. Circuit held unconstitutional under the First and Fifth Amendments a provision of the Communications Act which required non-commercial, educational television and radio stations that received federal funding to retain an audio tape of any program in which an issue of “public importance” was discussed. The Court stated:

Noncommercial licensees, like their commercial counterparts, are subject to regulation and license renewal proceedings by the FCC. This renders them subject as well to a variety of *sub silentio* pressures and “raised eyebrow” regulation of program content. While recent administrations provide ample examples of open forms of such pressure, . . . more subtle forms of pressure are also well known. The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry, and the setting of a license for a hearing on “misrepresentations” all serve as means for communicating official pressures to the licensee.

Id. at 1116 (footnotes and citations omitted). See also *Lutheran Church-Missouri Synod v. FCC*, 154 F.3d 487, 491, *petition for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) (FCC’s equal employment opportunity regulations unconstitutional because they “indisputably pressure -- even if they do not explicitly direct or require -- stations to make race-based hiring decisions”); *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976) (finding that informal “jawboning” by agency officials is judicially reviewable), *vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America v. ABC*, 609 F.2d 355 (9th Cir. 1979) (agreeing that “the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA”), *cert. denied*, 449 U.S. 824 (1980).

television station licensees with their bedrock public interest obligation -- that is, to provide programming responsive to issues of community concern. The issues/program report must include not only the title, time, date and duration of the programs which a licensee considers to be its “most significant” treatment of community issues during the preceding quarter, but “a brief narrative describing what issues were given significant treatment and the programming that provided this treatment.”⁶⁵ Apart from the conclusory complaints of advocacy groups, neither the *Report and Notice* nor the *Enhanced Disclosure Order* provides any basis for believing that these reports have failed adequately to accomplish their purpose.

D. The Commission Should Not Resurrect “Ascertainment Requirements in Any Form, Including “Community Advisory Boards.”

The *Report and Notice* asserts that the record in this proceeding “shows that new efforts are needed to ensure that licensees regularly gather information from community representatives to help inform the stations’ programming decisions.”⁶⁶ The Commission nonetheless declines simply to reinstitute its former detailed ascertainment rules, stating that, as in 1984, it does not believe the “potential benefits justify the costs.” Instead, the Commission tentatively concludes it should adopt what it conceives as a less burdensome ascertainment mandate – namely, a requirement that each licensee be required to meet quarterly with a permanent advisory board “made up of officials and other leaders from [its] service area” to help it determine the content of its issue-responsive programming. The Commission should not adopt this unprecedented – and we believe unconstitutional

⁶⁵ 47 CFR § 73.3526 (11) (i).

⁶⁶ *Report and Notice* at 25.

--proposal to *require* broadcast licensees to afford permanent and quasi-official status to an outside board of “advisors,” made up in part of government officials.

The first objection that may be made to the Commission’s proposal – before even considering its First Amendment implications – is that it represents regulation without a purpose. The Commission distinguishes its proposal from its former ascertainment rules -- which it concedes entailed costs in excess of any potential benefits -- on the ground that its current initiative would not be as costly and burdensome.⁶⁷ But saying that worse regulations can be imagined is not sufficient ground to justify the adoption of a rule which, though less burdensome, serves no useful purpose.

The Commission repealed its former ascertainment requirements not only because they were burdensome, but because it found “no evidence” that they had any beneficial effects. Thus the Commission found that “licensees become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements”;⁶⁸ therefore, it concluded that the requirements could be eliminated “with little or no risk of adverse effects on ... programming.”⁶⁹ Accordingly, the Commission announced that in all future proceedings

the focus of our inquiry shall be upon the responsiveness of a licensee's programming, not the methodology utilized to arrive at those programming decisions. If the programming presented by the licensee satisfies its obligation, the ascertainment efforts of the station are irrelevant.⁷⁰

⁶⁷ *Id.*

⁶⁸ *Television Deregulation, supra*, 98 FCC2d at ¶ 48.

⁶⁹ *Id.* at ¶ 54.

⁷⁰ *Id.*

In other words, the Commission found that ascertainment served no purpose and that *any* burden it imposed on licensees could not be justified. The Commission’s belief that the bureaucratic burdens that would be entailed by the rule now being contemplated would be less extensive than those imposed by the old ascertainment requirements is no reason to adopt them. The present proposal, like the former requirements, would accomplish nothing of value.

This is because, as the Commission has recognized, “[b]roadcasters do not operate in a vacuum”; rather, “like other citizens, [they] are exposed to newspapers, newsletters, town meetings and other community activities, all of which provide indications of those issues that are important to the community.”⁷¹ Indeed, any broadcast station with a news department is “ascertaining” community issues on a daily basis. Through their news personnel, the vast majority of broadcasters are constantly interviewing and otherwise obtaining the views of political and community leaders, those working for political and social change, and various individuals affected by the poor functioning of community services or by the misdeeds of those whose actions should come under official scrutiny. Station contacts with the community are not limited to station news personnel. General managers, public affairs personnel and others, including sales personnel, are constantly in dialogue with various components of the community. As the Commission recognized in 1984, these contacts are essential to

⁷¹ *Id.*

any broadcaster's ability to stay competitive, because a station that falls out of touch with the concerns of its community will fail in the marketplace.

