

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

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

To: Office of Secretary
Attention: The Commission

COMMENTS OF ALPHA & OMEGA BROADCASTING, INC.

1. Alpha & Omega Broadcasting, Inc. ("A&O"), 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, A&O urges the Commission to reject these overly intrusive regulations, in order to avoid their potentially disastrous consequences.

BACKGROUND

2. A&O is the licensee of full-power television station KTMW(TV), Salt Lake City, Utah, Fac. ID 10177 and Class A Television Station KCLP-CA, Boise, Idaho, Fac. ID 27621. Station KTMW provides religious, family-oriented local programming to the Salt Lake City-area

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

viewership. Station KCLP-CA is an affiliate of the Tri-State Christian Television network. A&O is also the licensee of four Low Power Television ("LPTV") Stations: (i) K49GD, Spanish Fork, Utah, Fac. ID 29213; (ii) K55IT, Provo, Utah, Fac. ID 29215, which is currently dark; (iii) K58FT, Huntsville, Utah, Fac. ID 29216; and (iv) K59GS, Salt Lake City, Utah, Fac. ID 1135.

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 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 (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)

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.

(the "Origination Proposal") and (5) the provision of an opportunity for LPTV stations to become eligible for Class A television status (the "Class A Eligibility Proposal").⁵ The Studio, Staffing, Advisory Board and Origination Proposals will be discussed in Section I of these Comments. The Class A Eligibility Proposal will be discussed in Section II.

Section I. The Studio, Staffing, Advisory Board and Origination Proposals Must Not Be Enacted.

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.

A. The Proposals Will Undermine True 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

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.

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 Utah 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 Utah 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.

B. 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. A&O believes that these costs will significantly impair the operation of family owned and operated small market stations like KTMW and KCLP-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 A&O, will be put out of business.

C. Increased Staffing Requirements Belies Advancements in Technology.

12. 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.

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

13. 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

⁶ See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 ¶¶ 1, 2 (2004) (the “*NOR*”).

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.

14. 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.

15. 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

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.

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

Section II. The Class A Eligibility Proposal Will Promote the Goal of Localism

16. The FCC tentatively concluded in the *Localism NPRM* that existing LPTV stations should be given the opportunity to be granted Class A status. This proposal would assuredly have the desired effect of increasing the localism. Because of their secondary licensing status and their all but non-existent satellite and cable carriage rights, LPTV stations are inclined to provide programming of particular interest to local community groups and niche audiences. It is through such programming that the stations survive in the face of competition of full-power stations and other video programming providers.

17. The standards that LPTV stations were required to comply with during the first Class A window remain sufficient to ensure that the licensees are committed to serve their communities and are deserving of the benefits that Class A status would bring them. LPTV stations should be required to: (i) broadcast a minimum of 18 hours per day; (ii) broadcast an average of at least 3 hours per week of programming produced within the market area served by the station; and (iii) comply with the Commission's LPTV rules and full power television, to the extent that current Class A stations were required to comply with the full-power television rules. As the possibility of a second Class A window seemed all but lost until recently, the Commission should allow stations a period of time to come into compliance with these standards before the eligibility window is opened.

18. To be given the chance to obtain Class A status, LPTV licensees would gladly accept the requirement to provide a certain amount of locally produced programming on their stations. As for this proposal at least, the benefits to the stations and the public outweigh the additional costs to be incurred by LPTV stations to become eligible for Class A status.

CONCLUSION

19. 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 the perverse effect of fostering greater homogeneity in programming. Accordingly, the FCC should decline to adopt the Studio, Staffing, Advisory Board and Origination Proposals addressed herein. However, the Commission's proposal to allow LPTV stations to qualify for Class A status will have the desired effect of increasing the number of broadcasters

Respectfully submitted,

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April 28, 2008