

**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)	MB Docket No. 99-325
Their Impact on the Terrestrial Broadcast Service)	
To:	Office of the Secretary	
Attention:	The Commission	

COMMENTS OF TED W. AUSTIN

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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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COMMENTS

1. Ted W. Austin, Jr., by counsel, hereby submits his Comments in response to the *Report on Broadcast Localism and Notice of Proposed Rulemaking*¹ (the “*Localism NPRM*”), in which the Commission announced that it is considering several sweeping changes to its Rules. Mr. Austin is the individual licensee of FM station KCHQ, Driggs, Idaho.

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

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, Austin 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”).

constitutional and legislative provisions. Accordingly, Austin urges the Commission to reject these overly intrusive regulations, in order to avoid their potentially disastrous consequences.

BACKGROUND

3. Station KCHQ serves Driggs, an extremely small and isolated community near the Idaho – Wyoming border, from studios located in Rexburg, Idaho. Due to the very small size of Driggs, and the limited labor pool available there, it is not practical to operate KCHQ in Driggs. .

4. Prevailing wage rates in Driggs are at least twenty to thirty percent higher than in Rexburg. The economics of KCHQ’s operation would come completely unraveled if it were forced to relocate to Driggs proper.

5. As difficult as it would be to operate in Driggs with full staffing during business hours, it would be absolutely impossible if the station had to be staffed during the overnight hours. KCHQ barely manages to cover its expenses under present circumstances. The changes the FCC is contemplating would destroy this facility and negate all of the valuable service that it provides.

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 (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>. If each Commissioner only spent twelve minutes reviewing the specific situation of each such station, this would force them to add two

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

months to each work year. The full Commission simply could not act on such a volume of applications unless all vacations were cancelled and the Commissioners chose to ignore numerous other important duties. Consequently, referral to the full Commission would be tantamount to a near-permanent suspended sentence of non-renewal. Licensees would feel severe pressure to avoid such uncertainty as to their continued authority to operate.

benefits to the public from such requirements, such as they may be, would outweigh its costs.

10. Austin believes that these costs will significantly impair the operation of independently owned and operated small market stations such as KCHQ. 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 Station, will be put out of business.

III. Destruction of Main Studio Location Requirements III 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, KCHQ would go dark if the proposals were adopted.

14. The Commission proposal ignores the synergistic benefits that commonly owned stations achieve when their stations have freedom to locate main studios as appropriate. 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 locate in their cities of license.

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

15. Weighed against these added costs, consider the dubious benefits that might be derived from the Staffing Proposal. Faced with increased staffing costs, most AM Stations will be forced to eliminate nighttime operations entirely, as would small market FM stations like KCHQ.

16. The loss of service of KCHQ would be 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. 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 un lamented 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. 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.⁷ 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.⁸ Thus, the FCC long ago determined that

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

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*").

ascertainment 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 Mr. Austin 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. He envisions 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 have had the first six stations in a market contact them. Eventually, unaffiliated stations gathered together to establish station ascertainment committees and

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.

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 represented by KCHQ 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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