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

In the Matters of	)	
	)	
Broadcast Localism	)	MB Docket No.04-233
	)	
Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service	))	MB Docket 99-325

To: Office of Secretary
Attention: The Commission

COMMENTS

1. Butte Broadcasting Company, Inc. ("BBCI"); Las Vegas Broadcasters, Inc. ("LVBI"); and Monterey County Broadcasters, Inc. ("Monterey", collectively, with BBCI and LVBI, the "Stations"), by counsel, hereby submits their Comments in response to the *Report on Broadcast Localism and Notice of Proposed Rulemaking*[1] (the "*Localism NPRM*"), in which the Commission announced it is considering several sweeping changes to its Rules.

2. The FCC has not established any causal link between the proposed changes and the agency's espoused policy aims, *i.e.*, responsiveness to the local community concerns. Moreover, the Localism NPRM fails to recognize that the burdens of compliance would fall most heavily on many of the very broadcasters who are currently providing the most effective locally-oriented programming. Furthermore, the proposed changes in the Rules pose problematic burdens on broadcasters pursuant to constitutional and legislative provisions. Accordingly, UCC

[1] *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218 (2008). Pursuant to the Commission's request that comments on the Staffing Proposal (defined below) as it pertains to radio be filed in the Digital Audio NPRM, CRA is filing a copy of these Comments in that proceeding, as well. Localism NPRM at ¶¶28-29, citing Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, MB Docket No. 99-325, 22 FCC Rcd 10344, 10391 ¶119 (2007) (hereinafter "Digital Audio NPRM").

urges the Commission to reject these overly intrusive regulations, in order to avoid their potentially disastrous consequences.

BACKGROUND

2. BBCI is the licensee of commercial radio stations KKXX(AM), Paradise, California, Facility ID 7909 and KYIX(FM), South Oroville, California, Facility ID 7914. BBCI is also the application for a new FM translator to be located in Chico, Nevada. *See* Facility ID 147123. Station KKXX is operated as daytime station with post-sunset operations. The station provides a listenable night time signal to Paradise, but BBCI has not been able to sell advertising on the station at night due the highly competitive market in which the station is located. Nonetheless, BBCI operates the station at nighttime with automation and a satellite feed.

3. Station KYIX and KKXX operate from a combined studio under the Commission's current main studio rules. The main studio in Paradise, California is approximately 20 miles from the station's community of license, South Oroville, California. Operation of the stations is possible only because of the cost efficiencies achieved by co-locating the main studios. Both stations' operate with 24/7 automatic EAS notification that overrides the stations' programming when activated.

4. LVBI is the licensee of commercial AM radio station KKVV(AM), Las Vegas, Nevada, Facility ID 36642. KKVV operates as a daytime station with very low post sunset operations. LVBI sells programming time at extremely low rates to small churches and community groups that populate Las Vegas. For programming between 6:00 PM and midnight, KKVV broadcasts local Spanish church services. KKVV provides the only daily Spanish religious programming in Las Vegas. A good portion of the nighttime operation of the station is unattended. LVBI has automatic EAS that overrides all programming at all times. Because of

the cost of living in the Las Vegas area, LVBI's employees must be paid wages higher than the minimum wage so that the employees can live in the community.

5. Monterey is the licensee of commercial radio station KKMC(AM), Gonzales, California, Facility ID 43603. KKMC operates full time at 10,000 watts. The station has been unable to obtain revenue after midnight, but Monterey nonetheless keeps the station operating 24 hours each day. Station KKMC operates with 24/7 automatic EAS notification that overrides the station's programming when activated.

ARGUMENT

6. Well-intended actions by government agencies may hurt an industry more than help alleviate a perceived problem. Any agency considering a new a regulatory prescription must ensure that the proposed cure is not worse than the disease. Medical students are taught *primum non nocere*; that is, “first, do no harm.” The phrase applies to regulation as well as to medicine. Intervention should be avoided where it poses potential dangers, despite the attraction of less certain benefits. Unintended harm will often outweigh any intended good.

7. In the instant context, the Commission contemplates certain changes in regulatory burdens on broadcasters. We focus here on the following proposed changes: (1) reversion to the old requirement that a main studio be located within a broadcaster’s community of license (the “Studio Proposal”);[2] (2) expansion of staffing requirements so that a licensee must staff a main studio during all times of operation (the “Staffing Proposal”);[3] and (3) the restoration of

[2] *Localism NPRM* at ¶ 41.

[3] *Id.* at ¶¶28-29, citing *Digital Audio NPRM* at ¶119.

ascertainment burdens in the form of permanent "community advisory boards" or other compelled audience surveys, town hall meetings, and the like (the "Advisory Board Proposal").[4]

8. The agency speculates that the Studio, Staffing and Advisory Board *might* increase local production of programming, which in turn *might* prove more reflective of the diverse needs and interests of local communities. Notice, however, that these projected benefits are entirely speculative. The potential harm, on the other hand, is much more certain. The increased costs involved in each proposal would endanger the financial viability of small independent stations. Where the added costs do not destroy the station altogether, they will frequently produce perverse results, such as increased homogeneity of content.

