BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations	)	MM Docket No. 00-168
	)	
Extension of the Filing Requirement For Children's Television Programming Report (FCC Form 398)	)	MM Docket No. 00-44
	)	
Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission	)	OMB Control No. 3060-0214

JOINT COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS

Richard R. Zaragoza
Lauren Lynch Flick
John K. Hane
Emily J. Daniels

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, D.C. 20037
202-663-8000

Their Counsel in this Matter

Dated: May 12, 2008

Summary

The Named State Broadcasters Associations hereby respond to the Paperwork Reduction Act notice published in the Federal Register on May 13, 2008[1] seeking comment on proposed new FCC regulations. The proposed regulations would require (i) that television broadcasters file a new Form 355 quarterly providing detailed reports on the source and category of programming content (the "*TV Form 355 Rule*"), and (ii) that every television station that maintains a web site post most of the contents of its paper-based public inspection file on that web site (the "*TV Online Public File Rule*").

The Named State Broadcasters Associations urge the Commission to refrain from certifying to the Office of Management and Budget ("OMB") that the new information collection and reporting requirements associated with the *TV Form 355 Rule and the TV Online Public File Rule* comply with the Paperwork Reduction Act until after it resolves pending petitions for reconsideration. Those petitions raise many issues that are relevant to the Paperwork Reduction Act analysis the FCC must undertake, and depending upon the Commission's action on reconsideration, review under the *PRA* will either be rendered moot in whole or in part, or will require a materially different analysis and justification.

As explained in these Joint Comments, the *TV Form 355 Rule and the TV Online Public File Rule* violate the letter and the spirit of the Paperwork Reduction Act and cannot pass muster. First, the FCC's estimate of the burden of compliance with the new requirements is immensely understated and lacks the required specificity. Second, the Commission's estimate of the burden

---

[1] *See Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 73 FR 13541 (March 13, 2008) ("*PRA Notice*").

appears impermissibly to "bootstrap" on existing collection and reporting requirements without analyzing the need for or effectiveness of those requirements. Third, the FCC has not analyzed the extent to which the burdens could be reduced. For example, the Commission has not even considered giving television stations the option of using the Commission's own website as its online public inspection file, which alternative would eliminate substantially the burdens and risks associated with requiring such stations to design, implement and maintain public inspection files, including documents that pose privacy and COPPA concerns, on their own websites. Fourth, the FCC has chosen to impose the rules on the entire industry based simply on the speculative "hope" that they will be effective.

The FCC is required to take every reasonable step to ensure that new information collection and reporting regulations 1) are the least burdensome necessary for the proper performance of the FCC's functions; 2) are not duplicative of information otherwise accessible; and 3) have practical utility. The Named State Associations submit that the proposed requirements fail all three of these elements. Accordingly, it would be arbitrary and capricious for the Commission certify these requirements to the OMB prior to the FCC's consideration of the several petitions for reconsideration currently pending before it. The Commission should act promptly on those petitions and then provide interested parties with a reasonable opportunity to provide their *PRA*-related comments on any regulations that survive reconsideration.

Table of Contents

Page

Summary i

Table of Contents iii

I. The Commission's Actions Adopting the TV Form 355 Rule and the TV Online Public File Rule Violate the Paperwork Reduction Act 3

A. The FCC has not adequately justified the need for either of the new rules or articulated any quantifiable benefits. 5

B. The FCC's projections of total burden and cost of compliance are immensely understated and conclusory. 5

C. The FCC's projections impermissibly "bootstrap" on pre-existing requirements. 8

D. The FCC has not analyzed the extent to which the burdens could be eliminated or reduced. 9

E. The FCC has not explained its failure to undertake a pilot or test program. 9

II. Specific Comments Regarding the *TV Form 355 Rule* 11

III. Specific Comments Regarding *TV Online Public File Rule* 16

Conclusion 18

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations	)	MM Docket No. 00-168
	)	
Extension of the Filing Requirement For Children's Television Programming Report (FCC Form 398)	)	MM Docket No. 00-44
	)	
Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission	)	OMB Control No. 3060-0214

To: Secretary
Attn: Cathy Williams

JOINT COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS

On behalf of Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York

State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, Wyoming Association of Broadcasters (each a "*State Broadcasters Association*" or "*SBA*" and collectively, the "*State Associations*" or "*SBAs*"), by their attorneys in this matter, hereby jointly comment in response to the "Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested" published in the Federal Register on March 13, 2008 (the "*PRA Notice*") in connection with the above-referenced information collection.[2] That collection specifically relates to two new, not yet effective, rules of the Federal Communications Commission ("FCC"): the rule requiring full power and Class A television broadcasters to complete, file with the FCC and make available to the public the new FCC Form 355 on a quarterly basis (the "*TV Form 355 Rule"*), and the rule requiring such broadcasters to duplicate on their websites virtually all of the contents of their "paper" public inspection files located in their main studios (the "*TV Online Public File Rule*").[3]

The *PRA Notice* seeks comment concerning: "(a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission,

---

[2] 73 FR 13542 (March 13, 2008).

[3] *See In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirements for Children's Television Programming Report (FCC Form 398),* Report and Order, MM Docket Nos. 00-168, 00-44, FCC 07-0205 (Jan 24, 2005) (establishing these information collection requirements) (*hereinafter "Enhanced Disclosure Order").*

including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of collection of information on the respondents, including the use of automated collection techniques or other forms of information technology".

For the reasons set forth herein, the Commission should not certify either of the two new rules to the Office of Management and Budget ("OMB") for approval based on the present record and, in any event, should not do so until after it has (i) acted on the several petitions for reconsideration currently pending before it, and (ii) provided interested parties with a reasonable opportunity to file comments under the Paperwork Reduction Act of 1995, Public Law 104-13 (the "*PRA*") based on such decision on reconsideration. Depending upon the Commission's action on reconsideration, review under the *PRA* will either be rendered moot in whole or in part, or will require a materially different analysis.

I. <u>The Commission's Actions Adopting the TV Form 355 Rule and the TV Online Public File Rule Violate the Paperwork Reduction Act</u>

The *State Associations* submit that the Commission's actions in adopting the *TV Form 355 Rule* and the *Online Public File Rule* violate the letter and spirit of the *PRA*, which was enacted "to minimize the federal paperwork burden"[4] by eliminating regulatory burdens "which are found to be unnecessary and thus wasteful ...."[5] Congress specifically applied this policy to the FCC's domain when it extended the broadcast license term to five years for television stations

---

[4] 44 U.S.C. § 3501(1) (Supp. V 1981).

[5] S.Rep. No. 930, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6241, 6243.

and seven years for radio.[6] Congress has, therefore, specifically imposed on the FCC a policy of "reduction in regulatory burden" through the *PRA*.[7]

To comply with the OMB regulations promulgated under the *PRA*, the FCC must evaluate any information collection requirement in a very specific way. Among other things, this review must include:

- An evaluation of the need for the collection of information.[8]
- A "specific, objectively supported estimate of the burden."[9]
- An evaluation of whether and to what extent the burden can be reduced.[10]
- A test of the collection through a pilot program, if appropriate.[11]
- A plan for the efficient and effective management and use of the information, including necessary resources.[12]

The *PRA Notice* gives no hint of a rationale for concluding that the proposed regulations pass muster under any of these items. As explained below, neither the information collections contemplated under the *TV Form 355 Rule* or in connection with the *Online Public File Rule* can survive an appropriate *PRA* review. Certain material *PRA*-related deficiencies in each rule are common to both new rules. Other material *PRA*-related are unique to one or the other of these rules. The *State Associations* will address those common flaws first, and then provide specific comments on the separate rules.

---

[6] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241, 95 Stat. 357, 736.

[7] *Black Citizens for a Fair Media v. F.C.C.*, 719 F.2d 407, 416-417 (D.C. Cir. 1983).

[8] 5 C.F.R. 1320.8(a)(1).

[9] 5 C.F.R. 1320.8(a)(4).

[10] 5 C.F.R. 1320.8(a)(5).

[11] 5 C.F.R. 1320.8(a)(6).

[12] 5 C.F.R. 1320.8(a)(7).

A. The FCC has not adequately justified the need for either of the new rules or articulated any quantifiable benefits.

In the *Enhanced Disclosure Order*, the FCC states that it is imposing these new rules based on a "hope" that they will increase public involvement in the licensing process. For example, the *Enhanced Disclosure Order* candidly acknowledges that experience shows few people actually visit stations and use the information that the FCC has required stations to maintain in their public files for decades.[13] With respect to the *TV Online Public File Rule*, the Commission acknowledges that the costs of establishing an online document management system may be "appreciable" but concludes the burdens are outweighed because the community will gain access to information "it may not otherwise be able to obtain."[14] The Commission does not claim, as it must to pass *PRA* muster, that the information is not available, and it cannot make this claim because all of the information subject to posting under the *TV Online Public File Rule* is already available to the community under existing FCC regulations.

B. The FCC's projections of total burden and cost of compliance are immensely understated and conclusory.

The *PRA Notice* estimates the number of respondents and responses as 56,030 each and estimates the time for preparing each response as between 2.5 and 52 hours, but it does not explain how the FCC determined these numbers. It is not clear from the *PRA Notice* whether those figures encompass the tasks associated with the *TV Form 355 Rule* or the *TV Online Public File Rule*, or both. In any event, according to the latest FCC-reported broadcast station totals, the new regulations would affect more than 2,300 full power and Class A television stations.[15] The *PRA Notice* estimates the "Total Annual Burden" as 2,072,814 hours, or about 900 hours per

---

[13] *Enhanced Disclosure Order* at ¶ 11.

[14] *Id*. at ¶ 10.

[15] http://www.fcc.gov/mb/audio/totals/bt071231.html.

station. While the this represents a considerable burden, the real burden is many times greater. A recently concluded study by the NAB shows that the true total burden of responding to the Form 355 requirements alone would exceed 4 million hours annually.[16]

The *PRA Notice* contains an estimate for the total annual cost of compliance at $11,600,000.00, a figure that is even more incongruous. First, the FCC's estimate of total cost conflicts with its own findings. The *Enhanced Disclosure Order* acknowledges that the cost for creating an online public file will be "substantial," including a one-time cost of "less than $15,000" per station.[17] Conversion costs of half this amount would greatly exceed the $11 million that the FCC projects as the one-year cost of the *TV Online Public File Rule* and, apparently, the *TV Form 355 Rule*.

Even accepting *arguendo* the FCC's estimate of 2,072,814 hours for responses, it appears that the FCC is assuming that the work will be performed by persons paid less than $5.60 per hour,[18] which is well under the Federal minimum wage of $5.85 per hour and well under most state minimum wages, which typically are higher than the Federal minimum wage.[19] Other costs, such as FICA, unemployment insurance, vacation and health benefits drive real labor costs higher, and union contracts require certain wage and benefit levels. Stations participating in the NAB's study of the real-world impact of complying with Form 355 reported an average salary of $33 per hour – almost six times higher than the FCC's below-minimum-

---

[16] Comments of the National Association of Broadcasters on Proposed Information Collection Requirements, MM Docket No. 00-168, MM Docket No. 00-44, and OMB Control No. 3060-0214, filed May 12, 2008 at 14-15 ("*NAB Comments*").

[17] *Id.* at ¶ 10, fn. 24.

[18] $11,600,000 projected annual costs divided by the FCC's 2,072,814 projected hours equals $5.596 per hour.

[19] http://www.dol.gov/esa/minwage/america.htm.

wage estimate – for the employees doing the work.[20] Real world labor market conditions are flatly inconsistent with the FCC's assumed costs, and the information collection and reporting requirements will impose many additional costs beyond bare labor costs.