But while adoption of the Commission's proposal would not serve any real purpose, it would have a very significant drawback – specifically, it would be unconstitutional. The radical nature of the Commission's proposal can be easily understood by imagining a similar government-mandated imposition of outsiders into the editorial processes of a newspaper. A starker violation of the basic First Amendment principle that editorial decisions are the sole province of the editors of the publication – whether print or electronic – can scarcely be imagined. *See, Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258 (1974); *Columbia Broadcasting System, Inc v. Democratic National Committee*, 412 U.S. 94, 124-25 (1973).

While the Commission may conceive of its proposal as an anodyne substitute for the rigid strictures of its former ascertainment requirements, the fact is that it would amount to nothing but regulation for regulation's sake. The Commission should resist the impulse to adopt new rules, especially ones that encroach on First Amendment rights

E. Reversion to the Commission's 1986 Main Studio Rule Would Be Arbitrary and Capricious

1. The Compelling Facts And Policy Considerations Which Led The FCC To Adopt The Current Main Studio Rule Remain In Place.

In the *Report and Notice*, the Commission proposes reverting to a main studio rule (the “*Main Studio Rule Reversion*”) last in effect twenty-one years ago – a rule summarily discarded in 1987 as “unduly restrictive.”⁷² Despite the careful deliberation that accompanied rejection of the old rule, and the measured replacement of it with

⁷² 1987 Order, *supra*, 2 FCC Rcd at 3218.

modern guidelines that “strike an appropriate balance between ensuring that the public has reasonable access to each station’s main studio . . . and minimizing burdens on licensees,”⁷³ the Commission now contemplates the abrupt reimposition of its obsolete 1986 rule. It seeks comment on whether such a regression will: (1) “encourage broadcasters to produce locally originated programming,”⁷⁴ and (2) further “interaction between the broadcast station and the community of service.”⁷⁵ For definitive answers to these inquiries, the Commission need look no further than the extensive, deliberative record it created in two prior main studio proceedings.

In its 1987 proceeding, the Commission concluded that, “in light of current broadcast station operations,”⁷⁶ in which “the main studio does not necessarily play [a] central role in the production of a station’s programming,”⁷⁷ the old rule mandating that every broadcast station maintain its main studio in its community of license could be relaxed significantly “without affecting the station’s ability to serve its community of license.”⁷⁸ Of great import to the Commission’s first inquiry here, whether reimposition of the 1986 main studio rule will encourage production of locally originated programming, the Commission found that “main studio facilities *within the political*

⁷³ *Report and Order, In the Matter of 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, 15693 (1998) (“1998 Order”).

⁷⁴ *Report and Notice* at ¶ 41 (“NPRM”).

⁷⁵ *Id.*

⁷⁶ *1987 Order* at 3219.

⁷⁷ *Id.* at 3218.

⁷⁸ *Id.*

boundaries of the community of license [do not] necessarily promote responsive programming.”⁷⁹ Technological developments permitted, and marketplace pressures dictated, that responsive programming could originate from outside the community of license, and in fact, from outside the main studio itself.⁸⁰ Consequently, the Commission instituted a new rule in 1987 permitting broadcast stations to locate main studios anywhere within their principal community contours.

In 1998, the Commission again reevaluated the main studio rule, and after careful assessment, revised it to permit broadcasters to locate their main studios up to twenty-five miles from the center of their communities of license, and in some instances, even further away.⁸¹ Such flexibility “maintains reasonable accessibility of station facilities, personnel and information to members of the station’s community of license, which enables the residents of the community to monitor a station’s performance, and encourages a continuing dialogue between the station and its community. In this way, a station . . . can be more responsive to local community needs in its programming.”⁸²

⁷⁹ *Id.* at 3219 (emphasis added).

⁸⁰ The 1987 Order recognized that “[m]obile units and remote studios, connected to stations through microwave and satellite links, are used to offer programming that includes live feeds from distant points covering events of national or regional significance.” *Id.* at 3218.

⁸¹ See 1998 Order, Appendix C. Section 73.1125 of the Commission’s rules was amended to provide that, in addition to locating a main studio “within twenty-five miles from the reference coordinates of the center of [the station’s] community of license,” a station could also locate its main studio “at any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station’s community of license.” *Id.* The principal community contour of some broadcast stations is significantly larger than a 25-mile radius.

⁸² *Id.* at 15692 (emphasis added).

Again acknowledging the diminished role of main studios in the production of programming, and the current technology of broadcast operations, the Commission allowed marketplace flexibility to determine the most advantageous locations for main studios, yet ensured that the “‘bedrock obligation’ of each broadcast licensee to serve the needs and interests of its community” was in no way altered.⁸³

Thus, in the context of two measured, incremental rulemaking processes that spanned more than a decade, the Commission methodically determined that, in regard to the encouragement of locally responsive programming, “the main studio no longer plays the central role in the production of a stations’ programming [,] and *programming originated from within the political boundaries of the community is not necessarily responsive to the needs and interests of the community.*”⁸⁴ Significantly, when the Commission elected in 1998 to further refine the main studio rule changes of 1987, it did so informed by the “real world” experience of the intervening eleven years. Yet today, the Commission seeks comment on a proposal to mandate locating main studios in communities of license “in order to encourage broadcasters to produce locally originated programming,”⁸⁵ and to provide listeners and viewers “greater access to locally responsive programming.”⁸⁶ The issue of whether the location of a broadcast station’s main studio in its community of license is necessary for the production of responsive programming has been thoroughly, and repeatedly, examined over an extended period of

⁸³ *Id.* at 15693.

