

SUMMARY

In the Localism NPRM, the FCC proposes to: (1) revert to the old requirement that a main studio be located within a broadcaster's community of license; (2) require that licensees must staff their main studios during all times of operation; (3) restore ascertainment burdens in the form of permanent "community advisory boards" or other compelled audience surveys, town hall meetings, and the like; and (4) establish minimum levels of locally-originated programming to be used to evaluating the responsiveness of a licensee's programming to local community concerns, while tying compliance to the license renewal process.

None of these proposals merits adoption. The FCC has no evidence that the changes would actually generate improvements in station performance. Most troublingly, a review of the Localism NPRM suggests that the current Commission has scant understanding of the hardscrabble nature of the broadcast industry in 2008 in smaller communities. Those who will have the greatest difficulty complying with these requirements are those who operate outside of well-served major metropolitan areas, and especially those serving niche audiences. The economic base simply does not exist for thousands of stations across America to be able to expand their payrolls and other operating costs as necessary to comply with the proposed rules. Finally, certain of the proposed rules conflict with important constitutional and statutory protections.

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

In the Matter of)
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Broadcast Localism) MB Docket No.04-233
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To: Office of the Secretary
Attention: The Commission

COMMENTS OF UNITED COMMUNICATIONS CORPORATION

STATIONS WWNY-TV, WNYF-CA AND WNYF-LP

1. United Communications Corporation ("UCC"), by counsel, hereby submits its 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. 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 urges the Commission to reject these overly intrusive regulations, in order to avoid their potentially disastrous consequences.

¹ *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218 (2008).

BACKGROUND

2. UCC is the licensee of full-power television station WWNY-TV, Carthage, New York, Fac. ID 68851; Class A Television Station WNYF-CA, Watertown, New York, Fac. ID 16743 and Low Power Television ("LPTV") Station WNYF-LP, Massena, New York, Fac. ID 16744. Station WWNY-TV is a CBS affiliate, Station WNYF-CA is a Fox affiliate and WNYF-LP is a satellite of WNYF-CA. Besides its network programming, Stations WWNY-TV and WNYF-CA have a long tradition of serving their community with local news, information, weather and emergency information, local programming, public service announcements, community outreach and sponsorships, as well as additional news and community information found on Station WWNY-TV's website. UCC also provides an avenue for the viewing public to comment on issues they feel are important through a weekly segment entitled "Your Turn" which airs during each Monday on WWNY-TV during the evening newscast. UCC believe market driven forces are the best incentive for broadcasters to serve the local needs of their community not government mandates.

ARGUMENT

* * *

"The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'" - Ronald W. Reagan

* * *

3. As suggested by the nation's 40th president, well-intended actions by government agencies may hurt more than help. 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.

4. 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 (3) restoration of 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 and (4) establishment of minimum levels of locally-originated programming, as opposed to heavy reliance on network or syndicated programming, for evaluating the responsiveness of a licensee's programming to local community concerns (and tying compliance with such thresholds to the license renewal process) (the "Origination Proposal").⁵

² *Localism NPRM* at ¶ 41.

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

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.

⁵ *Id.* at ¶¶40, 124. Compliance with the thresholds would result in "expedited processing" of stations' license renewal applications, while those broadcasters who fall short of the mark would receive scrutiny by the full Commission. Most license renewal applications are processed routinely – and relatively quickly – by the Media Bureau staff pursuant to delegated authority. The frank truth is that the full Commission lacks the time to deal with its *existing* workload in a timely fashion. Any requirement subjecting a host of applications to the attention of the full Commission is guaranteed to impose years of delay. If only 10 percent of stations fail to satisfy the new FCC dictates in a given renewal cycle, the full Commission would have to scrutinize the records of **1,481** radio stations and **231** television stations of various kinds. See <http://www.fcc.gov/mb/audio/totals/bt071231.html>. The full Commission simply could not act on such a volume of applications. Consequently, licensees will feel severe pressure to avoid such uncertainty as to their continued authority to operate.

5. The agency speculates that the Studio, Staffing, Advisory Board and Origination Proposals *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. First, 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. Second, heavy regulation aimed at localism in general, and in particular the Advisory Board and Origination Proposals, invoke problematic constitutional questions.