The FCC's *PRA* analysis must include a "specific, objectively supported estimate of the burden"[21] and the FCC is required to solicit comments on the accuracy of its estimate of the burden, including "the validity of the methodology and assumption used."[22] The FCC's estimate thus far is neither specific nor objectively supported, and there is no explanation of the FCC's methodology and assumptions. Without knowing how the FCC arrived at its estimate, it is impossible for the public to provide meaningful comment. Regardless of the FCC's methodology and assumptions, the estimated costs are unsupportable on their face because they assume wage rates that are illegal under Federal law and the laws of most states.[23]

The FCC's estimate is also not *specific* because it does not identify the estimated burdens of the individual collection and reporting requirements. That is, the FCC appears to have lumped together the cost of preparing and filing the Form 355 on a quarterly basis under the *TV Form 355 Rule* with the cost of designing, establishing and maintaining an online public file in compliance with the *Online Public File Rule*. Separate consideration of each is necessary not only because they are in fact two separate information collection requirements, but because all full power television and Class A television stations must complete and file the Form 355 while at least some such stations that lack websites would not maintain online public files. Without

---

[20] *NAB Comments* at 14.

[21] 5 C.F.R. 1320.8(a)(4).

[22] 5 C.F.R. § 1320.8(d)(1).

this distinction it is impossible for the public to provide meaningful comment or for the OMB to make individual determinations for each separate requirement.

Thus, the proposed requirements cannot be imposed without prior articulation of a specific, objectively supported estimate of the burden, including an explanation of the methodology and assumptions. Absent specific, objective and reliable burden estimates for each proposed information collection and reporting requirement, the OMB may not reasonably conclude that the burden is justified and therefore may not lawfully issue its approval for either new rule.[24]

C. The FCC's projections impermissibly "bootstrap" on pre-existing requirements.

In the case of an existing collection of information, the FCC must evaluate the burden that is already imposed by that collection.[25] The *Enhanced Disclosure Order* shows that the FCC justifies the new rules in large measure by asserting that much of the effort required to comply with these information collections was already required by other rules.[26] This sort of paperwork bootstrapping is not permitted under the plain language of OMB's regulations which require the FCC to evaluate the burden of existing rules.[27]

---

[24] 5 C.F.R. § 1320.5(e).

[25] 5 C.F.R. 1320.8(a)(4).

[26] *See, e.g., Enhanced Disclosure Order* at ¶ 10 ("stations must already place EEO reports on their websites" and "as discussed in previous Orders, the Commission has found that each of the items required to be placed in the public file are important and need to be accessible to the public"); *see also Enhanced Disclosure Order* at ¶ 55 (stating that burden of Form 355 "will be attenuated by reason of the fact that much of the information required for the new disclosure form is already required").

[27] 5 C.F.R. 1320.8(a)(4).

D. The FCC has not analyzed the extent to which the burdens could be eliminated or reduced.

Before submitting the new rules for OMB approval, the FCC is obliged to analyze the extent to which the paperwork burden imposed might be avoided or reduced.[28] No such analysis appears in the *Enhanced Disclosure Order* or in the *PRA Notice*. The record before the Commission in the *Enhanced Disclosure Order* proceeding is replete with showings both that the collection and reporting requirements are unnecessary and that the benefits, if any exist, can be realized through substantially less burdensome methods. The *State Associations* incorporate by reference their comments and petition for reconsideration filed in that proceeding which pleadings are appended hereto as *Exhibit A* and *Exhibit B*, respectively. As a case in point, the FCC has not considered whether its own website could serve as the "online public file" for all television stations. It would be a simple matter of the FCC modifying its existing website and identifying the types of documents that television stations are required to maintain in their public files but that are not already online at the FCC. A television station would be allowed to elect to use the FCC's website as its own website for public file purposes (and provide the FCC with some additional documents mirroring what the station maintains in its public file) or to spend the money to design, implement and maintain its own website for that purpose.

E. The FCC has not explained its failure to undertake a pilot or test program.

In light of the enormous paperwork and reporting burdens to be imposed in pursuit of vague and speculative benefits, the FCC's apparent decision not to undertake a pilot or test program for each new rule is perplexing and unacceptable. For example, to justify its enormously burdensome obligation that stations place the contents of their public files on their

---

[28] 5 C.F.R. 1320.8(a)(5).

websites, the *Enhanced Disclosure Order* acknowledges that paper-based public files are seldom used by the public. Nonetheless, the Commission concludes:

> It *may well be* that the requirement of physically going to the station and viewing the file during normal business hours has discouraged public interest in viewing the public files. By making the file more available through the Internet, we *hope* to facilitate access to the file information and foster increased public participation in the licensing process."[29]

In essence, the FCC is attempting to interest the public in doing something it has shown little interest in doing for more decades. To accomplish that dubious goal, the FCC has chosen to impose on television broadcasters nationwide sweeping new information collection and reporting obligations. The FCC does not have any rational, articulated basis for believing these pervasive and sweeping changes to day-to-day broadcast operations will accomplish anything of value. In its own words, the FCC simply "hopes" that if stations undertake millions of hours of paperwork at millions of dollars of expense, the public will become more interested in the FCC's licensing process.

The idea of greatly *increasing* information collection and reporting requirements because nobody uses the information that is already freely available is fiercely antithetical to the fundamental purpose of the *PRA*. Having concluded that people just do not make much use of the information contained in station public files, it is incumbent on the FCC to review the overall burden of public file maintenance (which in the aggregate, is enormous) in light of the questionable public benefit, and determine whether that requirement should be eliminated. Instead, the FCC concludes that because people are not interested in using public files, broadcasters should devote vastly more resources towards providing information people have shown to have no interest in reviewing. There is no crisis in American broadcasting that justifies

---

[29] *Enhanced Disclosure Order* at ¶ 13 (emphasis added).

millions of hours of human effort costing tens of millions of dollars annually in pursuit of a "hope" that Americans may become more "involved" in the broadcast licensing process. The FCC has a hope and theories about how to realize that hope. However, hope and bare theories are inadequate to support the certification the FCC is required to make to the OMB.

II. Specific Comments Regarding the *TV Form 355 Rule*

Television stations are already required to maintain a quarterly report listing those community issues to which they gave significant treatment over the past calendar quarter. Such programming is the s*ine qua non* of broadcasting. Contrast that documentation to the information that will be required to be compiled and provided to the FCC under the *TV Form 355 Rule*. What is the FCC going to do with the information? It is not proposing minimum quantities of certain types of content. Thus, why is the information relevant or material to its statutory mandate? If it is not, there is no necessity that offsets the clear burdens created by the *TV Form 355 Rule*. As an example, the Form 355 seeks information about the amount of programming that a station airs that is independently produced as well as the amount that is aired with voluntary video description services. The FCC's rules and case law do not require, or recognize as reflecting positively on a licensee's fitness to hold a station license, the airing of programming that is independently produced or aired with video descriptions. Moreover, none of the questions on the Form 355 relates the programming detailed therein to any actual issue encountered in the station's community. Accordingly, the relevance of collecting this information is questionable at best.

There should be no serious question that the burden in compiling, every quarter, all of the daily, minute-by-minute, data required under the *TV Form 355 Rule* will be monumental. Item 2 on the Form 355 requests detailed information regarding the type of programming aired on the station. While it is true that stations already have information regarding the programming they

air, it is not generally kept in the manner required to be disclosed on the Form 355, and the effort involved in converting that information to such a format is vast. The categories of programming required to be reported on Form 355 occur not only in news programming or network morning shows, but in syndicated talk show programming, *e.g.*, Oprah, Dr. Phil, The View, Ellen DeGeneres, Montel Williams, etc. as well. Locally produced programming, such as KOMO-TV, Seattle's "Northwest Afternoon," which is a one-hour live broadcast every weekday, also includes many segments that will qualify to be reported on Form 355. In addition, many network programs such as Dateline, 20/20, Nightline, and even The Tonight Show with David Letterman, among others, will need to be closely reviewed. To ensure an accurate filing and avoid a misrepresentation issue, nearly every minute of programming on every station will need to be scrutinized so that nothing slips by.

By way of example, many of the television broadcasters air a morning program of several hours that consists of both network-fed programming segments and locally inserted segments. Each day, at the conclusion of this program, station personnel will be required to dissect that day's morning program in order to compile the Form 355 data. Out of the two or three hours of programming aired, the station will have to review the discrepancy log and potentially a videotape of the program to separate out the number of minutes of the program that were fed to it by the network and the number of minutes that the station itself locally inserted into the program.[30] The station will then have to further break down each of those numbers to determine how many minutes of both types of programming constituted "National News," "Local News," "Local Civic Affairs Programming," "Local Electoral Affairs Programming," and just plain

[30] In unionized television stations work rules may impose additional costs, perhaps necessitating that at least two persons participate in the review.

"Local Programming" that includes significant treat of community issues not addressed elsewhere.

The process of dividing this time up would be time-consuming enough if it were abundantly clear what category each type of programming falls into. However, the distinction between a segment that is "Local News," one that is "Local Civic Affairs Programming," and one that is "Local Electoral Programming" is vague and subjective. Even distinguishing "Local News" from "National News" can be difficult where, for example, a station is located in Arizona and the issue is border security. As a result, there is no doubt that station personnel (and their supervisors and even station lawyers) undertaking this responsibility will spend countless hours referring to the definitions of these categories of programming while reviewing tapes or discrepancy logs from the programs with a stop watch and/or calculator in hand in order to complete the Form 355.

Many of these same stations will then air a noon news program, or local news at one or more of the 4:00, 5:00, and/or 6:00 P.M. hours, and potentially again at 10:00 or 11:00 pm, as well as network news in the early and/or late evening and as noted before, syndicated or other local programs throughout the day. These stations will have to undertake the exact same analysis with respect to these programs as well. Thus, the more informational programming that a station airs that falls into these various categories, the greater the burden of compliance. Stations will necessarily be involved in reviewing their logs and on-air tapes on an almost continuous basis to provide the Commission with the very precise and detailed information the Form 355 requests because waiting until the end of the quarter to prepare the form simply will not leave enough time to undertake this vast review of programming. Therefore, at whatever hourly rate the employees charged with this obligation are paid, it is likely that this responsibility will prevent

him or her from undertaking any other duties at the station, resultomg in stations hiring additional personnel simply to assure timely and accurate completion of the Form 355.

The items on the Form 355 addressing Public Service Announcements ("*PSA*s") add to the burdens already addressed. The Form 355 requires that stations report on those *PSAs* that air between 6:00 A.M. and 12:00 A.M. and that stations divide these *PSAs* between those that are sponsored and those that are not. In addition, the FCC asks for the percentage of times each *PSA* aired during primetime. Again, the Commission assumes that the fact that stations already possess some information regarding the *PSAs* that they air means that this information is what is needed to complete these items and, as a result, completing the Form 355 regarding *PSAs* does not represent an additional burden to broadcasters. However, the same copy of a *PSA* may air outside of the 6:00 A.M. to 12:00 A.M. timeframe. Thus, again, the station will have to printout of its traffic system data regarding every airing of every *PSA*, determine which airings fell within the 6:00 A.M. to 12:00 A.M. timeframe and the total times each *PSA* aired, calculate the percentage of airings that fell in primetime and review whether the *PSA* was sponsored at any time it aired. This burden is like that addressed above for longer form programming in that it is vast, but because the percentages are apparently to be calculated on a quarterly basis, it is impossible to "keep up" with this obligation and some portion of these responses will have to be prepared after the quarter has closed, placing additional pressure on station personnel as they work against the quarterly deadline to complete their forms.[31]

---

[31]This reporting obligation does not occur in a vacuum. Television broadcasters must also report on a quarterly basis with respect to the educational and informational programming they have aired for children and their compliance with the FCC's commercial limits in programming for children. Completion of these reporting obligations also involves reviewing station traffic and discrepancy logs to determine whether any children's programming was preempted and whether any instances of over commercialization of children's programs occurred. Given the similar nature of the work involved, it is likely that the same station personnel will be involved in each of these exercises, and the same station records will be in use, causing a quarterly bottleneck of

(… continued)

Finally, as noted before, extreme care must be taken in each categorization of programming and each response made in connection with the Form 355. The instructions require that stations provide information on "all" programming in particular a category and requires certification at the risk of misrepresentation to a federal agency if errors or omissions are made. As a result, layers of review will be required, including attorney involvement to continuously answer questions and to review documents before filing.