⁸⁴ *1987 Order* at 3219.

⁸⁵ *Report and Notice* at ¶ 41.

⁸⁶ *Id.* at ¶ 3.

time. The steadfast conclusion, determined through two carefully considered rulemaking proceedings, is that it is not.⁸⁷ Intervening years have witnessed only the acceleration in the pace of communications and the growth of “rootless” competition from such sources as satellite and the Internet, making broadcaster flexibility in their physical business operations ever more important.

The Commission poses a largely irrelevant question when it seeks comment on “whether accessibility of the main studio increases interaction between the broadcast station and the community of service.”⁸⁸ There can obviously be *some* correlation between main studio accessibility and interaction between a station and the community. But the relevant questions underlying this issue (questions thoroughly analyzed in the prior rulemaking proceedings) are how much of the overall interaction between the public and broadcasters occurs at main studios and where does the reasonable balance lie, in today’s mobile society, between the levels of studio “accessibility” and of station “flexibility” in trying to operate a viable business that often involves multiple stations within a single market? A review of Commission precedent is again instructive.

In 1987, the Commission flatly stated that a broadcast studio in the community of license is not “required to assure that a station is physically accessible to residents.”⁸⁹ In

⁸⁷ According to a letter to the Chairman of the Commission, signed by more than 120 members of Congress, “the stated goal of the reregulation, namely ‘to encourage broadcasters to produce locally originated programming,’ requires a logical leap that has no place in government regulation, and is a thinly guised method of controlling broadcast content.” Letter of Rep. Mike Ross, *et al.*, to The Honorable Kevin J. Martin, Chairman (April 15, 2008).

⁸⁸ *Report and Notice* at ¶ 41.

⁸⁹ *1987 Order* at 3218.

fact, “[a] studio located outside a community may be as accessible to residents as a facility within the community.”⁹⁰ These maxims originated from two findings: (1) “[r]esidents generally communicate with a station by telephone or mail, neither avenue dependent on locale,”⁹¹ and (2) “[t]ravel time has been reduced in many areas due to the growth of modern highways and mass transit systems.”⁹² In 1998, when it authorized the main studio rule currently in effect, the Commission found, once again, that: (1) “the public is increasingly likely to contact the station by phone or mail rather than in person,”⁹³ and (2) modern mass transit and highways ensured accessibility to “the remaining public”⁹⁴ that chooses to visit main studios. Discussing the then new 25-mile radius/50-mile diameter rule, the Commission noted that “[w]ith this standard, citizens at the opposite end of the community would not be expected to have to travel more than 50 miles to reach the studio, *which we believe is a reasonably accessible distance to expect members of the public to travel*, given today’s modern transportation and good roads.”⁹⁵

Prior, judicious consideration by the Commission established that citizens contact broadcasters by telephone and mail, and rarely in person. With the advent of faxes, cellular telephones, the Internet, and e-mail -- tools so much in their infancy at the time

⁹⁰ *Id.*

⁹¹ *Id.* Comments from the National Association of Broadcasters cited in the *1987 Order* indicated that community residents “rarely, if ever, visit the main studio.” *Id.* at 3216.

⁹² *Id.* at 3218.

⁹³ *1998 Order* at 15697.

⁹⁴ *Id.*

⁹⁵ *Id.* (emphasis added).

of the earlier proceedings that the Commission failed even to mention -- broadcaster/citizen interaction today is almost completely accomplished outside the confines of main studios. The scarcity of citizen visits to broadcast studios, and the lack of necessity of such visits due to modern communications, were major determinants in the development of the Commission's "reasonable accessibility" rule for main studios. The Commission, in both its 1987 and 1998 main studio orders, and in a 1999 follow-up memorandum opinion, contemplated the nature of the interaction between broadcasters and their communities, and struck "an appropriate balance between ensuring that the public has reasonable access to each station's main studio"⁹⁶ and minimizing regulatory burdens on broadcast stations. To regress to an outmoded rule, and force the relocation of hundreds of broadcast studios, so that the rare visitor will be assured of finding a studio within the "political boundaries"⁹⁷ of a certain community, strays far from the Commission's previously stated goal to "strike an appropriate balance" on this issue.⁹⁸ Stated another way, the FCC already has an extensive record establishing that a governmental mandate that main studios must be located within certain political boundaries does not benefit the listener, and nothing in the way of new factual evidence suggests that this well-supported finding should be revisited or revised.

⁹⁶ Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, *Memorandum Opinion and Order*, 14 FCC Rcd 11113, 11113 (1999) ("1999 Order").

⁹⁷ *1987 Order* at 3218.

⁹⁸ This is particularly so, given that, as the Commission has recognized, "[a] studio located outside a community may be as accessible to residents as a facility within the community." *Id.*

2. **FCC Adoption of the Main Studio Rule Reversion Would Impose Severe Costs on Broadcast Stations Without Measurable Countervailing Benefits.**

The FCC's proposal to reinstate the 1986 main studio rule is tellingly bereft of any factual or policy support beyond speculation and isolated anecdote. In other words, it is impossible to ascertain from the *Report and Notice* what the real world benefits *to the public* would be from breathing new life into this long ago discarded rule. By contrast, to assess the concrete costs that a regression to the 1986 main studio rule would impose on its operations, CBS Radio surveyed its regional broadcast engineers. The following three "case studies" are instructive in demonstrating the substantial costs, both in human and financial capital, which would be associated with reinstatement of the old rule.

