

who would be obvious candidates to be on any broadcaster's board. But if the advisory boards of competing stations in a market consist of the same individuals, how would that square with the interest in diversity which the Commission has so aggressively promoted? Does it really serve the Commission's oft-cited interest in diversity to have the same group of community representatives influencing the selection of programming on all stations in a market?

90. Even if membership on an advisory board might not constitute an "attributable interest" for purposes of the multiple ownership rules – and it's not entirely clear that membership would or should not in fact constitute such an interest – would not advisory boards with substantially overlapping membership counseling competing stations raise any kind of problem in the Commission's mind? And if the Commission, in an effort to avoid such a problem, were to limit any individual's participation on such boards (so that, for example, no individual could advise more than one licensee in a given market), how would competing licensees determine which prominent local people should be on which licensee's board?

91. These are all very real problems that the Commission does not appear to have considered. We submit that, in view of all these problems (not to mention countless similar others lurking not too far below the surface), the notion of mandatory advisory boards is a wholly unworkable concept, even if it were arguably Constitutional (which it is not).

92. While they oppose any Commission-required advisory board mechanism, the Commenters stress that *voluntary* boards may, in some situations, be useful. Fourteen questionnaire respondents indicated that they consult with community advisory boards of some form already. It is not clear whether those particular boards are precisely what the Commission has in mind – some, for example, appear to refer to periodic "focus group" surveys of listeners, some involve consultation with various community representatives in a generalized

“ascertainment” format”, some involve other variations on the theme. Still, at least some of our respondents indicated that they see some merit in voluntary reliance on some kind of board.

93. But the vast majority of respondents (63) indicated that they do *not* rely on any advisory board.

94. This underscores a point made above but worthy of repetition here. Localism is an inherently individual concept, varying from station to station, community to community, licensee to licensee, audience to audience. There is no “one-size-fits-all” mechanism which can legitimately be imposed on every broadcaster in every community. So while some broadcasters may have concluded that, in their particular circumstances, some form of “advisory board” works, many others have chosen not to rely on such “boards”. One respondent pointed out that if it were to require that *all* licensees rely on a local advisory board, the Commission would be doing a great disservice to small-town radio stations, since the governmentally-required board would likely be viewed as “artificial” by the local citizens. Interestingly, a number of Alaska respondents who indicated (without explanation or elaboration) that they themselves do have local advisory boards of some sort at the same time said (also without elaboration) that they do *not* support any government requirement that such boards be used.

95. The Commission would do well here to heed the advice of the D.C. Circuit, which cautioned that one should be

skeptical when regulatory agencies promote organizational forms that private enterprise would not otherwise adopt. At least such skepticism is appropriate when the agencies are trying to accomplish something that is essential to the survival and prosperity of firms in an ordinary market – such as ensuring that a business . . . is responsive to its customers.

Bechtel, supra, 10 F.3d at 881. It should be clear to the Commission that (a) the broadcast industry is aware of the concept of advisory boards but (b) the broadcast industry has *not* widely embraced that concept. It should also be clear to the Commission that, as noted above,

attracting and maintaining an audience is essential to the survival of any broadcast station, and localism is in turn an essential component of that process. Under these circumstances, even “promoting”²⁹ the concept of boards – much less affirmatively *requiring* them, as the Commission is proposing in this proceeding – would be at best a highly dubious undertaking.

96. It should also be noted in this connection that the purpose which the Commission apparently expects the “advisory board” to serve – *i.e.*, exposing broadcast licensees to input from the community – is already routinely handled by broadcasters in the ordinary course of their operations. Broadcasters interact with their communities in a wide variety of ways. Included as Attachment B is a collection of materials reflecting the depth and breadth of community involvement on the part of just a very small handful of broadcasters across the country, from East Coast to West Coast, from Florida to Alaska; we expect that, should the Commission believe it helpful, similar collections could easily be assembled and submitted by the vast majority of stations. Attachment C is a list of local organizations and activities in which, according to responses to our questionnaires, representatives of the respondents are directly involved on a regular basis. It is through such direct, personal integration into the community that broadcasters can and do become aware of the community’s needs and interests.

E. Unattended operation

97. In the *Localism Report/NPRM*, the Commission states that it is considering “requiring that licensees maintain a physical presence at each radio station facility during all hours of operation.” *Localism Report/NPRM* at 16. In support of that statement the Commission cites *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service*,

²⁹ At issue in *Bechtel* was not any Commission requirement, but rather something in the nature of a precatory policy intended to encourage, but not absolutely require, certain applicant behavior.