In contrast to the Form 355, the quarterly issues/programs lists currently required by the FCC focus on substance and are relatively easy to compile. These quarterly filings are available in stations' public inspection files and identify issues relevant to the station's community and the programming response that the station gave to each issue. Thus, a station is permitted to list all issue-responsive programming irrespective of whether it is independently produced, provided by network, etc. There is no need to laboriously categorize and account for every minute of each program against the possibility one of those minutes might prove responsive to a local community issue. These reports are prepared narratively and do not require the time-consuming computations and pigeon-holing of programming that will be required to complete the Form 355.

The FCC's claim that the data required to complete Form 355 is not much more than television stations are accustomed to compiling for their quarterly issues/programs lists is simply wrong. Although the FCC's assumptions and methodology for calculating the burden of compliance are not stated, it is clear that if each of the affected stations spends just twenty additional hours weekly – less than three hours for each broadcast day – scrubbing program logs

---

(… continued)

FCC compliance-related activities. These filing dates will also coincide for some stations with their annual EEO reporting, biennial ownership reporting and their license renewal filing activities. Thus, stations in certain states, when these later requirements arise, will be involved in completing up to five or six forms and filings for the FCC within the space of 30 days or less.

and reviewing programs, and assuming an unrealistically low fully burdened labor cost of $20 per hour, the total annual cost of compliance would exceed $50 million for Form 355 compliance alone, and even this figure is unrealistically low. The NAB's study of real-world implementation shows that compliance takes on average 34 hours per station per week, and that average labor rates are $33.[32] Notwithstanding the FCC's unexplained estimate, real-world data shows that the recurring annual real cost of compliance with the *TV Form 355 Rule* is roughly $135 million.

III. Specific Comments Regarding *TV Online Public File Rule*

The FCC has chosen to disregard the suitability of its own robust website as the universal "Online Public Inspection File" for all stations that wish to use it for that purpose. Instead, the FCC has mandated that each television station that maintains a website must spend whatever time and money may be necessary to create, implement and maintain online public files on their own websites. The Commission does not even consider allowing television stations to use the FCC's own website (subject to certain modifications) for that purpose. For that reason, the FCC has violated one of the cardinal requirements of the *PRA*: it has not given meaningful consideration to alternatives in order to reduce burdens on regulatees.

It is not possible to challenge the FCC's assumptions and methodology for determining the burden of compliance because the FCC has not yet identified its methodology and assumptions. The FCC must explain its reasoning and allow the public a reasonable opportunity to comment. As noted above, it is not possible even to address with specificity the FCC's projected burden for compliance with the *TV Online Public File Rule* because the FCC offers only an aggregate estimate for compliance with both the *TV Form 355 Rule* and the *TV Online Public File Rule*.

---

32 *NAB Comments* at 14.

In any event, the *State Associations* have demonstrated in their Comments and in their pending Petition for Reconsideration that the burden of complying with the *TV Online Public File Rule* alone greatly exceeds the FCC's total estimate for compliance with both new rules. The *State Associations* have provided the Commission with specific quotes from a reputable vendor showing that the cost of creating an online public file is at least $5,000 per station for outsourced posting and hosting services alone, plus another $6,000 per station per year in ongoing costs.[33] Similarly, the *State Associations* have shown that the cost of creating and maintaining an online public file/document management system (which is not the same thing as maintaining a typical broadcast station web site) costs is $65 per hour.[34] These costs do not include the internal labor and administrative costs of determining what must be posted online. Based on the record before the Commission, first-year costs for initial creation of online public files alone are more than double the $11 million dollar annual burden assumed by the FCC for compliance with the *TV Online Public File Rule* and the *TV Form 355 Rule* together.

There is no reasonable basis for the FCC's apparent assumption that complex tasks like operating an online document management system – especially when that system is subject to scrutiny and fines by the federal government – can be reliably accomplished by all respondents at costs well below minimum wage. Again, without a clear statement of the FCC's assumptions and methodology, informed comment is impossible. In any event, it is clear that the FCC's assumption of aggregate costs vastly understates the true impact of the regulation.

---

[33] See Exhibits A and B. The FCC acknowledges that the one-time setup cost could be substantial, "less than $15,000". *Enhanced Disclosure Order* at fn. 24. Yet even a $10,000 cost per affected station would greatly exceed the FCC's total estimated cost of complying with both new regulations.

[34] See Exhibit A, Declaration of Dave Biondi.

Finally, the *State Associations* challenge the *PRA Notice's* determination that the proposed regulations have no privacy impact. The *State Associations* incorporate by reference their explanation that online posting of email received from the public entails substantial privacy risks. Citizens who send email to a station may not have any expectation that their comments and their email addresses will thereby be published worldwide. Email from citizens often includes physical addresses, telephone numbers, and other personally identifiable information, and this information is easily "scraped" by unscrupulous parties. The *PRA Notice's* unexplained assertion that the regulations have no impact on privacy is simply wrong. The privacy issues raised are fundamental. The burdens on stations to deal with those issues have therefore been completely overlooked or ignored by the Commission.

With respect to the *TV Online Public File Rule*, the *State Associations* have shown that the FCC has not only grossly underestimated the burden imposed on television broadcasters, but also failed to consider an obvious, less burdensome, means of achieving the Commission's goals. In their Petition for Reconsideration, the *State Associations* urged the Commission to host the public files on its own website. Under this approach, only one website in the entire country would need to be modified, as opposed to thousands. In addition, the public would have a one-stop shopping location for any information the FCC ultimately concludes through rulemaking is really relevant to the public. The Commission's failure to consider such an alternative solution again demonstrates that it has not complied with it obligations under the *PRA*.

Conclusion

Ultimately, it is the obligation of the FCC to demonstrate that it has taken ***"every reasonable step"*** to ensure that the proposed collection and reporting regulations (1) are ***"the least burdensome necessary"*** for the proper performance of the FCC's functions; (2) are "***not duplicative of information otherwise accessible"***; and (3) have "***practical utility***" – actual and

not merely theoretical or potential usefulness.[35] The FCC must make these showings before the OMB may make an informed, reasoned judgment that the paperwork and reporting burdens generated by each of the new rules are necessary for the proper performance of the FCC's functions and that the burdens are justified by their practical utility.[36]

The *State Associations* submit that OMB may not reasonably or lawfully approve either new rule until the FCC has acted on the several petitions for reconsideration now pending before the Commission. Depending upon the precise resolution of those petitions the benefits/needs/burdens/risks assessment will be different than they are at this point in time, particularly as they relate to the First Amendment and privacy issues that have been raised on reconsideration. The *State Associations* support efforts to find ways to increase citizen involvement, but oppose indiscriminate imposition of heavy burdens and risks simply based on the "hope" that a theoretical benefit will emerge.

Based on the foregoing, the Commission should not certify either of the two new rules to OMB for approval based on the present record and, in any event, should not do so until after it has (i) acted on the several petitions for reconsideration currently pending before it, and (ii) provided interested parties with a reasonable opportunity to file comments under the *PRA* based on such decision on reconsideration. Depending upon the Commission's action on reconsideration, review under the *PRA* will either be rendered moot in whole or in part, or will require a materially different analysis.

---

[35] 5 C.F.R. § 1320.3(l) and 1320.5(d)(1).

[36] 5 C.F.R. § 1320.5(e).

Respectfully submitted,

NAMED STATE BROADCASTERS ASSOCIATIONS

By: /s/ Richard R. Zaragoza
Richard R. Zaragoza
Lauren Lynch Flick
John K. Hane
Emily H. Daniels

Counsel in this matter for the following State Broadcasters Associations:

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, Wyoming Association of Broadcasters

Dated: May 12, 2008

EXHIBIT A

DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

RECEIVED
DEC 18 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

Richard R. Zaragoza
David D. Oxenford
Tammy Gershoni

Their Attorneys

SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037-1128

(202) 663-8000

December 18, 2000

No. of Copies rec'd 0+4
List ABCDE

SUMMARY

Under their respective charters, each State Broadcasters Association has been established to protect and enhance the service and business of the free, local, over-the-air broadcast industry with its borders. Consistent with that common mission, they have caused the *NPRM* to be carefully reviewed by counsel and have concluded that, while certain of the Commission's positions are meritorious, many of its proposals, if adopted, would be unlawful as a matter of either constitutional or statutory administrative law.

By its *NPRM*, the Commission is signaling a return to an earlier regulatory time of formalistic ascertainment procedures, mandatory program logs and "quantitative minimums" for programming. Almost twenty years ago, with the benefit of a strong record in an extensive rule making proceeding, the Commission concluded that broadcasters routinely determine community needs and interests in a variety of ways and that the formalistic process of the then current ascertainment was very costly. Accordingly, the Commission decided to no longer evaluate broadcasters based on the particular method by which they ascertained those needs and interests.

In the same proceeding, the Commission concluded that it "quantitative minimums" renewal processing guidelines, as well as the companion requirement for maintaining program logs served no purpose, created an unjustifiable and significant burden on broadcasters and raised First Amendment concerns.

The Commission's Standardized Programming Form proposal poses the same substantial cost, policy and legal concerns. By selectively favoring certain categories of programming and by requiring television broadcasters to quantify such programming for public and FCC scrutiny, the government is proposing a scheme to censor certain programming speech, to the exclusion of other programming speech, of the nation's television broadcasters. The nature of the form and its contents will mislead the public into believing that certain minimum amounts of certain types of programming are required and therefore they can be expected to complain to the FCC if a station does not, in the opinion of the citizen, carry enough of the government "favored" typed of programming. Such complaints will necessarily require the Commission to decide what is "enough" thereby establishing a de jure or de facto quantitative standard for the industry. The higher the quantitative requirement, the greater the censorship. Even in the absence of a known numerical standard, broadcasters will tend to "chill" their own programming speech by choosing programming, to the exclusion of other programming, that meets or exceeds either (i) some national or local "average" (based on the publicly available data) or (ii) the level achieved in their last Standardized Programming Form for a particular category of programming. In both cases, the overriding goal will, as expected, be to avoid governmental scrutiny and second guessing, rather than the need for the station's programming to be innovative, unique and responsive to the evolving needs and interests of the community.

The Standardized Programming Form will also require, at least implicitly, the maintenance of voluminous station program logs, the very logs which the Commission found in 1984 represented a huge regulatory cost to the industry. This is foreseeable since it is likely that the Commission will insist that stations keep adequate daily log type records so that the data can be verified.

The Commission's proposal for the Standardized Programming Form will inevitably require the Commission to create a formalistic ascertainment process once again. The ascertainment information to be required under that form will be used by members of the public to determine whether particular demographically-related "communities" have been contacted and whether certain programming has been developed for those "communities." Using that information, it is likely that members of the public will complain to the Commission that their "community" was not contacted or that specific programming was not aired to meet their "programming needs." These types of complaints will force the Commission to determine what a "community" is, thereby putting pressure on the Commission to create a national standard of some twenty-one or more community segments, as it did in the past. In turn, the factual questions will include what representative or "leader" of the community was contacted, when, where and by whom.