Tampa - St. Petersburg - Clearwater, Florida. In this radio market serving nearly four million listeners, CBS Radio operates one AM and five FM stations, each with a distinctive format. A single main studio, serving all six stations, is located in St. Petersburg, immediately adjacent to Tampa. From that central location, CBS Radio serves its listeners in the entire Tampa-St. Petersburg-Clearwater area. The communities of license are themselves within close proximity, if not adjacent, to St. Petersburg.⁹⁹

Were the FCC to adopt the Main Studio Rule Reversion, CBS Radio would have to open – and operate – *five* new studios in this market, one each in the communities of Seffner (for WQYK(AM)), Safety Harbor (for WYUU-FM), Holmes Beach (for WLLD(FM)), Lakeland (for WSJT(FM)), and Tampa (for WRBQ-FM). Such

⁹⁹ The station licensed to Lakeland, furthest away at a distance of approximately forty miles, has noted no complaints from listeners as to the location of its main studio.

redundancy would be extremely costly and wasteful, and would reduce the stations' collective ability to serve the public interest. The math is simple. Dollars allocated to new "bricks and mortar" would be unavailable for other station purposes and initiatives, including (ironically) the very quality programming it is ultimately the Commission's intention to promote.

Years of operation from a centralized studio location have allowed CBS Radio to serve the Tampa-St. Petersburg-Clearwater market in the most effective manner possible. Adoption of the Main Studio Rule Reversion would force the deconstruction of certain components of the stations' core operations at a high price, payable by the stations and the public. The aggregate costs of construction and operation of temporary and permanent studios in each community of license, and the associated new technical equipment cost would be measured in the hundreds of thousands of dollars.

Not all of the communities of license have commercially available space for new studio locations. Seffner, Florida, for example, is a small, commuter "bedroom" community (population: 5,467) that appears to have no existing buildings suitable for a leased main studio. A studio in Seffner would likely have to be constructed from the ground up.

Any promised benefits from adding all these new buildings to this market are illusory, dwarfed by the costs. For example, the CBS Radio employee in charge of maintenance of all public inspection files in this market recalls exactly *one instance in the past eight years* of an individual visiting the main studio to inspect a local public inspection file. That individual was an intern with a national political party who wanted to review campaign spending by the presidential candidate for the opposing party. The

sole visitor to the main studio to inspect the file came to inspect the file for purposes unrelated to a particularly local issue.

Washington, DC: The Washington, DC radio market, where residents routinely commute more than an hour to work or school, is home to five CBS Radio stations, three FM stations and two AM stations. The Washington radio market serves nearly 4,300,000 listeners. CBS Radio operates two main studio facilities in this market – one in Lanham, Maryland, for its four stations with communities of license in Maryland (WLZL-FM, WTGB-FM, WPGC(AM) and WPGC-FM) and one in Fairfax, Virginia for its sole station in Virginia (WJFK-FM).

The Lanham studio is easily accessible to the listening public via public transportation – the studio is less than 1.5 miles from a Metro station, and on a bus route. It is adjacent to or near major roads, and one mile from the highway that connects most of the region (the Washington, DC Beltway). Currently, at the Lanham location, the programming, sales and production departments for each of the stations operate separately to serve each station’s distinctive format, yet all three share traffic and business departments resulting in significant economies of scale.

The Fairfax, Virginia, studio is located near the intersection of two major roads, in the city’s downtown. Its location was chosen by a prior station owner in the early 1980s, due to its central location and relative proximity to the core of the Washington metropolitan area, which helps the station attract more employees, and offer less expensive commuting options than it would be able to offer from Manassas, Virginia. Under the Main Studio Rule Reversion, CBS Radio would be forced to open – and operate – four new separate studios: one in Morningside, Maryland (WPGC(AM) and

WPGC-FM), one in Annapolis, Maryland (WLZL-FM), one in Bethesda, Maryland (WTGB-FM) and one in Manassas, Virginia (WJFK-FM). If the existing studio in Lanham closed, the easy transportation accessibility (a major concern in this major metropolitan area) provided by the current studio location would be forfeited for station visitors and employees, who would need to travel variously to Morningside, Annapolis, and Bethesda. These communities (especially Morningside and Annapolis) are far less accessible in terms of Metro and bus routes, and major roads and highways.

Other problems would arise from reversion to the 1987 rule. Morningside, Maryland (population 1,295), the community of license for WPGC (AM) and WPGC-FM, has very little, if any, commercial real estate property available for a suitable studio location. The station would be looking at the very real possibility of constructing a new studio building for these two stations from the ground up, assuming suitable and properly zoned commercial land is even available. Annapolis, the community of license for WLZL-FM, a Spanish-language station, has a far smaller community of Spanish-speakers than does the greater Washington, DC area – for which Lanham is far more accessible. Equipment purchase and relocation costs would cut into the stations' programming and public service budgets. Again, these very real costs to the listening public overwhelm the unsupported speculation of the *Report and Notice* that the public might somehow benefit from each studio's address being within the community of license's political boundaries.