22 FCC Rcd 10344, 10291, ¶119 (2007) (“*Digital Audio FNPRM*”). *Localism Report/NPRM* at 16. In a footnote to its statement, the Commission attempts to discourage comment on that particular proposal (“we do not seek comment on this issue here”), although in the text it does invite comment on whether this “physical presence” requirement should be extended to television licensees as well. *Id.*

98. Before addressing the question of unattended operation generally, we wish to observe that the Commission has *not* previously proposed the “physical presence” requirement that it mentions. The paragraph cited by the Commission in support of its claim that it is now considering such a proposal reads, in its entirety, as follows:

119. In connection with our review of public interest requirements for DAB, we seek comment on whether it is appropriate to review the rules that have facilitated the development of automated broadcast operations. Is there any reason that, in light of recent industry experience, the Commission should revisit its determination that stations may reliably and confidently use unattended and remotely controlled technical operations without jeopardizing the technical integrity of the radio service? Have changes in remote operation impacted the requirements that the Commission should adopt in this area?

Digital Audio FNPRM at 10391, ¶119.³⁰ With all due respect to the Commission, the vague language of the *Digital Audio FNPRM* on which the Commission relies stops well short of proposing that all radio licensees be required to “maintain a physical presence at each radio station facility during all hours of operation.” At most the cited language merely indicates that the Commission may have been inclined to consider some possible review of the technical side

³⁰ When the Commission refers to “recent industry experience”, it appears to be referring to a single incident in Minot, North Dakota. See *Digital Audio FNPRM* at n. 280. It should be noted that the particular facts of that particular incident appear to be in dispute, and it is not entirely clear that any problem was in fact attributable to unattended operation. But even if we assume, *arguendo*, that unattended operation was in fact the sole source of the Minot problem, we are constrained to observe that a single isolate incident is hardly a legitimate basis from which to conclude that any nation-wide, industry-wide problem exists. In view of the number of stations nation-wide and the number of emergency situations which arise daily, the fact that only one arguable problem has arisen is a testament to the soundness of the existing system.

of automated broadcast operations – *if* commenters were to demonstrate that there is any reason to do so. It is more than a slight stretch to go from some possible review of technical operational matters to a blanket prohibition against unattended operation. In view of that, the Commenters believe that it is both necessary and appropriate to address the question of unattended operation here.

99. We start with the data obtained from our questionnaires. Of the 76 respondents who answered questions about unattended operation, only 17 – significantly fewer than 25% -- indicated that they never operate in an unattended mode.³¹ Of the 59 respondents who indicated that they do operate one or more stations unattended at some point, more than half (30) indicated that, if the unattended operation rule were eliminated and a “physical presence” were necessary at all times of operation, they would simply turn their station(s) off during all or at least part of the time during which they presently operate unattended. The common explanation was simple: in most instances the unattended operation occurs during the overnight hours (*e.g.*, midnight – 6:00 a.m.). Stations tend to derive little if any revenue from operation during those hours, but such operation can make sense if it can be provided with minimal overhead. But if, in order to operate all night, the station has to pay a warm body just to babysit the operation, it makes no financial sense to do so: to operate that way would cause the station to lose money. Under those

³¹ Note that some respondents run unattended at some stations pursuant to waivers of the main studio rules which the Commission has expressly granted. In such cases, the licensee has proffered a detailed showing in support of its waiver request and has, in that connection, agreed to undertake particular obligations with respect to providing service tailored for the community of license of the “satellite” station that would operate unattended pursuant to the waiver. In view of the Commission’s express public interest determination underlying each such waiver, and in view of the fact that licensees subject to such waivers have committed to particularized program-related obligations over and above what they might otherwise have been subject to, we do not understand that the proposed elimination of the unattended operation rule would affect the continued viability or availability (upon a sufficient showing) of such main studio waivers in any respect.

circumstances, the natural and expected reaction would be simply to turn the station off at night. And that is precisely what the majority of respondents indicated they would likely do.

100. So the immediate impact of the proposal to eliminate the unattended operation rule would be to *decrease* the amount of service available to the public. The Commenters are at a loss to understand how the Commission could believe that to be in anyone's interest.