I. The Commission's Proposals Will Undermine Localism and Diversity.

6. Significant confusion arises in any discussion of policy goals if the goals themselves are not first clearly defined. Viewed in the aggregate, the Studio, Staffing, Advisory Board and Origination Proposals betray a presumption that locally-produced programming content is *ipso facto* more responsive to the diverse interests of the community. This presumption is especially apparent with respect to the Origination Proposal. The FCC does not, and cannot, sufficiently justify this presumption. Indeed, to perceive a causal relationship between, on the one hand, expansive influence by local special interests and locally-produced programming, and on the other hand, the respective goals of diversity and localism, is to accept blindly a superficial and illusory view of these otherwise worthy policy priorities.

7. Locally produced programming does not necessarily equate to responsiveness to local communities. For example, the presumption that locally produced programming equates to community responsiveness ignores the increased diversity of programming made possible by

national programming distributors that produce programming that has not been historically supported in many markets.

8. Programming that is truly responsive to the interests and needs of local audiences attracts and sustains audiences no matter where it is actually produced. Conversely, a failure to respond to local communities alienates prospective listeners and is therefore automatically self-destructive without any need for government intervention to dictate a venue for program production. This is especially true in an age of satellite and Internet delivered programming alternatives. Audiences have much greater choices now in video programming than ever before. If what they see is of no interest, regardless of where it was produced, they will not continue to watch such programming.

9. Similarly, true diversity in programming is the result of independent voices offering distinct products that the audience prefers enough to ensure that the provision of these products will be sustained over time. If viewers in Northern New York choose to watch programming produced in Alabama over locally produced programming should they not have the freedom to do so? There is no legitimate basis for the Commission to make a contrary decision. Further, if every station in Northern New York was to air nothing but locally produced programs, how would that contribute to diversity in programming content? In other words, audience share - while admittedly imperfect - is a more accurate reflection of responsiveness to the diverse interests of local communities than is the amount of programming produced at the local level, or approval by a supposedly representative sample of that community.

II. Increased Costs of Proposals Unsupported by Commission.

10. 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

the 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 and Origination Proposals 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.

11. UCC believes that these costs will significantly impair the operation of family owned and operated small market stations like WWNY-TV and WNYF-CA. 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 UCC, will be put out of business.

III. Destruction of Main Studio Location Requirements III Considered.

12. 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.

13. 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.

14. Station WWNY-TV is a perfect example of how the Studio Proposal does not recognize the uniqueness of the various television markets. The station's community of license is the small village of Carthage; however, the station's studio, which is co-located with the main studio for WNYF-CA, is currently located within the city of Watertown that not only serves as the County Seat for Carthage, but as a regional center for business and commerce for the three counties located in the Watertown-Carthage DMA. The studio location has been well established for decades.

15. The location of WWNY-TV's main studio has not prevented the station from serving Carthage. The station has and will continue to provide new coverage of Carthage. For example, WWNY-TV covered the construction of a new Veteran's Administration clinic in Carthage and continues to cover stories of interest regarding the clinic. WWNY-TV's morning news anchor, Jeff Cole, is a Carthage-native and participates in many local events in the village.

UCC supports many Carthage area not-for-profit organizations both financially and through on-air promotion. Additionally, WWNY-TV's station manager, Cathy Pircsuk served as a board member of the Carthage Area Hospital Foundation for a number of years and served as the Foundation's Capital Campaign Chair. Both WWNY-TV and WNYF-CA promote fundraising efforts for the hospital including its annual golf tournament. WWNY-TV also supports and acknowledges students and educators in the Carthage Central School system by awarding Athlete of the Week, Student of the Week and Educator of the Week honors to outstanding members of the school system. It is clear that WWNY-TV retains a close relationship with its community of license despite its main studio being located outside the confines of the community.

16. 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 WWNY-TV and WNYF-CA operate from the same location, equally accessible to their communities of license of Carthage and Watertown, 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, UCC would not be able to provide the viewers of WWNY-TV and WNYF-CA with the same level of local news and event coverage that the stations do now. Forcing the stations to operate separate main studios would financially ruin the stations.

IV. Increased Staffing Requirements Belies Advancements in Technology.

17. Weighed against these added costs, consider the dubious benefits that might be derived from the Staffing Proposal. 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. With respect to the Emergency Alert System (“EAS”) and the provision of disaster information to communities, 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 the EAS and 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.⁶ 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. One might describe such a presumption underlying a regulatory approach as the erroneous view that community responsiveness can only be determined at the “macro” level, *i.e.*, with respect to the entire potential listening audience.

⁶ See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 ¶¶ 1, 2 (2004) (the “*NOI*”).