Las Vegas: In this radio market serving nearly 1,756,000 listeners, CBS Radio operates four FM and two AM stations from a single main studio located in an unincorporated part of Clark County, Nevada, some 200 feet outside the boundaries of the city of Las Vegas. Five of the stations are licensed to communities in or adjacent to

the city of Las Vegas itself – KLUC-FM is licensed to Las Vegas, KSFN and KXNT are both licensed to North Las Vegas (six miles from the current main studio) and KMXB-FM and KKJJ-FM are both licensed to Henderson (fourteen miles from the current main studio). KXTE-FM is licensed to Pahrump, Nevada, forty-five miles away from the current main studio. If the FCC were to revert to the old main studio rule, four new main studios would have to be opened, at substantial cost, which would be exacerbated by the unusual geographic terrain in the Las Vegas market, and difficult, market-specific frequency coordination issues. While usable studio space could likely be found in Las Vegas, Henderson and North Las Vegas, a studio would have to be built from the ground up in Pahrump. New equipment would need to be purchased in all cases. Frequency coordination of additional STL channels would require all broadcasters – not just CBS Radio – to change frequencies, as the majority of the FM stations in this market are located on two major mountain tops. If the frequency changes proved impossible, CBS's share of the cost of installation of new telephone wire between the relocated main studios and the transmitter sites could exceed half a million dollars.

Staffing the newly scattered main studios would also be a major issue. Such a move would require hiring and training of new (and redundant) technical personnel. Should three new studios have to be established, added personnel at those studios would be required to be trained in emergency procedures, and interaction with local, state, and federal law enforcement officials. Shared station personnel would suffer from the studios' lack of proximity to each other. Particularly in an area like Las Vegas, where public transportation is minimal, forcing joint-station management personnel to drive from studio to studio, rather than walking down the hall to coordinate station operations,

would be exceedingly wasteful. Enticing qualified personnel to travel to distant studio locations could prove challenging, since most qualified personnel live in the immediate Las Vegas area. The new studios would do little to encourage residents in this car-dependent, sprawling city and suburban area to actually visit the studios, especially since history shows they rarely make in-person visits to the existing studio in Clark County. Again, the public would be the ultimate loser, as the phantom benefits promised by the *Report and Notice* would pale in comparison to the consequences of the financial drain on the stations created by these new compliance burdens.

* * *

Seldom do the scales of a cost/benefit analysis swing so heavily against a proposal as in the case of the proposed Main Studio Rule Reversion. The occasional, sporadic, essentially illusory benefits promised by the mushrooming of multiple main studio “buildings” within a single radio market must be weighed against the massive, potentially crippling costs that would attend the destruction of the broadcasting industry’s reasonably efficient market business models, lawfully crafted in response to governmental rule revisions long ago adopted for amply supported, compelling reasons. The harms would be massive and unjustifiable. The Main Studio Rule Reversion proposal should be summarily rejected.

F. **Adoption of the Proposed Attended Operation Rule Reversion Would Reintroduce Costly Inefficiencies, With Negligible Improvement in the Provision of Emergency Information.**

The Commission also proposes reverting to an “attended operation” rule last in effect thirteen years ago (the “*Attended Operation Rule Reversion*”) – a rule discarded in

1995 “for reasons of efficiency.”¹⁰⁰ In its 1995 proceeding on unattended operation of broadcast stations, just as with the 1987 and 1998 proceedings on the main studio rule, the Commission thoroughly analyzed the issue before it - - whether changes in broadcasting technology mandated rejection of the rule that broadcast stations be “attended” at all times of operation - - and concluded, after careful deliberation, “to eliminate the requirement that a broadcast station must have a licensed radio operator on duty in charge of the transmitter during all periods of broadcast operation.”¹⁰¹ Now, thirteen years later, the Commission inquires “whether we should require a physical presence at a broadcasting facility during all hours of operation.”¹⁰² As with the issue of main studio location, the Commission need only look to its precedent for the answer.

The prior proceeding that addressed unattended operation focused on improvements in transmitters and transmitter monitoring technology, not on how, or if, attended operation somehow “increase[d] the ability of the station to provide information

¹⁰⁰ *Report and Order, In the Matter of 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, 11480 (1995) (“1995 Order”). CBS recognizes that the *Report and Notice* explicitly seeks comment in this docket only on the Attended Operation Rule Reversion as it relates to television stations. The *Report and Notice* references a *digital* radio proceeding (MM Docket No. 99-325) in which the reply comment cycle closed in November 2007 as the docket in which comment has been sought on the Attended Operation Rule Reversion for radio stations. Given the importance of this issue for radio stations and given the fact that the FCC expresses “concern about the prevalence of automated broadcast operations” *in this docket*, CBS requests either: (i) leave to file in this docket the comments below concerning the Attended Operation Rule Reversion for radio stations; or (ii) consideration of these comments as late-filed in MM Docket No. 99-325.

¹⁰¹ *Id.* at 11479.

¹⁰² *Report and Notice* at ¶ 87.

of a local nature to the community of license.”¹⁰³ The rule allowing for unattended operation was directed at the need, or by 1995, the lack thereof, for constant human monitoring of transmitters, so as to alleviate promptly any interference resulting from malfunctioning technical equipment. By the time of the 1995 proceeding, there simply were “no technical obstacles to the automation of any type of broadcast station,”¹⁰⁴ so the Commission readily approved automation of stations and unattended operation.