101. But that's not the only downside of this particular proposal. Of the respondents who answered that they did not contemplate ceasing operation during the hours of current unattended operation, the overwhelming majority observed that the cost of staffing the station during those hours would be substantial. Either new staff would have to be hired or existing staff would have to be re-assigned. In either case, the effect would likely be the same: a diminution in the station's ability to serve the public because of limitations on its resources. As discussed above, broadcasters' resources are *not* capable of infinitely expanding as necessary to accommodate whatever chores the Commission may impose. If the Commission insists that all operation be attended by a "physical presence", then that may be accomplished, but only by reallocating the station's scarce resources – and that means that resources that were available for some aspects of the station's service may no longer be available because they would have been reallocated to assure compliance. Some multiple station owners indicated that they might even be forced to turn off one or more stations entirely in order to accommodate the staffing requirement at other stations. (Others indicated that they might be forced to sell some or all of their stations.)

102. So again, from this perspective the elimination of the unattended operation rule would be a significant *decrease* in service to the public. As discussed earlier, such decreases would almost invariably involve loss of news or public service programming which tends to be

expensive to produce and difficult to sell. In other words, far from increasing “localism” in any meaningful sense, this particular proposal would diminish it.

103. A number of respondents also took issue with the Commission’s facile assumption that elimination of the unattended operation might “increase the likelihood that each broadcaster will be capable of relaying critical life-saving information to the public.” *Localism Report/NPRM* at 16. The Commission’s theory seems to be that having a warm body at the station overnight will automatically be preferable to having other systems in place that might alert station personnel of emergencies. The Commission should think again. As several respondents observed, the labor pool available to fill graveyard shifts involving little more than babysitting transmission equipment is limited, and is expected to consist largely of less than expert, mature individuals who can be relied on in extraordinary emergency conditions. This is especially true in smaller markets.

104. By contrast, virtually all stations which currently operate unattended have systems in place which assure prompt alerts to responsible station personnel. Indeed, many respondents advised that station management is personally familiar with local police and emergency personnel who are able to contact station personnel, directly, at any time of the day or night. Further, automated EAS systems provide additional assurance that, should an emergency arise, the station will be able to transmit any necessary alerts.³²

³² If the Commission were to find that there is a problem with obtaining emergency access to airwaves outside normal business hours – and again, we observe that there is no basis for such a finding currently in the record – that problem would be more properly addressed by a targeted regulation, such as requiring stations to have a 24-hour number that pages an engineer or other person who is qualified to get emergency material on the air. As discussed above, overnight staffing with untrained personnel would be counterproductive, because it would impose a heavy financial tax on licensees and might even lead to false expectations by emergency officials. A full-time staffing requirement would also fly in the face of advances in technology, which permit use of the Internet and other technologies to control broadcast equipment – including not only

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105. Almost all of the proposals in this proceeding, but the full-time staffing proposal in particular, will fall hardest on the smallest stations that least deserve the punishment. It may discourage the construction of new stations in very small markets because of the added cost, thus producing a result contrary to the intent of Section 307(b) of the Communications Act, and will serve as a series of barriers to entry by small businesses, contrary to the mandate of Section 257. Indeed, this proceeding, if the Commission does not change its course, could ultimately exceed even the consolidation frenzy of the past decade as the most anti-small business regulation the agency has promulgated in recent memory.

106. Here again, then, we find that the Commission's proposal will be counterproductive, imposing substantial, non-recoupable costs onto broadcasters and thereby forcing them either to stop operation altogether (at least during hitherto unattended hours) or reallocate their scarce resources to permit continued operation during those hours, but only by cutting back on valuable service at other times. This makes no sense at all. The Commenters strongly oppose the proposed elimination of the unattended operation rule.

F. Local Programming Renewal Processing Guidelines

107. In its most blatant attempt to impose content-based regulation on broadcasters, the Commission proposes to reintroduce "renewal application processing guidelines" for the purpose of "ensur[ing] that all broadcasters . . . provide some locally-oriented programming." *Localism Report/NPRM* at 22. While the Commission offers no specific proposal beyond that terse

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transmitter monitoring but also manipulating the programming chain – with more facility and functionality than ever before. These technologies may also permit intervention by better trained and expert technical and programming personnel than those who would babysit a studio in person.

statement, it appears that the agency contemplates returning to the pre-deregulation days during which, hidden in the obscure Part 0 of the Commission's rules was a provision (Section 0.281) setting out the "delegations of authority" to the then-Broadcast Bureau. And further hidden in that section was a subsection which authorized the Bureau to act on renewal applications meeting certain minimum levels of certain types of programming. Applications falling below the specified levels could *not* be acted on by the Bureau, but would instead have to be referred to the full Commission for disposition.