The proposal of the Commission to require television stations to maintain two sets of public inspection files, one at their studios and a new one on the World Wide Web, is unwarranted and will be enormously costly. Access to the public inspection files of stations is preserved by rule. If access is denied, that becomes an enforcement issue. However, this is no evidence of a general breakdown in enforcement and there is no known public outcry for 24 by 7 access to the file that would justify requiring that the contents of all television station public inspection files be posted on the Internet. Also, based on expert opinion detailed in the Joint Comments, the new proposal will require television stations nationwide to expend hundreds of thousands of dollars in straight typing, scanning and proofing the thousands of pages of information contained in many public inspection files, as well as in web-site design, web-site

redesign, web-site maintenance, all to make the information easily accessible and fully compatible with the needs of the disabled.

In summary, the *NPRM* has the look and feel, as well as foreseeable effect, of a proceeding initiated in the 1960's when regulatory micro-managment was regarded as the only way to regulate in the public interest and government was expected not only to solve all problems but also to create them so that it could take credit solving them. At bottom, this proceeding is a solution in search of a problem.

TABLE OF CONTENTS

I. INTRODUCTION 2

II. DISCUSSION 5

A. THE PROPOSED REGULATION REQUIRING BROADCASTERS TO GATHER, CATEGORIZE AND DISCLOSE DETAILED PROGRAMMING DATA WOULD VIOLATE THE FIRST AMENDMENT AND WOULD OTHERWISE BE UNLAWFUL AS AN ARBITRARY AND CAPRICIOUS ACT 9

1. Adoption of the Standardized Programming Form Proposal Would Contravene the First Amendment 9
2. The Standardized Programming Form Proposal, If Adopted, Would Be Arbitrary and Capricious 15

B. IT WOULD BE ARBITRARY AND CAPRICIOUS TO REQUIRE BROADCASTERS TO PLACE DATA ON THEIR PAST CLOSED CAPTIONED PROGRAMMING IN THEIR PUBLIC INSPECTION FILES 18

C. THE PROPOSED REGULATION REQUIRING BROADCASTERS TO POST ON THE WORLD WIDE WEB THE COMPLETE CONTENTS OF THEIR PUBLIC INSPECTION FILES, INCLUDING THE PROPOSED EXTENSIVE PROGRAMING DATA, WOULD BE ARBITRARY AND CAPRICIOUS 19

III. CONCLUSION 22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON D.C.

In the Matter of	)	
	)	
Standardized and Enhanced	)	MM Docket No. 00-168
Disclosure Requirements for	)	
Television Broadcast Licensee	)	
Public Interest Obligations	)	

To: The Commission

JOINT COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

Alaska Broadcasters Association, Arizona Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Georgia Association of Broadcasters, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters,

South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (each, a "State Association" and collectively, the "State Associations"), by their attorneys, and pursuant to Sections 1.415 and 1.419 of the Commission's Rules and Regulations, 47 C.F.R. § § 1.415, 1.419, hereby jointly comment upon the Commission's above-captioned *Notice of Proposed Rule Making* (the "*NPRM*"), MM Docket No. 00-168.

I. INTRODUCTION

1. Under their respective charters, each State Association has been established to protect and enhance the service and business of the free, local, over-the-air broadcast industry within its borders. Consistent with that common mission, they have caused the *NPRM* to be reviewed by counsel and have concluded that, while certain of the Commission's positions are meritorious, many of its proposals, if adopted, would be unlawful as a matter of either constitutional or statutory administrative law.

2. Under its *NPRM*, the Commission has tentatively proposed the following for analog and DTV television broadcasters:

(a) That such broadcasters gather and categorize detailed programming and other data, complete a lengthy standardized form and place the completed form in their public inspection files, on a quarterly basis. These broadcasters would need to report on the quantity of time they air news casts, local newscasts, public affairs programming, political/civic

discourse programming, programs for under-served communities, public service announcements, locally originated public service announcements, and local programming devoted to local issues that was not reported under any of the aforementioned categories. The standardized form would also require television broadcasters to report how many minutes of free air time they provide federal, state and local candidates before a general election. They would also report whether they sell advertising to state and local candidates before an election. In addition, the standardized form would require such broadcasters to explain their ascertainment procedures. Finally, under the standardized form, the broadcasters would have to report on non-broadcast activities they perform for their communities.

(b) That television broadcasters place in their public inspection files information on what programming was aired with closed captioning and video description.

(c) That television broadcasters create and maintain web sites on which they post, on a quarterly basis, their public inspection files, or as an alternative, that the State Associations create and maintain web-sites on which they post, on a quarterly basis, the public inspection files of their member stations.

(d) That television broadcasters design their own web-sites to meet the World Wide Web Consortium's Web Accessibility Initiative guidelines for making web sites accessible to persons with disabilities.

3. In support of these proposals, the Commission contends that there is a newly discovered need to make it easier for members of the public to access the materials in the public inspection files of television stations and to make the information in such files "easier to understand." The Commission cites to assertions that some individuals have had "difficulties" when seeking to examine the public inspection files of certain stations and that some members of the public find station public inspection files to lack "consistency and uniformity" as a general matter, and particularly as relates to the quarterly "issues/programs lists". The Commission characterizes the issues/programs lists as "an assortment of information which the public may have difficulty determining the extent to which the station is serving the public interest" and speaks approvingly of the standardized form contained at Appendix A of the 1998 Report from the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters. For purposes of these Joint Comments, the form is referred to as the "Standardized Programming Form." The Commission expresses the hope that its new proposals will increase dialogue between the public and stations and lessen the need for Commission involvement. As shown below, sadly the Commission's proposals will likely have the opposite effect since they will have the foreseeable effect of involving the Commission more and more in the areas of ascertainment, record keeping and programming, notwithstanding the fact that, after a searching and careful rule making decision by the Commission years ago, it decided to get out of the "program quantity" business in order to focus on the "issue responsiveness" of stations.

4. The State Associations certainly do not take issue with the general proposition that the Communications Act of 1934, as amended, empowers the Commission to engage in rule making and to adopt a variety of regulations which are in the public interest. However, the public interest standard is just that, a standard which also contains limits on the Commission's

actions. The Commission's conduct is also circumscribed, inter alia, by pertinent provisions of the United States Constitution and the Administrative Procedure Act (the "APA").[1] The following are axiomatic. The Commission may not adopt a rule that constitutes an unlawful abridgement of a broadcaster's Free Speech rights under the Constitution. In addition, every rule making proceeding at the Commission must conform to the requirements of the APA and no rule may be adopted by the Commission that is arbitrary or capricious. In this latter respect, the Commission must ground each action upon a legally adequate record. It must identify and examine the various alternatives, including the option of taking no action. Its selected course of action must be rational. Any time the Commission's proposed action constitutes a substantive change in policy direction away from a long standing policy, the Commission must explain the basis for the change and that basis itself must be rational. For the reasons that follow, the State Associations submit that the proposals of the Commission suffer from one or more legal infirmities that bar their final adoption.

II. DISCUSSION

5. The Commission's proposed actions under the *NPRM* signal a deliberate intent to return to a long ago discredited regulatory time of formalistic ascertainment procedures, voluminous, mandatory program logs, and innovation chilling "quantitative minimum" programming standards. In the past, the Commission required broadcasters to employ formalistic "community needs and issues" ascertainment procedures and to maintain vast quantities of detailed program logs to evidence how much time a station devoted to certain categories of programming. These requirements, despite the certain risk of homogenizing the programming fare of the entire broadcast industry, involved the Commission in examining a

[1] *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (1994).

station's programming judgments through the use of renewal application program-related "processing guidelines." Those processing guidelines meant that a broadcaster would be subjected to rigorous review at license renewal time if the station's "composite week" program logs showed that the broadcaster had aired "less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming." *Report and Order, The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 ¶ 5 (1984) (hereinafter "*Report and Order*").

6. In 1984, the Commission reviewed those policies and found that the formalistic ascertainment procedures, mandatory program logs and programming minimums were not justified and indeed created significant program-related legal issues. The Commission explained that the "costs incident to technical compliance and record keeping are inappropriate" and that the "regulatory structure raise[d] potential First Amendment concerns" which were "exacerbated by the lack of direct nexus between a quantitative approach and licensee performance." *Id.* ¶ ¶ 26-27. In addition, the Commission pointed out that "Congress intended private broadcasting to develop with the widest journalistic freedom consistent with its public interest obligation." *Id.* ¶ 27.

7. In reaching its decision to drop the requirements for formalistic ascertainment efforts, the Commission explained that the possible benefits to the public were not justified by the substantial costs incurred by broadcasters. *See id.* ¶ ¶ 48-54. At that time, the Commission found that eliminating formal ascertainment requirements would "result in annual savings of 66,956 work hours to the industry," which translated into monetary savings of between $2,425 to $8,986 per broadcaster. *Id.* ¶ 51. The Commission also recognized that

broadcasters "become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements, and that our existing procedures are, therefore, neither necessary nor, in view of their significant costs, appropriate." *Id.* ¶ 48. Accordingly, the Commission concluded that broadcasters would no longer be assessed by the particular methods through which they ascertain the issues that are important to their communities. *See id.* ¶ 54.

8. Likewise, the Commission found that its "quantitative minimums" renewal processing guidelines, as well as its companion requirement for maintaining voluminous quantities of detailed program logs, served no purpose and created an unjustifiable and significant burden on broadcasters. *See id.* ¶ 69, 74. With respect to the program log requirement, the Commission cited to a GAO Report finding that the requirement for program logs "constituted the largest government burden on business in terms of total burden hours." *Id.* ¶ 69. By the Commission's own calculations at that time, the program logs burdened broadcasters over 2,468,000 hours per year. *See id.* The Commission stated that these costs were "significant" and "inappropriate," and that the "traditional policy objectives with respect to programming have never been fulfilled by the presentation of mere quantities of specific programming." *Id.* ¶ ¶ 26, 29. As a result of its findings, the Commission concluded that "the issues/programs lists is a more useful vehicle to record a licensee's effort" to serve the public interest by airing issue-responsive programming. *See id.* ¶ 75.

9. The Commission also found that its "quantitative minimums" programming standard adversely impacted the broadcaster's freedom of program choice and overall program diversity. For example, the Commission recognized that, as the number of "video outlets increases," broadcasters, "in response to economic incentives," may direct their programming

"toward a narrower audience," – a trend which the Commission sought to encourage. *Id.* ¶ 34. The Commission observed that reliance upon the marketplace, rather than on formalistic programming minimums, would "foster this development by allowing the licensee to consider the programming of other television stations in its market in fulfilling its programming responsibilities." *Id.*

10. The Commission's decision in 1976 to remove itself from approving or disapproving radio format changes underscores the appropriateness and lasting validity of the Commission's 1984 policy decisions in the areas of ascertainment and programming. *See FCC v. WNCN Listener's Guild,* 450 U.S. 582 (1981). In reviewing the Commission's decision to no longer regulate changes in formats, the court noted that "the Commission believes that Government intervention is likely to deter innovative programming." *Id.* at 595. The Commission was "convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programming." *Id.* at 601.

11. For the reasons stated below, it is clear that the Commission's proposals constitute a distinct reversal in direction and a return to a prior discredited regulatory time of formalistic ascertainment procedures, mandatory program logs and "quantitative minimums" for programming. Thus, these proposals raise the same compelling legal and policy concerns that persuaded the Commission to jettison those requirements almost twenty years ago.