The impact of unattended operation “on licensees’ ability to serve local needs”¹⁰⁵ was addressed in the 1995 order, in connection with station participation in the then-new Emergency Alert System (“EAS”). The Commission noted that unattended operation of stations under the old Emergency Broadcast System (“EBS”) might be problematic (but not impossible), since EBS “was designed for human intervention,”¹⁰⁶ but that “EAS, on the other hand, *is specifically designed for unattended operation.*”¹⁰⁷ One of the cornerstones of EAS was the requirement that its “encoders and decoders provide both *automatic* and manual operation [that] will permit each EAS participant to determine whether to use *automatic* or manual operation to send or receive EAS alerts.”¹⁰⁸ EAS, recognized the Commission, was being developed and implemented concurrently with

¹⁰³ *Id.* at ¶ 29.

¹⁰⁴ *1995 Order* at 11481.

¹⁰⁵ *Report and Notice* at ¶ 28.

¹⁰⁶ *1995 Order* at 11481.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Amendment of Part 73, Subpart G, of the Commission’s Rules Regarding the Emergency Broadcast System*, 10 FCC Rcd. 1786, 1822 (1994) (emphasis added) (“1994 Amendment”).

rules permitting unattended operation of broadcast stations.¹⁰⁹ More to the point, to the extent issues of public safety and unattended operation are now being raised (*e.g.*, the public’s immediate access to information about weather emergencies), the undeniable central fact is that the Commission long ago established a comprehensive system designed to deliver such emergency information almost instantaneously - - and to do so automatically, in conjunction with unattended broadcast station operation.

In the early 1990s, the FCC determined that EAS was the appropriate mechanism by which to inform the public of time-sensitive, critical emergency information. It then set forth the specific requirement that EAS function *without human intervention*. Just this past year, the Commission began requiring EAS participants to receive alerts activated by state governors or their designees, and to deliver emergency alerts to areas smaller than a state.¹¹⁰ In short, the Commission has studied, in deliberative and painstaking manner,¹¹¹ the issue of the provision of emergency information to local communities in times of emergency. As a result of this deliberation, the Commission has mandated, and supervised, the implementation of a fully operational Emergency Alert System, a core component of which is the ability to function, seamlessly and hand-in-hand, with unattended station operation. The Commission’s concern over any supposed

¹⁰⁹ *Id.* at 1823.

¹¹⁰ In the Matters of Review of the Emergency Alert System; Independent Spanish Broadcasters Association, the Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, *Petition for Immediate Relief, Second Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 13275, 13303 (2007) (“2007 Further NPRM”).

¹¹¹ The formation and implementation of EAS began in 1991. *See 1994 Amendment* at 1792.

inability of a station operating unattended to provide information regarding “severe weather or a local emergency”¹¹² is misplaced, especially in light of the recent strengthening of the EAS requirements, and the Commission’s promise “to address the issues in the currently outstanding EAS Further Notice of Proposed Rulemaking.”¹¹³ EAS is the obvious mechanism by which to assure that critical emergency information reaches the public. The Commission now conflates the issue of the former “attended operation” rule, which was designed to address transmitter malfunctions and radio wave interference, with broadcasters’ abilities to provide emergency information, an issue which is currently being addressed in a proceeding concerning the Emergency Alert System, the system that was specifically designed for that purpose.

The Commission’s proposed revival of the attended operation rule is thus another example of re-regulation that would compel the expenditure of scarce financial and human resources for no evident purpose. Sporadic, anecdotal incidents of EAS problems, or even failures, cannot serve as the basis for a regulatory conclusion that there is a widespread problem calling for a universal remedy. In other words, press reports that may or may not be accurate concerning a failure of one radio station to deliver an emergency message during one overnight hours period cannot rationally or lawfully

¹¹² *Report and Notice* at ¶ 29.

¹¹³ *Report and Notice* at ¶ 86. One proposal in the *2007 Further NPRM* addresses “geo-targeting” of EAS alerts, so as to allow EAS to function on an even more localized level. *2007 Further NPRM* at 13307. Another is to further ensure that EAS operates as designed in emergencies. *Id.* at 13308. Both of these proposals, if acted upon, should further alleviate the Commission’s concern about providing emergency information to citizens.

serve as the springboard for a government mandate that all stations nationwide be “attended” at all hours of operation. Such a “remedy” is grossly disproportionate to the underlying, isolated problem it is supposedly addressing.

Indeed, the cost of trying to ensure against any possible -- and hypothetical -- failure of EAS would be far greater than merely requiring that all stations be attended by a “warm body” at all times. While the *Report and Notice* fails to define “physical presence,” if, as the Commission suggests, fully attended operation of stations is to “increase the likelihood that each broadcaster will be capable of relaying critical life-saving information to the public,”¹¹⁴ the presence of an unskilled employee will not be sufficient. In order to accomplish the Commission’s declared purpose, the person or persons charged with “attending” a station must be capable of “relaying” information -- that is, of physically assuming control of the main studio, going on the air, and broadcasting. That person, therefore, would need to be sufficiently competent to be able to receive information about an emergency, analyze it, sift through potentially erroneous and irrelevant information, consult with authorities, and then “relay[] critical life-saving information”¹¹⁵ in a competent, accurate manner without exacerbating the situation. Such requirements carry vastly different financial and operational implications, beyond merely mandating a “physical presence” at a broadcast facility during station operations.¹¹⁶

¹¹⁴ *Report and Notice* at ¶ 29.