108. While this "guideline" approach stopped just short of imposing express programming quotas on the broadcast industry, the implication was unmistakable: broadcasters should strive mightily to meet the specified minimum so that the Bureau could act because, otherwise, Bad Things would likely happen if the full Commission had to get involved. It's like a teacher threatening to send the misbehaving student to the principal's office. The raised eyebrow effectively communicates the unmistakable threat of dire consequences should the licensee fall short of the minimum levels specified in the rules.

109. This proposal is shocking in its patent unconstitutionality. The Commission expressly states that its goal is to force "all broadcasters" to provide "some locally-oriented programming". It is impossible to read that as anything but content-based program regulation, pure and simple. Such regulation is prohibited by Section 326 of the Communications Act and by the Constitution, even more so than the enhanced programming reporting requirements discussed above. Even Commissioner McDowell has acknowledged that the Commission's proposed content-based regulations have placed the Commission on a "collision course with the First Amendment rights of broadcasters". Speech (April 23, 2008), Quello Communications Law and Symposium (available at

281772A1.pdf). We note also that the proposed imposition of “renewal guidelines” relative to particular types of programming belies the Commission’s assurance to the contrary in the *Enhanced Disclosure Order* at, e.g., ¶43 (rejecting the claim that the Commission intends to establish “program quotas, or . . . select[] licensees’ programming for them”).

110. While the blatant First Amendment intrusion is appalling, it is even more so in view of the fact that, in advancing this proposal, the Commission appears to be totally ignorant of the fact that its own extensive historical record demonstrates conclusively that this “renewal guideline” approach *does not work*. That historical record establishes that, even at a point when the Commission’s regulatory energies were clearly directed to producing “localism”, the steps it took – including “renewal guidelines” – failed to produce the results it was looking for. *See, e.g., supra* at 15-21. So it is even more appalling that the Commission, with very substantial reason to know for sure that this approach won’t work, goes ahead and proposes it anyway. We urge the Commission to abandon the notion of imposing “renewal guidelines”.

111. But even more shocking and more appalling is a question which the Commission asks in Paragraph 124 (page 56) of the *Localism Report/NPRM*, in a brief discussion of the “renewal guideline” proposal. Bear in mind, now, that up to this point in the document the Commission has devoted more than 55 single-spaced pages to the question of how to promote local programming. In Paragraph 124, the Commission asks questions about the “renewal guideline” proposal:

[S]hould these guidelines be expressed as hours of programming per week or, as in the past, percentages of overall programming? Should the guidelines cover particular types of programming, such as local news, political, public affairs and entertainment, or simply generally reflect locally-oriented programming? What should the categories and amounts or percentages be? Should we adopt processing guidelines regarding specific types of locally-oriented programming to be aired at particular times of the day? Should the Commission create other renewal processing guidelines that give processing priority to stations that meet certain measurable standards?

Then, and only then, does the Commission raise the following question *for the first time* in the entire report:

How should we define local programming?

Let us repeat that to allow its impact to sink in:

HOW SHOULD WE DEFINE LOCAL PROGRAMMING?

So the Commission has devoted more than 55 pages to proposals designed, one way or another, to pressure broadcasters to provide local programming, and the Commission acknowledges only on page 56 that it doesn't know what "local programming" is? If the Commission itself does not know what "local programming" is, how can it have determined in the previous 55 pages that there may be any need to pressure broadcasters to provide such programming? Since the Commission, by its own admission, has not yet developed a definition of "local programming", we submit that it is, at a bare minimum, hopelessly premature for the Commission to take any action at all in this proceeding. After all, without such a definition the Commission cannot claim to know for sure whether there is in fact even an arguable need for the proposed rules. The demand for careful, measured deliberation, deliberation supported by clear understanding of essential terminology (like, for instance, "local programming") is especially acute here where the Commission's proposals plainly run afoul of the Constitution.

G. Main Studio Location

112. Expressing an interest in making broadcast main studios a "part of the neighborhood", the Commission also requests comment on whether it should turn the clock back more than two decades and require that a station's main studio be located within the station's city

of license, as was the case prior to 1988. *Localism Report/NPRM* at 22-23. This proposal, like most of the Commission's other proposals, would have serious, deleterious results.

113. Of our questionnaire respondents, 30 indicated that they currently operate one or more stations whose main studio is not located in the city of license.³³ An equivalent number indicated that their stations' main studios are all in their respective cities of license. But none of the respondents indicated that the particular location of their respective studios impaired in any way their ability to interact effectively with their communities.