A. THE PROPOSED REGULATION REQUIRING BROADCASTERS TO GATHER, CATEGORIZE AND DISCLOSE DETAILED PROGRAMMING DATA WOULD VIOLATE THE FIRST AMENDMENT AND WOULD OTHERWISE BE UNLAWFUL AS AN ARBITRARY AND CAPRICIOUS ACT

1. Adoption Of The Standardized Programming Form Proposal Would Contravene The First Amendment

12. While the Commission has the authority to regulate broadcasters in the public interest, *see id.* at 594, the Communications Act "prohibits the Commission from exercising the power of censorship." *Nat'l Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (citing 47 U.S.C. § 326).[2] When the FCC requires its regulatees to compile and publicly disclose data on certain types of programming, but not on other types of programming, the government has placed itself in the position of favoring certain programming over, and to the exclusion of, other programming. As a result, the government is essentially selecting what content is aired by broadcasters. In order to impose a content-based regulation on speech, the Commission must have a compelling reason and the regulation must be narrowly tailored to satisfy that compelling reason. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991).

13. In addition to being an impermissible content-based regulation, the government's act to identify certain types of programming for potential governmental scrutiny chills speech in violation of the First Amendment. Finding that a regulation chills speech turns not on whether the Commission actually penalizes a broadcaster for its programming choices, but rather on

---

[2] 47 U.S.C. § 326 provides that the Commission lacks "the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." Although 47 U.S.C. § 326 specifically identifies radio communications, the statute is applied to prohibiting the Commission from censoring television broadcast stations. *See, e.g.*, *Nat'l Black Media Coalition v. FCC*, 589 F.2d 578, 581 (1978).

whether the broadcaster will censor itself "to avoid official pressure and regulation." *Cmty.-Serv. Broad. Of Mid-America, Inc. v. FCC*, 593 F2d 1102, 1116 (D.C. Cir. 1978). These pressures can take on "subtle forms." *Id.* "To the extent that a recording requirement" restricts a broadcaster's programming discretion, "it will be effecting a new and significant diminution in the broadcasters' First Amendment freedoms." *Id.* at 1117.

> "Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern."

Id. at 1118.

14. There are grave constitutional free speech problems with the Commission's Standardized Programming Form proposal. While the Commission does not even address the First Amendment implications of its standardized form proposal, clearly the proposed regulation is not narrowly tailored to achieve a compelling end. The Commission is essentially taking the position that it is justified in creating categories of governmentally favored programming because (i) stations are required to air programming responsive to community needs and issues, (ii) the Commission and members of the public have the right to monitor such performance, (iii) and that the quarterly issues/program lists contain "an assortment of information" that does not aid someone who wants to know if a station has complied with the station's obligation to air issue-responsive programming.

15. There should be no genuine dispute that the newly proposed Standardized Programming Form is in fact a reincarnation of the Commission's long ago discredited program log and "quantitative minimum" requirements. That proposed regulation will require television stations to gather and categorize program data, and to use that data to complete a standardized form which will be placed in their public inspection files and posted on the World Wide Web.

Such requirement will recreate the implicit requirement that stations maintain the very same program logs that the Commission ruled so many years ago should no longer be required. Those logs, or other comparable record keeping, will be necessary to allow the Commission to verify the data contained in the Standardized Programming Form. The Standardized Progamming Form will also lead to de jure or de facto "quantitative minimums" for programming. Obviously, if the data is to be generated for public review and monitoring, this creates the likelihood that such data will be used as the basis for complaints, petitions or objections filed with the Commission against stations by members of the public. Each complaint, petition, or objection filed will place the Commission in the position of having to rule on the merits of a variety of programming-related claims such as, for example, whether a particular station is not carrying enough of a certain type of programming. Given the likelihood of that type of claim, and the Commission's need to resolve it, it is inevitable that the Commission will have to resort to some quantitative measure of programming adequacy such as national or local "averages" or the programming "minimums" that the Commission eschewed so long ago for constitutional and other reasons. The threat of the government measuring broadcast stations against certain "averages" or "quantitative minimums" will pressure television broadcasters to carry certain amounts of particular types of programming, to the exclusion of other types, to avoid or at least reduce the risk of governmental scrutiny. *See Cmty.-Serv. Broad. of Mid-American, Inc.* 593 F.2d at 1116.

16. In the *NPRM*, the Commission asserts that the Standardized Programming Form will allow the public to monitor a broadcaster's "programming choices" so as to ensure that the broadcaster is meeting its obligation to serve the community's needs. Although this appears benign on the surface, the mere requirement of the form will chill speech. The Standardized

Programming Form will create for each television broadcaster a "performance floor" since the broadcaster will feel pressure to meet or exceed the levels set forth for each program category in its last most recent standardized form, regardless of the shifting needs of their communities and the availability of other programming outlets, all to avoid having to justify later to the government why the station's quantitative performance in one or more categories fell. The performance floor aspect of the form thereby chills the broadcaster's overall programming discretion.

17. The Standardized Programming Form proposal may not be adopted because the concept of express or implicit quantitative programming minimums is abhorrent under principles of First Amendment law and the 1934 Communications Act in several different respects. The Commission has previously concluded that a station has wide discretion in determining how best to respond to community needs and issues in its overall programming, and that a station may take into consideration the programming of others in the same community. As the number of "video outlets increases," broadcasters, "in response to economic incentives," may direct their programming "towards a narrower audience." *Report and Order*, 98 FCC 2d ¶ 34. The Commission has also asserted that quantitative standards deny broadcasters discretion and do not assure quality programming. *See Nat'l Black Media Coalition*, 589 F.2d at 580. In fact, in the past, the Commission asserted that granting broadcasters greater discretion would further benefit the community by allowing broadcasters to change programming as the needs of their community change. *See Memorandum Opinion and Order, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 104 FCC 2d 358 ¶ 2 (1986) (hereinafter "*Memorandum Opinion and Order*"). Also, the standardized form process, which will pressure stations

nationwide to at least maintain certain quantitative minimums, will not permit a television broadcaster, when deciding what programming types to air, to take into consideration the programming of other broadcasters in the same community. The pressure toward program category and quantitative homogenization frustrate broadcasters in their efforts to innovate and to provide varied programming, including issue-responsive programming. Thus, each community and the nation will be denied the fullest opportunity for a true diversity of programming choices.

18. The Commission has not put forth a compelling need for restricting speech as a result of the proposed standardized form. When explaining its decision to no longer regulate changes in formats, the Commission asserted that "the existence of the obligation to continue service . . . inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications." *WNCN Listeners Guild*, 450 U.S. at 590 n.15 (*quoting* an FCC *Memorandum Opinion and Order*, 60 FCC 2d 858, 865 (1976)). Furthermore, when the Commission eliminated regulation in the form of quantitative minimums and program logs, it stated that "the regulatory structure raises potential First Amendment concerns" that "are exacerbated by the lack of direct nexus between a quantitative approach and licensee performance." *Report and Order*, 98 FCC 2d ¶ 27.

19. The Commission's standardized programming form proposal is not narrowly tailored to meet a compelling need. The categorization of programs and quantitative minimums is not a regulation that is narrowly tailored to determine whether stations are responding to community issues and needs. The Commission has previously concluded that the types of programming carried, and the amount of such programming, are not factors that are necessarily

determinative, or even necessarily indicative, of whether a station is airing enough programming responsive to community needs and issues. On the other hand, the currently required quarterly issues/programs lists do constitute targeted and probative "evidence" of whether a station is doing a satisfactory job responding to community needs and issues. The lists are community need/issue focused and describe in detail what programming was aired to respond to each need/issue. It does not take a rocket scientist to determine whether, in the opinion of a particular member of the public, an important need or issue has been missed altogether or that too little airtime was devoted to an issue that was not only important but raged for weeks or months on end. The Commission long ago concluded, with the benefit of an extensive rule making record, that "the issues/programs list is a more useful vehicle to record a licensee's effort" to provide issue-responsive programming. *Id.* ¶ ¶ 74-75. That those lists may vary in content from station to station is evidence of the individuality of each station, not evidence of the inadequacy of the reporting scheme. If the Commission is truly concerned that the public does not understand what the quarterly issues/programs lists are intended to show, a narrowly tailored response by the Commission would be to require stations to maintain a cover sheet for each quarterly report that offers the following explanation:

> Attached hereto is the Quarterly Issues Programs List for Station ___. The listing identifies the needs and issues of the Station's community of license which the station found warranted the most significant treatment during the previous three months. Stations are required to air programming responsive to the evolving needs and issues of their respective communities of license. In fulfilling this obligation, stations have wide discretion to choose what needs and issues to address and what types of programming they will employ to fulfill this obligation. The needs and issues identified in this listing is not necessarily inclusive of all the needs and issues responded to by the Station during the period. In the event that you do not see listed a particular need or issue that you believe should have been addressed by the station during the period covered by the listing or that you believe a particular matter deserved added coverage by the station during the period, you are encouraged to raise the matter in person or over the telephone

with station management or to fax or e-mail your question to the station. The station's contact information is as follows: _____.

20. Based on the foregoing, the Commission's proposal to scrap quarterly issues/program lists and replace them with the Standardized Programming Form is legally barred under the United States Constitution.

2. The Standardized Programming Form Proposal, If Adopted, Would Be Arbitrary and Capricious

21. The State Associations believe that it would also be unlawful, as an arbitrary and capricious act, for the Commission to adopt its proposed standardized form requirement. Section 706(2) of the APA provides that it is unlawful for an agency to act in an "arbitrary and capricious" manner. *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (1994). Before finalizing a decision, an agency first must consider all the relevant factors, look at the alternatives, and articulate a rational reason for the decision. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Fresno Mobile Radio Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999); *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984). The agency's explanation for its decision "must minimally contain 'a rational connection between the facts found and the choice made.'" *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995) (quoting *State Farm Mut. Auto Ins. Co.*, 463 U.S. at 43). An agency's action will be found arbitrary and capricious when it merely states the facts and conclusions without providing a rational connection. *See id.* at 1407. Furthermore, once an agency establishes a policy, an "irrational departure from that policy" will be deemed arbitrary and capricious. *Immigration and Naturalization Serv. v. Yang*, 519 U.S. 26, 32 (1996). The Commission must provide an explanation before departing from precedent. *See Orion Communications Ltd. v. FCC*, 131 F.3d 176, 181 (D.C. Cir. 1977). "An

agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not just casually ignored." *Comm. For Cmty. Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984).

22. It is clear from the earlier discussion that, if the Commission were to adopt its standardized form proposal, such action would result in a de facto reversal of a Commission policy that has been in place for almost twenty years. When eliminating the program guidelines in 1984, the Commission found that it was "no longer interested in the amounts of programming in categories such as 'news' and 'public affairs.'" *Report and Order*, 98 FCC 2d ¶ 74. The Commission determined that the public could easily obtain the information it needs through newspapers and magazine entertainment guidelines. *See id.* ¶ 78. Moreover, the Commission concluded that the information "no longer serves any regulatory purpose," and "the issues/programs list is a more useful vehicle to record a licensee's effort" to provide issue-responsive programming. *Id.* ¶ ¶ 74-75. In addition, the Commission has held that market incentives would ensure broadcasters meet the needs of their community. *See Memorandum Opinion and Order*, 104 FCC 2d ¶ 2. When explaining its decision to no longer regulate changes in formats, the Commission asserted that it was "convinced that the market, although imperfect, would serve the public interest as well or better by responding quickly to changing preferences and by inviting experimentation with new types of programs." *WNCN Listener's Guild*, 450 U.S. at 601. Thus, according to the Commission's prior policy statements, the standardized form will disserve the public interest because each community will receive less, not more, issue-responsive programming.