II. Increased Costs of Proposals Unsupported by Commission.

9. Although any link between the proposed changes in the Rules and the fostering of increased localism is highly speculative, the changes are certain to impose substantial costs on small, independent broadcasters. The financial viability of such stations is a prerequisite for the delivery of their distinct programming voices. It therefore stands to reason that increasing the operating costs of broadcasting, will most likely redound to the *net detriment* of the provision of programming responsive to less significant, and perhaps even marginalized, audiences in a local community. The added cost to licensees that the Staffing Proposal represent is a prohibitively high price to pay for broadcasters that desire to serve small, underserved segments of their communities. This is especially problematic when one considers that it has never been proven that the benefits to the public from such requirements, such as they may be, would outweigh its costs.

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[4] *Localism NPRM* at ¶27. Licensees would be compelled to consult with these advisory boards – representing various diverse segments of the community – as to whether programming is sufficiently responsive to local community concerns. *Id.* at ¶¶26, 40.

10. The Stations believe that these costs will significantly impair the operation of independently owned and operated small market stations such as themselves. In the current economic crisis, these costs are especially hurtful. If the economy does not make a speedy recovery, it is likely that advertising revenues will decrease, making the future uncertain for broadcasters. With the additional costs engendered by the localism proposals, only large station conglomerates will be able to survive. Independent and small market broadcasters, such as the Stations, will be put out of business.

III. Destruction of Main Studio Location Requirements Ill Considered.

11. Prior to the trend in recent decades toward deregulation, the FCC required a licensee to maintain its "main studio" - and the site of a station's public inspection file - within the station's official "community of license." For many years, a much more flexible rule has been in place. Relative proximity to the community of license has been deemed sufficient. The Commission's indication that it may revert back and require broadcasters to locate their main studios within their communities of license is completely unsubstantiated and would universally injure broadcasters. This proposal would prove to be extremely costly for existing broadcasters to relocate their main studios and would limit the choices of locations for new broadcasters to place their main studio. Further, there is no justification for the Commission to ignore the decades of operation under the less restrictive standards that have evolved since the removal of the requirement that broadcasters locate their main studio in their communities of license.

12. There is no direct benefit to the public of requiring a broadcaster to locate its main studio inside its community of license instead of a neighboring community. The fact is that many communities are devoid of affordable real estate needed for a main studio. Broadcasters must also consider the employment pools from which they must draw their staff and commuting

patterns when picking a location for their main studio. Less tangible considerations such as the desirability of potential employees to work at a given location must also be taken into account.

13. For example, BBCI argues that if it had to staff and maintain a separate studio for KYIX, it would instantly result in negative cash flow for that station. Faced with such a BBCI would probably elect to sell the station to a group owner who has other stations in the market. The Commission's desire for diversity will be diminished when BBCI is forced to sell KYIX to a competitor who already has a station cluster in the market.

14. The Commission proposal ignores the synergistic benefits that commonly owned stations achieve when their stations' main studios are co-located. The Commission acknowledged these benefits in its past ownership proceedings, but does not provide any reasons why those benefits would be outweighed by forcing stations to separate main studios. Stations KKXX and KYIX operate from the same location, equally accessible to their communities of license of Paradise and South Oroville, California, respectively. The cost savings achieved by decreased equipment and real estate costs alone justify more relaxed main studio requirements. These cost savings allow stations to provide more locally oriented programming to their viewing public. Without the benefits achieved from co-locating their main studios, BBCI would not be able to provide the listeners of KKXX and KYIX with the same level of service that the stations do now. Forcing the stations to operate separate main studios would financially ruin KYIX and severely strain the operation of KKXX.

IV. <u>Increased Staffing Requirements Belies Advancements in Technology and Would Financially Ruin Independent and Small Market Broadcasters.</u>

15. Weighed against these added costs, consider the dubious benefits that might be derived from the Staffing Proposal. Faced with increased staffing costs, most of the AM Stations

will be forced to eliminate nighttime operations entirely. For example, the power bill for Monterey to operate KKMC at 10,000 watts for six hours a night in addition to wages for increased staff would simply force Monterey to shut down KKMC's operations at midnight. BBCI believes that it would be illogical to have KYIX remain on the air after 6 PM with the station's low power with required staffing increases, even at minimum wage. It will be forced to eliminate night time operations altogether if the Staffing Proposal is passed.