114. To the contrary, respondents described studios that were the focal point of much activity, both broadcast and non-broadcast related. While the reported numbers of visitors to main studios varied widely among the respondents, it is clear that the particular locus of the studio has not generally been a factor in the licensees' abilities to maintain contacts with their communities.³⁴ Respondents repeatedly described their stations' many interactions both at the studio and throughout the community – whether through news gathering efforts or attendance at community events or production of programming or even mere quotidian activities such as grocery shopping or going to church.

³³ Of course, such facilities were developed in compliance with the Commission's current rules, often at considerable expense to the licensee. Licensees who acted in good faith reliance on existing rules and policies should not now be forced to suffer the loss of that investment.

³⁴ The Commission may assert that the fact that each licensee's local public inspection file must be maintained at the main studio and, therefore, requiring the studio to be in the community of license may facilitate access to the file. But the Commission is aware, from a petition for rulemaking filed several years ago by David Tillotson, that the actual number of public file inspections is and has historically been reportedly minimal. Moreover, the requirement – already adopted but not yet effective for TV licensees, not yet adopted but strongly hinted at for radio licensees – that all materials from the public file be posted on the Internet – a concept, we are constrained to point out, which appears to be the antithesis of "localism" – would obviate any need for making the public file physically available in any case.

115. A number of respondents pointed out that their ability to collocate studios in a central community substantially enhanced their ability to serve the separate communities of license. For example, one licensee owns three stations, each in a different community. Two of the three communities in question have populations of fewer than 1,500; the third is in a larger community which serves as the commercial and recreational hub of all three. By collocating all three main studios in the larger community, the licensee is able to provide improved service through state-of-the-art facilities and resources (*e.g.*, high-speed broadband service) not available in the smaller communities. Moreover, because of the central location of the larger community, residents of all the communities in question have easy access to the stations (since residents of the smaller towns in the area routinely visit the larger community for shopping, entertainment, etc.).

116. But if that licensee were required to split up those three studios, it would have to establish two new studios, each of which would be located in a community of fewer than 1,500 people. The available facilities would be inferior to those the stations currently enjoy. And the total cost would exceed \$200,000 per station. Once the stations had been relocated, the licensee would have to run three separate operations where it now runs only one. On-going operating costs would thus sky-rocket.

117. And as we have seen in connection with other proposals thus far in this proceeding, these additional costs would not be recoupable: they would be pure expense, with no hope of offsetting revenue. So, as we have also seen earlier, adjustments would have to be made, and the most likely place where those adjustments would be felt would be in precisely the types of programming that the Commission is trying to pressure broadcasters to provide.

118. The licensee described here is not alone. In fact, from the various questionnaire responses its situation appears to be far more the rule than the exception. Estimates of the cost of relocating studios ranged from the tens of thousands up to the millions. In the vast majority of cases, the respondent indicated that the additional costs would likely require serious reduction in the licensee's ability to provide local news and nonentertainment programming. So, as is the case with most of the Commission's other proposals herein, the actual effect to be anticipated from the proposal would be precisely the opposite of what the Commission claims to be seeking. This makes no more sense than any of the other proposals here. The Commenters strongly oppose this proposal as well.

H. Voice-Tracking

119. The Commission also requests comments on the "prevalence" of voice-tracking. *Localism Report/NPRM* at 51. Fifty-four respondents reported that they do not utilize voice-tracking at all, while 17 indicated that they do to some degree. However, it appears that at least some of those 17, when referring to "voice-tracking", were including in that term programming pre-recorded and produced by local, in-house talent and time-shifted slightly. That does not appear to constitute "voice-tracking" as described by the Commission. Respondents who reported using voice-tracking in one form or another pointed out that it frees up the schedule of on-air talent, enabling those employees to engage in news gathering, attendance at community events, or other interactions with the community. In that sense, voice-tracking may be a beneficial practice.

120. We may also question exactly how the Commission can distinguish between voice-tracking, on the one hand, and reliance on standard network programming, on the other. No one can doubt, after more than 70 years of broadcast history, that network programming is

non-objectionable. How, then, can voice-tracking be deemed contrary to the public interest? What precisely is the evil that the Commission sees in the practice? ³⁵

I. Local Music

121. Finally, the Commission seeks comment on whether it should require licensees to provide data concerning the broadcast of “the music and other performances of local artists” and how licensees “compile their stations’ playlists”. *Localism Report/NPRM* at 52. As an informational matter, 19 of our respondents indicated that they do not generally air any local artists, while 53 respondents reported that they do broadcast local artists.