23. Not only has the Commission failed to explain its reversal in policy, it has not even offered a rational basis for its proposed action. As explained above, the core responsibility

of a broadcaster is to air programming responsive to community needs and interests. There is no rational nexus between the standardized form and the broadcaster's public interest obligation. If the public does not understand what it is looking at, or looking for, when it reviews the quarterly issues/programs lists, the most logical course of action is to better inform the public what the lists represent and why they exist. Also, the lack of access to a station's public inspection file has nothing to do with the adequacy of these lists. If access is the issue, the appropriate remedy is enforcement, not the radicalization of a process that has served the public well for almost twenty years.

24. The Commission's assertion that the quarterly issues/programs lists provide too much information for the public to glean whether the broadcaster is serving the public interest is not rational given that, under the Standardized Programming Form proposal, much more information, including numerous exhibits, will be provided to those same members of the public. Most of that information, for the reasons already explained, has nothing to do with truly measuring a station's responsiveness to community needs and issues. Thus, the nature of the form will in fact mislead the public and thereby cause this misled public to involve the Commission more and more in the programming decisions of television broadcasters, rather than less as expressly hoped by the Commission.

25. The ascertainment showing required under the proposed Standardized Programming Form will pressure the Commission to re-institute the formalistic ascertainment requirements of long ago, for no valid reason. For almost twenty years, the broadcaster's public interest responsibility has been focused on addressing the significant unmet needs, interests and issues of the overall community served by the broadcaster. However, the form cited with approval by the Commission in this proceeding will require television broadcasters to report how

many hours of "programming" they have devoted to "underserved communities," as distinguished from the entire community's needs and issues. This new requirement will require all stations to be all things to all people. The likelihood of this result is apparent from the type of data the Commission is proposing that stations gather, categorize and disclose. For example, if a member of the public does not see, based on the data contained in a particular station's Standardized Programming Form, that his or her demographically defined "community" is being served with programming specifically developed for it, or if that person does not see his or her demographically defined community mentioned among the groups contacted, that person will be able to complain to the Commission that the station's ascertainment efforts were legally inadequate. In that event, the burden will be on the station to respond and explain its why it did not, if it did not, contact the complainant's "community," or why it did not program for that particular "community." If the Commission disagrees with broadcasters that certain "communities" have not been contacted or that the "programming needs" of certain "communities" have not been met, the Commission will find itself having to determine which "communities" every station *in the nation* must separately and routinely ascertain, thereby placing itself on the road to recreating the discredited formalistic, twenty-one ascertainment categories of old.

B. It Would Be Arbitrary and Capricious to Require Broadcasters to Place Data on Their Past Closed Captioned Programming in Their Public Inspection Files

26. The Commission is proposing to create a new category of documents to be included in every television station's public inspection file – namely, information identifying the programming aired by station which is closed captioned. This proposed requirement is unsupported by any need of the consumer. Such consumers should be interested in knowing what future programs are closed captioned. Under the Commission's proposal, the contents of

the public inspection files would only reflect a broadcaster's past programming. In addition, members of the public may obtain that prospective information from local television programming guides.

C. THE PROPOSED REGULATION REQUIRING BROADCASTERS TO POST ON THE WORLD WIDE WEB THE COMPLETE CONTENTS OF THEIR PUBLIC INSPECTION FILES, INCLUDING THE PROPOSED EXTENSIVE PROGRAMMING DATA, WOULD BE ARBITRARY AND CAPRICIOUS

27. The State Associations have already shown why the Commission is legally barred from adopting its Standardized Programming Form. Whether or not that form, with exhibits, is part of a television station's public inspection file, the State Associations submit that it would be arbitrary and capricious, and therefore unlawful, for the Commission to require that the complete contents of that public inspection file be posted on the World Wide Web. Such a requirement would needlessly impose a substantial burden on broadcasters for no valid reason.

28. Broadcasters are currently required to maintain, in their publicly accessible public inspection files, in addition to their quarterly issues/programs lists, "applications, authorizations, citizens agreements, service contour maps, ownership reports, annual employment reports, written correspondence with the public on station operations, material related to Commission investigations or complaints . . . certification that the licensee is complying with its requirements for local public notice announcements . . . political files . . . records regarding compliance with commercial limits on children's programming, and Children's Television Programming Reports." *NPRM* ¶ 14. The *NPRM* proposes that, except for the issues/programs lists, broadcasters will be required to continue to maintain all the information listed above in their public inspection files, while adding the standardized form plus the seven to eight accompanying exhibits.

29. Not only is there no legally supportable basis in the record to require a duplicate set of public inspection files, one to be maintained at each station's main studio, and another to be maintained on the World Wide Web, any requirement that such files be posted on the web will place an extraordinary burden on broadcasters. As shown, the current regulations already require broadcasters to maintain massive quantities of paper in their files. One broadcaster in Maine reported that, excluding the station's political files, its public inspection files now contain 2,255 sheets of paper. Even if the quarterly issues/programs lists are replaced with the quarterly standardized programming disclosure form with its seven to eight exhibits, this will likely result in a net increase in paper, to say nothing of the fact that the quarterly effort to create those new documents will require the expenditure of hundreds of hours of work per broadcaster each year, in gathering the data, collating the data and in-putting the final data on the form and in the exhibits. The standardized form, under the guise of being merely two sheets of paper, actually is the equivalent of nine new filings. Aside from the category for newscasts, each of the other categories requires an exhibit. Each section, therefore, is essentially a separate work effort, with all the categories merely sharing the same cover sheet. In addition, unlike the issues/programs lists which can be routinely written by staff, the eight categories requiring exhibits will require management hours, a factor which the Commission found relevant years ago when it got out of the program quantity business. *See Report and Order*, 98 FCC 2d ¶ 73.

30. Requiring broadcasters to post all the contents in their public inspection files on the World Wide Web, whether on their own web-sites or on the web-sites of their State Associations, will further substantially increase the burden on broadcasters. To accommodate such a requirement, the two-thirds of broadcasters in the top 100 markets that already have web-sites will have to redesign and significantly increase the capabilities of their web-sites. While

every state broadcasters association would want to help its members comply with any new requirement in this area, such an effort would itself place an enormous strain on the personnel and resources of those associations that to accommodate their broadcasters which do not have their own web-sites.

32. The State Associations contacted Dave Biondi at Broadcast Net to better understand what would be entailed in establishing, designing and upgrading web-sites to accommodate the Commission's new proposals. See his Declaration which is attached hereto as *Exhibit A*. Through his company, Mr. Biondi has developed and maintains the web-sites of the Broadcast Executive Directors Association and of numerous other state broadcasters associations and others. He has estimated that it would take a professional listserver, at $65 per hour, approximately 15 minutes to 1½ hours, per page, to complete the process of posting each sheet of paper contained in a broadcast station's public inspection files on the website

33. Specifically, to comply with the proposed posting regulation, a broadcaster will need to hire a web-site designer to design, or re-design as the case may be, a web-site so that can be easily navigated and can accommodate the vast amount of documentation that exists in the typical public inspection file. In addition, to make its web-site fully accessible to persons with disabilities, a broadcaster would have to spend even more time and expense. At an average charge of $65 per hour, Mr. Biondi estimates that it would take 2 ½ to 3 times longer to make a website disability friendly, and it will take 20 minutes to 6 hours, per page, to post the information on such a website. In addition, Mr. Biondi estimates that it would cost each broadcaster approximately between $30 and $50 a month for the additional web-site space needed to store all this documentation. If one were to multiply these costs by the 1,668 full power television stations that are currently licensed, and the number of low power television

stations that will be granted Class A television status, it should be clear to the Commission that any mandatory posting requirement will impose an overwhelming burden on the television broadcast industry at the worst possible time, when the industry's resources are being directed to implementation of the enormously expensive and risky new DTV service.

34. Weighed against these facts is the fact that the public inspection files of stations are routinely accessible to members of their community. Anyone can view the public inspection files at a station's main studio during regular business hours. Where such access is impeded, the situation should be brought to the Commission's attention immediately. The State Associations know of no public outcry for a 24 hour a day right of inspection. Accordingly, the Commission has failed to show that the public desires, much less needs, access to a broadcaster's public inspection files during other than normal business hours.

III. CONCLUSION

Based on the foregoing, the State Broadcasters Associations respectfully urge the Commission to adopt the positions advanced by them in these Joint Comments.

Respectfully Submitted,

The Named State Broadcasters Associations

By: _____

Richard R. Zaragoza
David D. Oxenford
Tammy Gershoni

Their Attorneys

SHAW PITTMAN
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Dated: December 18, 2000

Document #: 1049945 v 8

ShawPittman

A Law Partnership Including Professional Corporations

Tammy Gershoni
(202) 663-8282
tammy.gershoni@shawpittman.com
Not Admitted in DC. Supervised by Attorneys of the DC Bar

DOCKET FILE COPY ORIGINAL

December 19, 2000

RECEIVED

DEC 19 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, DC 20554

Re: Comments
MM Docket No. 00-168
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations

Dear Ms. Roman Salas:

Transmitted herewith is Exhibit A which, through inadvertence, was omitted from the Joint Comments of the Named State Broadcasters Associations, filed on December 18, 2000, for the above referenced Notice of Proposed Rulemaking. Please associate this Exhibit with the appropriate Comment.

If there are any questions concerning this matter, please contact the undersigned.

Very truly yours,

T Gershoni

Tammy Gershoni

Enclosure

No. of Copies rec'd 0+4
List A B C D E

Document #: 1056198 v.1

Exhibit A

RECEIVED

DEC 1 9 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EXHIBIT A

DECLARATION OF DAVE BIONDI, PRESIDENT OF BNET

I, Dave Biondi, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Dave Biondi and I am President of BNet, Inc., the holding company of Broadcast Net, located at 1110 Hackney Street, Houston, Texas 00023. I have been a broadcast engineer for over 20 years. I currently am responsible for the broadcast engineering maintenance of 7 stations in the Houston area and maintain the public inspection files of 3 broadcast stations.

2. Broadcast Net operates over 300 listservers and hosts over 350 websites. Our clients include the Broadcast Executive Directors Association and many of the State Broadcasters Associations. Broadcast Net also provides web designing services, and is an Internet Service Provider in Texas.

3. I have been asked what it would cost to (1) create a website for a station that would accommodate that station's public inspection files; (2) post the information contained in that station's public inspection files on the station's website; (3) maintain the additional storage space that a website will need to accommodate a station's public inspection files; and (4) create and maintain a website that meets the World Wide Web Consortium's Web Accessibility Initiative ("W3C/WAI") guidelines for people with disabilities.

4. Broadcast Net currently charges $65 per hour for creating a website and for posting information on the website.

5. The task of creating a website usually requires a five to six hour meeting with the broadcaster to assess how best to design the website. The decision of how best to design the website depends on the type of information that will be presented on that website.

6. I estimate that it will take between 15 minutes and 1½ hours to complete the full process of posting each sheet of paper contained in a broadcast station's public inspection files on the website. If the page is scanned onto the website and then proofread, the process will take approximately 15 minutes per page. Although scanning the page may take less time that retyping the page, it will not meet the requirements of W3C/WAI because it cannot be adapted for use by the disabled. If it is just a matter of retyping text, such as a letter from the public, it should only take approximately 20 minutes to post each page onto the website. If the page contains graphics or tables, it may take up to 1½ hours to post onto the website. Additional time may be required for posting graphics and tables onto a website due to the fact that it is not always evident at the outset how to best present this data. Also, ensuring that a graphic appears accurate and is properly sized can take from 20 minutes to 1 hour.