16. LVBI believes that it will be doubtful that if it were required to provide full time staffing for KKVV after 6:00 PM, the station would remain profitable. The high wage rates in the Las Vegas area would amplify the negative effect on KKVV's operations. To attempt to remain profitable, LVBI would be forced to increases programming access rates for community oriented programming such as the Spanish religious services that directly serve Las Vegas' Hispanic community. This would be considered unacceptable to LVBI and contrary to the Commission's goal of serving a community's needs and interests.

17. With the state of automated operating and monitoring equipment, there is no need to have increased staff on site to monitor station operations during night-time hours. All of the Stations operate with fully automated EAS that interrupts programming when necessary at any hour of the day. The Stations are not without direct management resources to address any problems that may arise. BBCI notes that the manager of KKXX and KYIX resides near the stations and could be at the stations' main studio in 10 minutes if an EAS emergency arose. The Commission cannot contend that the only way to improve such service to the public is to require 24/7 staffing of stations. A more reasonable response to addressing any perceived deficiencies or anecdotal evidence that some stations do not operate as required would be to bolster the

entrenched EAS and seek to improve the equipment broadcasters use to monitor EAS notices and improve the lines of communication between station management and the EAS infrastructure.

V. The Commission Fails to Justify a Return to Ascertainment Disguised as Community Advisory Boards.

18. The Advisory Board Proposal is no better than a revisitation of the FCC's old and unlamented policy of "ascertainment." The Commission has historically relied on broadcasters' unique position as stewards of radio spectrum to justify imposing on licensees an obligation to provide programming that is responsive to the needs and issues of the citizens who reside in the broadcaster's community of license.[5] The Commission's ascertainment procedures required broadcasters to take a series of minutely-prescribed affirmative steps to determine the problems, needs and interests of the community, and to devise programming to meet those problems, needs and interests. In the *Deregulation of Radio Order,* the Commission determined that there was no need to require a single radio broadcaster to provide programming to meet all of the needs and issues of all of the groups within its community.[6] Instead, the community responsiveness of a broadcaster might well be determined with respect to the station's own audience and presumably only a portion of the local community.[7] Thus, the FCC long ago determined that ascertainment

[5] *See Broadcast Localism,* Notice of Inquiry, 19 FCC Rcd 12425 ¶¶ 1, 2 (2004) (the "*NOI*").

[6] *See Deregulation of Radio*, Report and Order, BC 79-219; RM-3099; RM-3273, FCC 81-17, 84 FCC 2d 968, ¶66 (1981) (the "*Deregulation of Radio Order").*

[7] *Deregulation of Radio Order* at ¶66. The Commission found "[w]hat is important is that broadcasters present programming relevant to public issues both of the community at large or, in the appropriate circumstances, relevant primarily to the more specialized interests of its own listenership." *Id.* Likewise, in its *Deregulation of Television Order*, *Deregulation of Television*, Report and Order, MM 83-670, FCC 84-293, FCC 2d 1076 (1984) (the "*Deregulation of Television Order"),* the Commission found that "market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities." *Id.* at ¶2. To that end, revision of the ascertainment rules would "provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities." *Id.* at ¶3. The Commission found that there was no evidence that ascertainment made television broadcasters provide more programming addressing the needs and issues of their communities

was not producing its intended benefits, and there is simply no reason to believe a resuscitated form will prove beneficial now.

19. It is the experience of the Stations that the formal ascertainment requirements did not meet the Commission's goals then and will not do so now. Due to human nature, the Board will want to tell the station what to program, not what community needs should be covered in Public Affairs. Therefore, it would be illogical to include all segments of the community on an advisory board. The Stations envision a classical music fan on a Board of a "hip hop" station suggesting that the station play more of the Board member's favorite music. Situations like these will drive the Board members and the station management crazy.

20. Additionally, the stations and groups that the Commission envisions constituting the boards will not find the process to be especially enlightening if the past will prove any example. For example, most public officials refused to give ascertainment interviews after they had the first six stations in a market contact them. Eventually, unaffiliated stations gathered together to establish station ascertainment committees and each radio and TV stations sent a representative to the monthly meetings. It was an expensive process. In reality, stations rarely learned anything they did not know already from normal community interaction and monitoring local news.

CONCLUSION

21. In view of the foregoing, the Commission's proposed new regulations would for the most part prove counter-productive by imposing additional costs and facilitating greater homogeneity in programming. Independently owned and operated small market stations such as

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than they would without formal ascertainment requirements. *Id*. at ¶48. In fact, the Commission noted that the ascertainment procedures and programming guidelines did not guarantee that programming would serve the goal of localism. *Id*. Instead, ascertainment impeded licensees from using their discretion to address the needs of their communities and delayed service to the public. *Id*. at ¶52.

represented by the Stations will be forced out of business as they will find the increased costs too great to bear. Accordingly, the FCC should decline to adopt the Studio, Staffing and Advisory Board Proposals addressed herein.

Respectfully submitted,

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