122. These numbers, however, are of no real consequence here because, again, the Commission is wading into very deep and very murky Constitutional waters when it proposes to involve itself in the program selection processes of its licensees. On what basis does the Commission justify this intrusion? Certainly there is nothing in the Communications Act that authorizes the Commission to seek to promote “local artists”, however that term may be defined – and, as appears to be the Commission’s custom in this proceeding, it has declined to provide any useful definition. Even if the term “local artist” had been defined, the Commission has

³⁵ Before the Commission suggests that voice-tracking might in some way be deceiving to the audience and therefore require some mandatory disclosure, we remind the Commission of the fact that, in 1928, the FRC concluded that the broadcast of phonograph records “required that all broadcasting of this nature be clearly described in the announcement of each number. . . . [because] such broadcasting without appropriate announcement is, in effect, a fraud upon the public.” 1928 Second Annual Report (FRC) at 19 (available at <http://www.fcc.gov/fcc-bin/assemble?docno=281026>).

failed to explain how a licensee can or should factor an artist's "local" nature into the station's program selection process.³⁶

123. Additionally, numerous respondents noted that, if they were required to compile detailed records concerning the broadcast of local artists, they would likely try to avoid such broadcasts so as not to incur the additional recordkeeping burden.

124. We do not mean to suggest that the broadcast of local artists (again, however that might be defined) is not a good idea. To the contrary, such programming can be and often is among the most entertaining. But that is a decision to be made by the licensee, *not* by the government. Non-elected officials are not in a position to determine what types of programming are best suited for audiences throughout the country.

V. CONCLUSION

125. The foregoing extensive review brings us back to where we started. The Commenters wish to make one thing clear: they are committed to localism. But localism is an inherently individual process, which encompasses a near-infinite variety of interactions between station and audience, audience and station. Approaches which may be perfectly suited for one station in one community may be wholly unworkable, or even counter-productive, for other stations in other communities. "Localism" does not lend itself to any governmentally-imposed, one-size-fits-all cookie cutter formula; rather, it is an *attitude* which individually infuses and instructs each broadcaster's operation differently.

³⁶ For example, if the most prominent local musicians happened to bagpipers or polka bands, would the Commission seriously expect them to be featured on a station whose format was classical music, or Tejano music, or hip-hop?

126. Stations serve their local communities in myriad different ways. Sometimes it's a call-in show featuring local elected officials. Or perhaps the broadcast of local church services. In some communities, stations devote considerable resources to the broadcast of local high school sports contests, or local fairs, or talent shows, or fund drives – the list goes on and on. Importantly, broadcasters involve themselves in their communities *now*, without any governmental compulsion, because it's the right thing to do and because it's an essential element of their business. As noted above, if a broadcaster fails to provide responsive programming service to its audience, the audience can and will look elsewhere (whether to other broadcast stations or to the ever-increasing ranks of non-broadcast services which compete for audiences in the 21st Century). A broadcast station without an audience is doomed.

127. The Commission should give the public some credit. If the public really were dissatisfied with local broadcast service, the public could and would have so advised the Commission. The public has not done so.³⁷ Tens of thousands of license renewal applications have been filed and granted without substantial protest from the public.³⁸

³⁷ As noted above, the Commission has received petitions and/or objections from many members of the public who have opposed license renewal applications based on various complaints about programming. A small and very recent sampling of the evidence: *Ms. Andrea Cano*, 23 FCC Rcd 1938 (Audio Division 2008); *WSKG Public Telecommunications Council*, 23 FCC Rcd 1259 (Audio Division 2008); *Mr. Robert Schore*, 23 FCC Rcd 736 (Audio Division 2008); *Mr. Peter D. Moss*, 22 FCC Rcd 18328 (Audio Division 2007); *Ms. Rosanda Suetopka Thayer*, 22 FCC Rcd 17305 (Audio Division 2007); *Oregon Alliance to Reform Media (c/o Media Access Project)*, 22 FCC Rcd 15183 (Video Division 2007); *Mr. William Sommers*, 22 FCC Rcd 15076 (Video Division 2007); *Mr. Stephen Diliberto*, 22 FCC Rcd 12983 (Audio Division 2007). We encourage the reader to take a look at these decisions to get an idea of the types of objections being raised. We submit that none of the cited cases involved any valid claim of a shortfall in "local" programming.