7. If a broadcaster already has a website, I estimate that the additional storage space that will be required to accommodate the public inspection files will cost, on average, $30 to $50 each month. The additional cost will depend on the number of pages that need to be posted. If the broadcaster scans pages onto the website, storage space will cost more than if the pages are retyped because the graphics that result from scanning create a much larger file size.

8. I estimate that it will cost between 2 ½ and 3 times more to design a website to comply with the W3C/WAI guidelines. One reason for the additional cost is that the parameters

of each page need to be evaluated as it is being designed, built and reviewed. In addition, the website will need to be created in the format of "plain text" so that it will be simplistic enough for "vocal readers" to read the hyperlinks. For example, typical formats, such as "java script," do not normally generate the characters that can be read by the device that reads the pages to seeing impaired individuals.

9. I estimate that it will take between 20 minutes to 6 hours to complete the full process of posting each sheet of paper contained in a broadcast station's public inspection files onto a website that complies with the W3C/WAI guidelines. This is because extra steps need to be taken when posting the information onto the website. As an example, each page will need to be checked to make sure that the "vocal reader" will be able to read the page for those individuals that are blind. Because photographs and graphics, such coverage maps, cannot be read by a "vocal reader," a clear description of the photograph or graphic also will have to be posted in the subtext – a caption has to be created to explain each photograph and graphic so that the vocal reader can read it. Also, for individuals that are visually impaired but can still read, the information on the website will need to be enlarged and the page will need to be checked in the larger mode to make sure it has not lost its readability. Another example of an extra step that will need to be taken is that the placement of the hyperlinks need to be spaced far enough apart so that people that use a stick-in-mouth device to operate the computer do not need to be accurate.

Dave Biondi
President, BNet

12-18-00
Date

Document #: 1051792 v.1

EXHIBIT B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations	)	MM Docket No. 00-168
	)	
Extension of the Filing Requirement For Children's Television Programming Report (FCC Form 398)	)	MM Docket No. 00-44
	)	

JOINT PETITION FOR RECONSIDERATION OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

Richard R. Zaragoza
Lauren Lynch Flick
Christine A. Reilly
Emily J. H. Daniels

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, NW
Washington, D.C. 20037
(202) 663-8000

Their Counsel in this Matter

Dated: April 14, 2008

SUMMARY

Just as the owner of a newspaper is a publisher, any person or entity, including a television station, that operates a website is a publisher. As detailed in the Petition, the Commission's action adopting the Online Public File Rule infringes the First Amendment rights of television broadcasters, and is arbitrary and capricious.

The State Associations emphasize at the outset that they have no quarrel with the principle that all broadcast stations must be accountable to the viewers and listeners that they are licensed to serve. Thus, this Petition does not contest, as an "end" goal, that principle. Rather, this Petition challenges, as violative of the First Amendment, the particular "means" chosen by the Commission to achieve that goal. The Petition also identifies a suitable alternative "means" that would not involve the First Amendment rights of television broadcasters.

The Online Public File Rule infringes the First Amendment rights of television broadcasters in at least two different, but materially adverse, ways. The rule in effect penalizes a television broadcaster for using the Internet to publish through its website. If a television station has a website, the rule also dictates what speech the Internet-based publisher must carry in order to avoid violating Federal law.

The State Associations of course acknowledge that broadcasters have not been afforded the degree of First Amendment protection that is afforded to others, such as newspaper publishers. However, the Online Public File Rule is not intended to control content that is to be published using a station's licensed spectrum. Rather, the rule is intended to control the speech of a television broadcaster published over the Internet for which the broadcaster needs no license. This distinction casts serious doubt on the applicability of the Less-First Amendment-Protection-For-Broadcasters holding embodied in *Red Lion* to unlicensed electronic publication undertakings carried on by broadcasters, and supports the legal conclusion that activity of a

broadcaster publishing over the Internet through a website is deserving of full First Amendment protection.

This infringement is avoidable simply by the Commission using its own, very user-friendly website that is perfectly suited (and can be modified as necessary) to perform the role that the Commission wants thousands of television station websites to perform – namely, to provide members of the public inside and outside a television station's service area Internet-based access to voluminous information about every television station in the United States.

Viewed over the expanse of the television broadcast industry, the burdens and risks associated with fully complying with the Online Public File Rule will be staggering. There are approximately 1,759 full-power and 556 Class A television stations that could become subject to the Online Public File Rule. One very experienced and well-respected vendor, which was brought to the attention of the State Broadcasters Associations, has proposed to charge any television station that is required to establish an electronic public inspection file a set-up fee of $5,000 per station and $500 per month for maintaining the contents of the online public file on the vendor's server. This represents a first-year charge of $10,500 per station and a recurring annual fee charge of $6,000. If every full-power and Class A television station were required to create and maintain an electronic public inspection file, the first-year cost to the television broadcast industry overall could be $24,307,500, with subsequent year annual costs of $13,890,000. It is reasonable to assume that this price tag for outsourcing the set-up and maintenance of a television station's online public inspection file system is a fair proxy for calculating the costs to a television station, which chooses to handle the matter in-house, of increased staffing and server capacity necessary to create and maintain a fully compliant

Internet-based public inspection file system. Under either calculation, the burden on the television broadcast industry and on stations individually will be staggering.

To the extent that the Commission believes that additional information about television stations should be made available on the Commission's website in order to advance its goal of enhancing "the ability of both those within *and* those beyond a station's service area to participate in the licensing process" without violating any television licensee's First Amendment rights, the Commission has the power to initiate appropriate rulemaking proceedings. Reliance upon the Commission's own website is the preferred solution here. By following that path, the Commission will have avoided entangling the government in the content of these "electronic newspapers" operated by television stations without the need for any license.

The State Broadcasters Associations respectfully request the Commission to rescind its action adopting the Online Public File Rule.

TABLE OF CONTENTS

PAGE

Summary……..ii

Table of Contents…….v

Introduction……..3

Discussion……4

The Commission's Action Adopting The Online Public Inspection File Rule Violates the First Amendment Rights of Television Station Licensees and is Arbitrary and Capricious……...…..4

Conclusion…….13

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations	)	MM Docket No. 00-168
	)	
Extension of the Filing Requirement For Children's Television Programming Report (FCC Form 398)	)	MM Docket No. 00-44

To: Marlene H. Dortch, Secretary

Attn: The full Commission

JOINT PETITION FOR RECONSIDERATION

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The

New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, Wyoming Association of Broadcasters (each a "State Broadcasters Association" or "State Association" and collectively, the "State Broadcasters Associations" or "State Associations"), by their attorneys in this matter, and pursuant to Section 1.106 of the Commission's Rules, hereby jointly petition the Commission for reconsideration of its Report and Order adopted on November 27, 2007, and released on January 24, 2008, in the above-captioned proceeding.[1]

In this proceeding, the Commission adopted, *inter alia*, a new rule requiring television stations to post their public inspection files on their Internet websites, if they have one, and to make this file available to the public without charge (the "Online Public File Rule"). With limited exceptions, the new rule will require television stations to replicate their paper-based public files on their websites. Those stations will not be required to post on their websites paper-based letters sent to the station or the political file of the station. The Online Public File Rule is to become effective 60 days after the Commission publishes in the Federal Register notice of the Office of Management and Budget's approval of the new rule.

---

[1] *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, Report and Order, MM Docket Nos. 00-168, 00-44, FCC 07-0205 (Jan 24, 2008) (the "Online Report and Order").

For the reasons set forth herein, the Commission should rescind its action adopting the Online Public File Rule.

Introduction

Each State Broadcasters Association is committed to advancing and protecting the free, local, over-the-air broadcast industry within their respective borders and at the Federal level by helping to create and maintain a regulatory and economic environment that is maximally conducive to the growth of the broadcast industry. Because the Online Public File Rule will adversely affect their television station members, including violate the First Amendment rights of those members, the State Associations continue their participation in this proceeding.

The State Associations emphasize at the outset that they have no quarrel with the principle that all broadcast stations must be accountable to the viewers and listeners that they are licensed to serve. Thus, this Petition does not contest, as an "end" goal, that principle. Rather, this Petition challenges, as violative of the First Amendment, the particular "means" chosen by the Commission to achieve that goal. The Petition also identifies a suitable alternative "means" that would not involve the First Amendment rights of television broadcasters.

Just as the owner of a newspaper is a publisher, any person or entity, including a television station, that operates a website is a publisher. As detailed below, the Commission's action in adopting the Online Public File Rule infringes the First Amendment rights of television broadcasters, and is arbitrary and capricious.

Discussion

THE COMMISSION'S ACTION ADOPTING THE ONLINE PUBLIC INSPECTION FILE RULE VIOLATES THE FIRST AMENDMENT RIGHTS OF TELEVISION STATION LICENSEES AND IS ARBITRARY AND CAPRICIOUS

The State Broadcasters Associations submit that once the Online Public File Rule becomes effective, it will violate the First Amendment rights of all television station licensees. The rule will apply to the licensee of any television station that has chosen to use the Internet to publish certain information to the public at large via the station's website. Since the Online Public File Rule will regulate the content on a television station's website by requiring that enormous amounts of certain content be published on the website, the rule will also deter a television station from using a website to publish. Thus, the Online Public File Rule in effect penalizes a television broadcaster for using the Internet to "speak" through its website. If a television station has a website, the rule also dictates what speech the Internet-based publisher must carry in order to avoid violating Federal law. In short, a television broadcaster's First Amendment protected freedom of speech is infringed in two different but related ways by the Online Public File Rule. This threatened impairment of the television broadcaster's First Amendment rights can be avoided by using, with some modifications, the Commission's own, very user-friendly, website to perform the role that the Commission is directing thousands of television station websites to perform – namely, to provide members of the public, inside and outside a television station's service area, Internet-based access to voluminous information about every television station in the United States.

In support of its action adopting the Online Public File Rule, the Commission states that the new requirement is "consistent with Congressional intent in adopting Section 309 of the Act to embrace a public file requirement that enhances the ability of both those within *and* those

beyond a station's service area to participate in the licensing process."[2] In response to a First Amendment challenge to the proposed rule, the Commission cited to its requirement that "applicants…publish notice of their filing of certain applications in local newspapers."[3] Also, for the sake of argument the Commission assumes that the Online Public File Rule triggers the "intermediate scrutiny" First Amendment review standard but concludes that the First Amendment is not violated because the Online Public File Rule "advances important governmental interests unrelated to the suppression of free speech…and…does not burden substantially more speech than necessary to further those interests."[4]

As a general proposition, speakers have a First Amendment right not to be compelled to speak by the government.[5] In *The Miami Herald Pub. Co. v. Tornillo*, the Court held that where the government forces a newspaper to carry speech that it otherwise would not want to carry, the First Amendment is violated to the same extent as when the government directly prohibits speech.[6] Furthermore, in *Riley v. National Fed. of the Blind of N.C.*, the Court held that a statute that required fundraisers to disclose particular information was unconstitutional because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."[7] Government regulation of speech based on its content is subject to strict scrutiny.[8] If a regulation regulates speech based on its content, the regulation must be narrowly tailored to

---

[2] Report and Order at ¶13.

[3] *Id*. at ¶15.

[4] *Id*. at ¶16.

[5] *Time Warner Cable v. City of New York*, 943 F. Supp. 1357 (S.D.N.Y. 1996), aff'd *Time Warner Cable v. Bloomberg* L.P., 118 F.3d 917 (2d Cir. 1997).

[6] 418 US 241, 256 (1974).