¹¹⁵ *Id.*

¹¹⁶ Further confusion as to the Commission’s intent is inherent in the fact that the Commission’s proposal seeks, in one line, to require maintenance of a physical presence “at each *radio broadcasting facility*,” and in the next to require “that all

Whatever the cost to licensees, the main point is that requiring that broadcast stations be attended at all times would not meaningfully enhance the effectiveness of EAS in disseminating emergency information, or benefit the public in any other way. The attended operation rule should neither be reinstated as to radio stations nor extended to television.

G. Proposals to Regulate Voice Tracking and Station Playlists Would Impede Broadcasters' First Amendment Rights.

The Commission questions whether it should regulate voice-tracking, which it defines as “a practice by which stations import popular out-of-town personalities from bigger markets to smaller ones, customizing their programming to make it appear as if the personalities are actually local residents.”¹¹⁷ Voice-tracking, contrary to the Commission’s definition, does not typically involve the “importation” of “personalities from bigger markets.” It is, in fact, most often employed by stations to enable local talent to record programming for broadcast at a later time; an employee can finish his or her air shift and move to a production studio down the hall to record the non-music components of an overnight or weekend daypart through a computerized system that automatically inserts music, advertisements, public service announcements and other

radio stations be attended.” *Id.* The question arises as to whether the Commission is proposing that each individual *radio station* have, at all times of operation, its own staff dedicated solely to that station? The answer would have major cost implications for commonly-owned stations that operate from the same facility. In this regard, we note that, in seeking comment on whether an attended operation requirement should be extended to television stations, the Commission seems to use the terms “station” and “facility” interchangeably. *See id.* (“[W]e seek comment here on whether we should extend this requirement to television *stations*, as well as radio *facilities*.” (emphasis added)).

¹¹⁷ *Report and Notice* at ¶ 101.

programming when aired. Because the non-music components can be recorded separately from the other programming, a single employee can fill the equivalent of several “shifts” in the course of a day.

There is simply no evidence in the record that this use of “time shifting” technology to present programming somehow “diminish [es] the presence of licensees in their communities and thus hinder[s] their ability to assess the needs and interests of their local communities.”¹¹⁸ Voice-tracking is a valuable and efficient tool of technology for many broadcasters, one that is employed daily on a *local* level in many markets. Were these stations precluded from maximizing their local talent in this manner, they would face additional programming costs in terms of new employees or rights fees for network or syndicated programming.

A proposal that would incorporate steps to limit voice-tracking would also raise obvious, substantial constitutional concerns - - dictating or monitoring the methods by which broadcasters may, or may not, speak. Another potential regulation alluded to in the *Report and Notice*, that of “requir[ing] licensees to provide . . . data regarding their airing of the music and other performances of local artists,”¹¹⁹ similarly approaches an untenable position of interference in programming choices. It is highly unlikely that any attempted “addressing” of voice-tracking or music playlists would survive the scrutiny which protects against governmental interference with broadcasters’ free speech rights.

¹¹⁸ *Id.* at 111.

¹¹⁹ *Report and Notice* at ¶ 112.

III. THE EROSION OF THE CONSTITUTIONAL AND POLICY RATIONALES FOR THE UNIQUE REGULATION OF BROADCASTING STRONGLY COUNSELS AGAINST THE ADOPTION OF SWEEPING INITIATIVES TO RE-REGULATE BROADCASTING.

We begin this discussion with what we assume is common ground: Not even the most zealous advocate of broadcast regulation would contend that any of the possible content regulations discussed in the *Report and Notice* would be constitutional if applied to the print media. As stated by a unanimous Supreme Court in *Miami Herald Publishing Company v. Tornillo* in striking down a newspaper right-of-reply statute virtually identical to the FCC's former personal attack rule, sustained in the landmark *Red Lion* case as to broadcasting:

The choice of material to go into a newspaper, and the decisions made as to ... [its] treatment of public officials and public issues -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹²⁰

The Court concluded that “compulsion to publish that which reason tells [editors] should not be published is unconstitutional.”¹²¹

Broadcasting has, of course, long been thought to be subject to a different standard of regulation, based on the theory of “spectrum scarcity.” The argument is that, since there are more would-be broadcasters than there is electromagnetic spectrum, the government must control the process of who gets to broadcast on what frequency. Given

¹²⁰ 418 U.S. 241, 258 (1974).

¹²² *Id.* at 256.

the necessity of making this determination, the argument goes, government may attach conditions to the use of the spectrum it licenses -- including conditions as to the content of what is broadcast. As classically stated by the Supreme Court in *Red Lion*

Broadcasting Company v. FCC:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.¹²²

An alternative formulation of this reasoning argues that broadcasters, in being granted a license to transmit over a particular frequency, are given a right to use public property which can be conditioned in the same way as a landlord can specify the terms under which he will rent out his property.

However, as shown by the serious criticism to which the scarcity doctrine has been subjected by numerous jurists, scholars and former members of the Commission, the matter is not as simple as suggested by these pithy statements.¹²³ Indeed, in its

¹²² 395 U.S. 367, 388 (1969).