³⁸ We understand that some members of the Commission may believe that the Commission's review of renewal applications has been perfunctory and less than critical, and that that may account for the fact that the vast majority of renewal applications are granted without problem. In response we need only point, again, to *Reading Broadcasting, Inc., supra*. There the
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128. While the Commission may delude itself into believing that its processes are too arcane and abstruse for the Average Joe to comprehend, let's get real. The process of objecting to a renewal application is relatively simple and straightforward, much like filing comments in a rulemaking proceeding such as this one – and the number of comments filed in this proceeding certainly suggests that the public has no problem doing so. The primary difference between a station-specific objection and a set of general rulemaking comments is that the former requires some actual, detailed factual showing. If local service really were as lacking as the Commission seems to think, then we should have seen some significant upswing in station-specific objections founded on such actual, detailed factual showings. There has been no such upswing.

129. So the Commission is charging ahead without any valid factual basis.

130. The Commission's enthusiasm here is especially striking because the agency lacks the statutory authority to do what it is trying to do *and* because the Commission's ultimate goal is unconstitutional.

131. And finally, as demonstrated repeatedly above, even if we overlook all of those very basic threshold problems, the fact of the matter is that the Commission's various proposals, if adopted, would be completely counterproductive, resulting in substantial decreases, rather than increases, in locally-oriented programming. The Commission cannot deny the fact that licensee resources are not infinitely elastic and invariably capable of stretching to assure easy compliance

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incumbent renewal applicant's record was carefully dissected in the crucible of a hearing, at the conclusion of which the presiding Administrative Law Judge denied the renewal application. On appeal, though, the full Commission *reversed* that decision and granted the renewal, notwithstanding an abysmal lack of locally-oriented nonentertainment programming by the incumbent. Whatever you might say about this case, you can't say that it did not require the full Commission to engage in a detailed evaluation of the incumbent's past programming performance.

with new regulatory requirements. The limited nature of licensee resources is especially acute now, when the broadcast industry as a whole finds itself immersed in a highly competitive marketplace unimagined and unimaginable a decade or two ago.³⁹

132. The Commission's localism proceeding, then, is (to borrow from Winston Churchill) a riddle wrapped in an enigma inside a mystery. No factual basis for it is apparent, no legal or Constitutional justification for it exists, and its obvious consequences would be precisely the opposite of the Commission's apparent goal. For all of these reasons, the Commenters oppose the adoption of the changes proposed in this proceeding.

Respectfully submitted,


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April 28, 2008

³⁹ As Commissioner McDowell observed in his April 23, 2008 speech at the Quello Communications Law and Symposium, the Commission undertook deregulation in the 1980s because, after a thorough review of the market, the Commission concluded that competitive market incentives would ensure locally-responsive programming. In the Commissioner's words, "if market incentives were sufficient in 1984 to motivate broadcasters to stay in touch with their communities, today's much more competitive market will certainly drive stations to respond to local interests."

ATTACHMENT A

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March, 2008

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Localism Questionnaire

In connection with our preparation of Comments to be filed with the FCC in response to its Report on Broadcast Localism and Notice of Proposed Rulemaking ("Localism Report"), we are seeking information from broadcasters relative to points raised in the Localism Report. We would appreciate it if you would take the time to review and respond to this questionnaire, providing as much detailed information as possible. You can complete the questionnaire on your computer (using Adobe Acrobat) or you can print it out and write/type in your answers. We hope to present to the FCC specific empirical evidence of the impact of some of its proposals on broadcasters and, more importantly, on the public which the broadcast industry serves.

In the questionnaire we summarize some of the FCC's proposals. We encourage you to review the full text of the Localism Report. It can be found at:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-218A1.pdf

or let us know and we can email you a copy. You can also find a summary of the Localism Report at: http://www.fhhlaw.com/memo_clients/2007/Back%20to%20the%20Future%20II.pdf

If you have any questions about the FCC's proposals, please feel free to contact us.

The current deadline for comments is April 28. We would appreciate receiving your response to this questionnaire by April 1 in order to give us enough time to digest all the information and incorporate it as appropriate in our Comments.