[7] 487 US 781, 795 (1988).

[8] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (U.S. 2001), citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994).

promote a compelling government interest. In addition, the government must choose the least restrictive means to further the articulated interest.[9]

The State Associations of course acknowledge that broadcasters have not been afforded the degree of First Amendment protection that is afforded to others, such as newspaper publishers.[10] However, the Online Public File Rule is not intended to control content that is to be published using a station's licensed spectrum. Rather, the rule is intended to control the speech of a television broadcaster published over the Internet for which the broadcaster needs no license. This distinction casts serious doubt on the applicability of the Less-First Amendment-Protection-For-Broadcasters holding embodied in *Red Lion* to unlicensed electronic publication undertakings carried on by broadcasters, and supports the legal conclusion that activity of a broadcaster publishing over the Internet through a website is deserving of full First Amendment protection.

There should be no genuine dispute that the Online Public File Rule operates, in essence, as (i) a deterrent to a television broadcaster's use of the Internet to speak using a website, as well as (ii) a forced speech mechanism for any television broadcaster that chooses, nevertheless, to use a website. The rule forces such television broadcasters to publish certain information over the Internet on a continuous, permanent basis as a condition to having a website. The Online Public File Rule is not limited to transient situations where, for example, an application filed with the FCC proposes a new broadcast station or a substantial change in ownership or control of an existing station. Accordingly, the Commission's reliance on its local newspaper publication requirement, which is very narrow in purpose, geographic scope and duration, is misplaced and provides no meaningful precedent for the Online Public File Rule. In contrast to the local

---

[9] *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (U.S. 2000).

[10] *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 267 (1969).

newspaper publication requirement, the Online Public File Rule is intended to require continuous, permanent, worldwide publication over a communications medium, for which the broadcaster needs no license, of massive amounts of certain content that is already available at a television station's main studio and that is available, with some exceptions that can be modified, on the Commission's own website. The Commission has not offered any valid reason why those current avenues for public access to information, in combination, are inadequate on their face or lawfully justify the two related infringements of the television broadcasters' First Amendment rights, particularly where the Commission's own website can be enhanced to duplicate a station's own public inspection file.

The Commission has not even attempted to explore the possibility of making information that is currently required to be in a station's public inspection file, but that is not currently available on the Commission's own website. Pursuant to appropriate rulemaking proceedings, the Commission could require television stations to electronically file certain additional information with the Commission that is not currently online at the FCC, e.g., station Quarterly Issues/Programs Lists and Annual EEO Public File Reports, information that is already in a station's public file. To illustrate, the Commission's website home page could be modified to provide a button labeled "Station Public Inspection Files" which, in turn, would take the user to a page entitled "Station Public Inspection Files" that lists, in the sequence of the public inspection file rule itself, each category of required document. From there, the user could, for example, click on "Applications and Related Materials" which would take the user to the current section of the Commission's website that is labeled "Search for Application Information." At that point, all the user would have to do is enter the call letters of the desired station in order to examine, and

download at his or her option, a particular application. This same structure could be used for every other type of document required to be contained in a television station's public file.

The relative ease of modifying one website (the FCC's), in lieu of modifying than more than 2,000 websites, is best illustrated by considering, aside from the First Amendment costs, the economic and liability risk burdens for individual stations and for the television broadcast industry overall to implement and maintain their own online public inspection files. There are approximately 1,759 full-power and 556 Class A television stations that could become subject to the Online Public File Rule.[11] One very experienced and well-respected vendor, which was brought to the attention of the State Broadcasters Associations, has proposed to charge any television station that is required to establish an electronic public inspection file a set-up fee of $5,000 per station and $500 per month for maintaining the contents of the online public file on the vendor's server. This represents a first-year charge of $10,500 per station and a recurring annual fee charge of $6,000. If every full-power and Class A television station were required to create and maintain an electronic public inspection file, the first-year cost to the television broadcast industry overall could be $24,307,500, with subsequent year annual costs of $13,890,000. It is reasonable to assume that this price tag for outsourcing the set-up and maintenance of a television station's online public inspection file system is a fair proxy for calculating the cost to a television station, which chooses to handle the matter in-house, of increased staffing and server capacity to create and maintain a fully compliant Internet-based public inspection file system. Under either calculation, the burden on the television broadcast industry and on stations individually will be staggering. Furthermore, these costs do not take into consideration the doubling of potential liability for <u>both</u> paper-based public file violations as

[11] *Broadcast Station Totals as of December 31, 2007*, New Release (Mar. 18, 2008).

well as Internet-based public file violations.[12] If the Commission were to use its own website as the television broadcast industry's central online public inspection file, these burdens would be removed.

Incidentally, the fact that television stations have the option under the Online Public File Rule to provide "links" to the Commission's website for certain of their public file documents will not substantially reduce the burden of the rule. The reason is that the "option" the Commission has granted simply swaps a burden and creates a new risk. Specifically, use of the "linking" option injects potential liability for non-compliance because of the vulnerability and thus the unreliability of the Commission's "linking" system. The Commission has not indicated that a station may simply link to the primary Commission website at www.fcc.gov and allow the user of the site to find the information that he or she is looking for. Rather, it appears that if a station wishes to use "links," it must provide an internal link to each specific document in the Commission's online database under circumstances where the Commission has offered no assurances that these internal links will remain static. Thus, in order for a station to be certain that they are in continuous compliance with the Online Public File Rule, at the least these links will have to be continuously monitored by station staff or additional software will have to be implemented to monitor changes to the links in question. By using the FCC's own website, this issue becomes moot.

It is also clear that the Commission has not taken into careful consideration an entirely different set of burdens and risks triggered by the Online Public File Rule requirement that relate

[12] The State Associations have examined the possibility of serving as "outsource" vendors to their television station members for purposes of setting up and maintaining their online public inspection files. However, if the associations were to assume that role, they would, in turn, have to "outsource" the design, server capacity, implementation and maintenance tasks to third-party vendors at considerable cost and liability risk. Such a role would take these associations well beyond their capabilities and chartered missions. As a result, many have informed their members that they cannot assume that role.

to the posting of e-mails sent to the station. Prior to imposition of the rule, a hard copy or electronic copy of all such e-mails was required to be kept in a station's public file available for public inspection at the station's main studio in either paper or electronic form. However, when that same e-mail is posted on a station's website for anyone in the universe to read, the exposure of the sender's e-mail address and other header information is accessible worldwide. If the sender copied others on the same message, all of their e-mail address information would also be exposed. A person sending an e-mail to the station will not necessarily be aware that by sending an e-mail to the station such information will be posted on the station's website for the world to see. Any informational effort by the station to notify viewers that their e-mails will be posted on their website would likely reach only a small percentage of people who might send an e-mail to the station that would, in turn, be required to be posted on the station's very public website. Few viewers read the "Privacy Policy" posted on websites, and someone sending an e-mail to a television station would not necessarily be doing so while using the station's website in any event. While the current public inspection file rule permits a sender to request that his or her communication not be placed in the station's public inspection file, there is no evidence that this "right" is well-known. Further, e-mails posted to a station's website would likely be searchable in order to meet the disability accessibility requirements. E-mail header fields could then be searched or accessed by "bots" that scour the Internet harvesting e-mail addresses in order to spam users. Given these concerns, the posting requirement under the Online Public File Rule may actually <u>deter</u> viewers from communicating with a station by e-mail, or by any means, in order to avoid his or her correspondence becoming available to the world. In short, this particular posting requirement with its chilling effect works to undermine the very communications dialogue between a station and its community that the Commission seeks to

encourage.[13] Television stations are also concerned that the requirement that television stations publish for essentially worldwide consumption e-mails received by their stations will lead to all sorts of complaints and lawsuits from senders, from persons shown as "cc's" on e-mails, from persons who are the intended recipients of e-mails, and from persons who are the subject of such e-mails. Furthermore, the Commission has not provided any assurances that this requirement, as it relates to children, will not undermine federal laws and policies to protect children from Internet-based predators. If the Commission views this information as important notwithstanding the risk, the Commission should assume full responsibility by requiring that the information be available on its website, and not on the websites of more than 2,000 television stations. Furthermore, if the Commission's own website became the online public file for the television broadcast industry, such resolution would also eliminate the substantial confusion surrounding whether a television station can create PDF copies of certain documents and upload them to its website and still comply with the Commission's requirement that all documents be accessible to the disabled.

There is simply no valid justification for the television broadcast industry, or their First Amendment rights, to be burdened in this way given the availability of an obvious, viable alternative. The Commission's own website already serves, to a significant degree, the very purposes upon which the Online Public File Rule is grounded. Through that easy-to-use website, members of the general public already possess Internet-based access to vast quantities of information about every television station in the United States. The Commission, through its Media Bureau, has stated:

---

[13] *See In the Matter of Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233 (Jan. 24, 2008).

> The FCC's Web site contains extensive information on broadcast radio and television stations. For example, users may generate tailored lists of AM, FM, and TV stations, view electronic applications for construction permit or license as well as EEO and ownership reports, locate some historical documents pertaining to radio stations, find mailing addresses, and read a summary on the process of applying for a radio broadcast station. In this document, we provide short summaries for new users on some repeatedly requested subjects of interest, along with links for further reading or searches. This does not represent a complete list of information available, but it does provide a place to start your research. Please bookmark or print this page and use it as a reference.[14]

To the extent that the Commission believes that additional information about television stations should be made available on the Commission's website in order to achieve its goal of enhancing "the ability of both those within *and* those beyond a station's service area to participate in the licensing process" without violating any television licensee's First Amendment rights,[15] the Commission has the power to initiate appropriate rulemaking proceedings. Reliance upon the Commission's own website is the constitutionally preferred solution here. By following that path, the Commission will have avoided entangling the government in the content of these "electronic newspapers" operated by television stations without the need for any license. Given that the Commission has, to date, failed to consider this alternative, it is clear that whether one applies a "strict scrutiny" or "intermediate scrutiny" First Amendment review standard, the Commission has not met its burden to "narrowly tailor" its actions which have the effect of regulating content or to avoid burdening "substantially more speech than necessary to further [its] interests." This failing also supports the conclusion that the Commission has not fully complied with the Regulatory Flexibility Act of 1980, as amended.[16]

The fact that the Commission has stated that affected stations will have an opportunity to apply for a waiver of the rule does not ameliorate the Commission's constitutional

---

[14] Federal Communications Commission, *For New Visitors: Finding Information About Radio and Television Stations on the FCC Web Site*, http://www.fcc.gov/mb/audio/new-visitors.htm (last accessed April 14, 2008).

[15] *Id*. at ¶13.

[16] *See* 5 U.S.C. § 603.

transgressions. Due to the vagueness of the "standard" for waiver of the Online Public File Rule, the opportunity for "waivers" of the rule does not appear to be meaningful. Furthermore, it is not clear that waivers would be permanent rather than only temporary. In any event, no television station should have to be faced with seeking a governmental waiver in order to take advantage of its First Amendment liberties.

The same facts and discussion equally support the conclusion that the Commission's action in adopting the Online Public File Rule is arbitrary and capricious.[17] Accordingly, the Commission should reconsider and rescind the rule on that basis as well.

Conclusion

Based on the foregoing, the State Broadcasters Associations respectfully request the Commission to rescind its action adopting the Online Public File Rule.

Respectfully submitted,

NAMED STATE BROADCASTERS ASSOCIATIONS

By: _____/s/_____
Richard R. Zaragoza
Lauren Lynch Flick
Christine A. Reilly
Emily J. H. Daniels

PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

Their Attorneys in this Matter

Dated: April 14, 2008

[17] 5 U.S.C. § 706(2)(A).