19. The “macro-only” analysis was rejected in the *Deregulation of Radio Order*.⁷ The Commission therein 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. Instead, the community responsiveness of a broadcaster might well be determined at the “micro” level, *i.e.*, with respect to the station’s own audience and presumably only a portion of the local community.⁸ Thus, the FCC long ago determined that ascertainment was not producing its intended benefits, and there is simply no reason to believe a resuscitated form will prove beneficial now.

20. If, as explained above, the sustaining of an audience is one of the better indicators of a broadcaster’s community responsiveness, it bears noting that whatever steps a licensee must take in order to secure the approval of every self-appointed representative of a panoply of local special interest groups, such steps are highly unlikely to produce a passionate audience for the station. Moreover, since the same activist groups are likely to exert pressure in nearly every community of any size, the pressure on broadcasters will be toward greater homogeneity of

⁷ 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*”).

⁸ *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 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.

content, not toward offering a distinct programming format craved by a distinct subset of the community.

VI. The Shadow of Extortion Created by the Advisory Board and Origination Proposals.

21. Together, the Advisory Board and Origination Proposals will tend to expose broadcasters to opposition from special interests and to problems at license renewal time. These two proposals may well lead to the very real threat of extortion of broadcasters to provide air time to various segments of their communities. It is easy to forecast the development of an extortion process arising whereby self-appointed representatives of various local constituencies threaten to protest a broadcaster's renewal application if the broadcaster does not provide air time to the “representative” in question. Never mind that the local interest groups enabled by the agency in this process did not bother to purchase or lease a station, or to have the Commission pass judgment on their qualifications to serve as a *de facto*, no cost licensee,⁹ or to worry about whether their programming will draw any real audience.

22. The Advisory Board and Origination Proposals constitute a back-door effort to regulate content by creating a “safe harbor” policy whereby licensees will be pressured to eschew nationally distributed programming, or at least certain kinds of such programming.

VII. Constitutionality and Statutory Concerns.

23. For the reasons explained above, the proposals would subject any broadcaster's continued operating authority to the approval of various special interest groups. This will have a chilling effect on the First Amendment rights of broadcasters.¹⁰

⁹ The *Localism NPRM* offers very little to suggest that the Commission has adequately considered how Advisory Boards could undermine or even contradict the FCC's Rules with respect to unauthorized control of a broadcast license.

¹⁰ See, e.g., *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 964 at n.12 (1984), citing *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). “By placing discretion in the hands of an official to grant

24. It is not our purpose to compose here an appellate brief, but we are alarmed by the Commission's apparent blind eye in its Localism NPRM to potential constitutional and statutory challenges posed by the Origination and Advisory Board Proposals in particular. The promulgation of these proposals would almost certainly invite First Amendment constitutional challenges.

25. First, the traditional justification for agency restrictions on the First Amendment rights of broadcasters, i.e., the scarcity of spectrum as articulated in *Red Lion*, has been increasingly undermined by technological advances with respect to digital broadcasting and the recent phenomenal growth of competitive media platforms. The FCC itself has cited these trends as grounds for its own deregulatory efforts with respect to the agency's ownership concentration Rules. Thus, the FCC's own laborious efforts to loosen restrictions on media ownership have made applying different standards to the First Amendment freedoms of broadcasters more difficult to support.

26. In addition, any standards or "objective thresholds" that the Commission might adopt within its Origination or Advisory Board Proposals could be challenged as either too vague or too specific. That is, if the Commission gives insufficient guidance to broadcasters as to the community responsiveness thresholds that will satisfy the requirements for renewal of a license, the proposals rightly would be viewed by a court as posing too great a danger of imposing self-censorship. Conversely, standards that are too specific might well pose a problem under non-delegation doctrine. At the very least, courts are likely to insist that the new Rules include extensive provisions for administrative and adjudicatory review before empowering private

or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech." *Id.*

actors such as Advisory Boards to exercise government's coercive power over other private actors, i.e., broadcasters.

27. In view of the dubious benefit to be gained by these Proposals and the nearly certain high costs associated with them, the Commission may not want to engage in the difficult, perhaps impossible, work of attempting to reconcile its Advisory Board and Origination. First Amendment and statutory considerations suggest that the agency's Advisory Board and Origination Proposals would require extremely careful crafting, and in fact may not be able to survive court scrutiny. Accordingly, the FCC should decline to adopt these particularly problematic Proposals.

CONCLUSION

27. 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. Family owned and operated small market stations like WWNY-TV and WNYF-CA 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, Advisory Board and Origination Proposals addressed herein.

Respectfully submitted,

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