PLEASE NOTE THAT, IN THE LOCALISM REPORT, THE COMMISSION INDICATES THAT SOME QUESTION EXISTS CONCERNING THE EXTENT TO WHICH BROADCASTERS ARE IN TOUCH WITH THEIR RESPECTIVE COMMUNITIES OF LICENSE. IN ORDER TO DISPEL ANY SUCH QUESTIONS AND DEMONSTRATE CONCLUSIVELY THAT BROADCASTERS ARE POSITIVELY INVOLVED WITH THEIR COMMUNITIES, IT WOULD BE EXTREMELY HELPFUL IF EACH LICENSEE COULD OBTAIN LETTERS FROM LOCAL OFFICIALS (E.G., ELECTED OFFICIALS, HEADS OF COMMUNITY ORGANIZATIONS, REPRESENTATIVES OF PARTICULAR COMPONENTS OF THE COMMUNITY) ATTESTING TO SUCH INVOLVEMENT. IF YOU FEEL THAT YOU WOULD BE ABLE TO PROVIDE US WITH SUCH LETTERS, PLEASE CONTACT US RIGHT AWAY SO THAT WE CAN WORK WITH YOU TO OBTAIN THE MOST EFFECTIVE POSSIBLE SUPPORTING MATERIALS.

If you have any questions about this, please contact Harry Cole at 703-812-0483 or cole@fhhlaw.com.

Thank you for your help.

I. MAIN STUDIO LOCATION

The current main studio rule permits the location of a station's main studio anywhere within its city-grade contour, or anywhere within the city-grade contour of any other station of any other service licensed to the same community, or anywhere within a 25-mile radius of the station's city of license.

In the Localism Report, the FCC is proposing to require that each station maintain its main studio in its city of license.

This portion of the questionnaire seeks information about the likely impact such a change would have on your operations.

1. *Stations*

On the next page list the call sign, service, community and location (community only – street address not necessary) of each of your stations, and indicate approximately how long each studio address has been in use for its respective station, whether the studio site is owned or leased and, if leased, approximately how much time remains on the lease.

2. *Visits from public*

Indicate in the far right hand column on the next page the number of members of the public who have visited the main studio to discuss (a) community needs and interests and/or (b) nonentertainment programming matters with station personnel. If specific data are not available, estimate to the best of your recollection, and indicate the period of time (e.g., last year, last license term, period during which the studio has been at this location, etc.) for which the estimate is made. Describe in the box below (or on a separate sheet) the nature of any such visits to your studio. (For example, do members of the public simply "drop in" or do they make appointments? Do visitors tend to be elected officials, representatives of particular groups within the community, average citizen/listeners, others? Do visitors wish to discuss past programming or possible future programming?) Do you have signage making your site easily identifiable to members of the public?

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3. *Anticipated costs of studio relocation*

Estimate the cost to your operation if the main studio rule were to be revised as proposed by the FCC (*i.e.*, a station's studio would have to be located in the station's community of license), and if you were required to bring your studio(s) into compliance with that rule. To the extent possible, provide detail of the anticipated costs (*e.g.*, cost of new site, costs associated with moving from existing non-compliant site, costs associated with decentralization of previously consolidated operations affecting multiple stations licensed to multiple communities in the same geographic vicinity, etc.) and, if meeting these anticipated costs would likely result in any decrease in public service programming, please include a brief explanation.

4. *Technical considerations*

(a) With respect to any studio that would be subject to relocation if the proposed rule were to be adopted, do you deliver the programming signal from your studio to your transmitter by STL (yes/no)?

<input type="checkbox"/>	<input type="checkbox"/>
Yes	No

(b) If yes, do you anticipate that congestion in the auxiliary band in your area will present any difficulties in arranging for any alternate STL path that may be necessary (yes/no)?

<input type="checkbox"/>	<input type="checkbox"/>
Yes	No

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2. *Impact of prohibition against unattended operation*

If the FCC were to prohibit unattended operation, how (if at all) would you adjust your operations?

- | | | | |
|----|---------------------------------------------------------------------------------------------------------------|--------------------------|--------------------------|
| a. | Sign the station off the air at times when operation is presently unattended? | <input type="checkbox"/> | <input type="checkbox"/> |
| | | Yes | No |
| b. | Hire new staff to permit continued operation at all times with personnel physically present? | <input type="checkbox"/> | <input type="checkbox"/> |
| | | Yes | No |
| c. | Re-assign existing personnel in order to assure physical presence of staff at all times of station operation? | <input type="checkbox"/> | <input type="checkbox"/> |
| | | Yes | No |
| d. | No change | <input type="checkbox"/> | <input type="checkbox"/> |
| | | Yes | No |

Provide a brief explanation of your response(s), noting in particular the anticipated burdens (including dollar costs) that such a rule change would impose on station operation and the way(s) in which you would expect to deal with such additional burdens. To the extent that staffing considerations would influence your response, indicate the current size of your staff.