¹²³ See, e.g., *Tribune Company v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (“[i]t may well be that . . . the FCC would be thought arbitrary and capricious if it refused to reconsider its [broadcast-newspaper cross-ownership] rule in light of persuasive evidence that the scarcity rationale is no longer tenable”); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc) (“Partly the criticism of *Red Lion* rests on the growing number of broadcast channels.”); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995), cert. denied sub nom. *Pacifica Foundation v. FCC*, 516 U.S. 1043 (1996) (Edwards, C.J., dissenting) (spectrum scarcity is an “indefensible notion” and “today . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum”); id. at 684 (Wald, J., dissenting) (“Technical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years.”); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C. Cir. 1986), cert. denied, 482 U.S. 919 (1987)

meticulously documented opinion eliminating the fairness doctrine -- an opinion which was affirmed by the Court of Appeals and which still stands as the judgment of the FCC -- this Commission *itself* held that the doctrine was unconstitutional and contrary to the public interest, in part because of its finding that “the scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of first amendment review for the electronic press.”¹²⁴ Further, the Commission roundly rejected the notion that government intrusion into broadcast content is no more troubling than a landlord’s specifying the terms of a lease. It is “well established,” the

("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L. J. 899, 904 (1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting conventional, single-channel broadcasting -- and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the theory that media were using a 'scarce resource,' the radio spectrum, it no longer did."); Laurence H. Winer, *Public Interest Obligations and First Principles* at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J. Gregory Sidak, *Foreign Investment in American Telecommunications: Free Speech* at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, CATO Policy Analysis, No. 282 at 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

¹²⁴ *In Re Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York*, 2 FCC Rcd. 5043, 5054-55 (1987), *recon. denied*, 3 FCC Rcd. 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (“*Syracuse Peace Council*”).

Commission noted, that “government may not condition the receipt of a public benefit on the relinquishment of a constitutional right.”¹²⁵

We do not here intend to challenge the entire structure of broadcast regulation as being unconstitutional. What we do intend is to suggest that although *Red Lion* may remain good law in the sense that it has not been overruled and continues to be cited by the Supreme Court ¹²⁶ (albeit without examination of its underlying premises), the rationale of that decision has been seriously undermined. And the instant record reveals no factual or policy reasons -- much less compelling ones -- that would recommend a return to highly intrusive forms of broadcast regulation that could put the doctrine under further stress.

¹²⁵ *Id.* at 505.

¹²⁶ *Turner Broadcasting System v. FCC*, *supra*, 512 U.S. at 637-39; *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 567 (1990); *League of Women Voters v. FCC*, 468 U.S. 364 (1984); *CBS v. FCC*, 453 U.S. 367, 395-96 (1981). Notwithstanding its continued reliance on *Red Lion*, the Supreme Court has clearly indicated its possible willingness to reexamine that decision. Thus, in *League of Women Voters v. FCC*, *supra*, the Court stated:

The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required

468 U.S. at 376, n.11 (emphasis added) (citation omitted).

Of particular relevance in this regard is the case of *Time Warner Entertainment Co. L.P. v. FCC*.¹²⁷ In *Time Warner*, a panel of the United States Court of Appeals for the District of Columbia Circuit, relying on *Red Lion* and the spectrum scarcity theory, sustained against First Amendment challenge a provision of the 1992 Cable Television Consumer Protection and Competition Act which required licensees of direct broadcast satellite services (“DBS”) to reserve between four and seven percent of their channel capacity “exclusively for non-commercial programming of an educational and informational nature.”¹²⁸ That position, however, could not command a majority of the full Court. A petition for rehearing *en banc* was denied by a 5-5 vote, with the five dissenters arguing that *Red Lion* should not be extended to justify content regulations imposed on DBS providers, because “[t]he new DBS technology already offers more channel capacity than the cable industry, and far more than traditional broadcasting.”¹²⁹ The dissenters went further, however, and expressed significant doubt as to the continued vitality of *Red Lion* “[e]ven in its heartland application” to broadcasting. The dissenters noted that *Red Lion*

has been the subject of intense criticism. Partly this rests on the perception that the "scarcity" rationale never made sense -- in either its generic form (the idea that an excess of demand over supply at a price of zero justifies a unique First Amendment regime) or its special form (that broadcast channels are peculiarly rare). And partly the criticism rests on the growing number of available broadcast channels. While *Red Lion* is not in such poor shape that an intermediate court of appeals could

¹²⁷ 93 F.3d 957 (D.C. Cir. 1996), *reh. en banc denied*, 105 F.3d 723 (1197).

¹²⁸ 93 F.3d at 973.

¹²⁹ 105 F.3d at 724.

properly announce its death, we can think twice before extending it to another medium.¹³⁰

CBS respectfully suggests that a question raised by one-half the membership of the District of Columbia Circuit as to whether the “scarcity rationale [ever] made sense” should also give the Commission pause as it considers returning broadcasting to the intense regulatory regime to which it was subject during the seventies and eighties.

¹³⁰ *Id.* at 724, n.2 (citations omitted). The dissenters would have considered on rehearing whether the DBS regulation could have been justified as a condition legitimately attached to a government grant. 105 F.3d at 726-28.

CONCLUSION

At the very best, any benefit to the viewing and listening public that would result from adoption of the proposals set forth in the *Report and Notice* is highly speculative. On the other hand, it is certain that such rules would impose compliance costs on broadcasters entirely unknown to their multichannel and online competitors. For the FCC now to be considering proposals for the extensive re-regulation of broadcasting, as television and radio stations strive to adapt to revolutionary changes in their businesses, is quite simply baffling. Such a course will succeed only in impeding broadcasters' continued delivery of high quality – and free -- news, sports and entertainment programming to their audiences.

Respectfully submitted,

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