

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Of Counsel:

Kraig Jennett
Anthony Kim
Law Students
Georgetown University Law Center

Angela J. Campbell, Esq.
Coriell S. Wright, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

May 30, 2008

Andrew Jay Schwartzman, Esq.
Media Access Project
1625 K St NW
Washington DC 20006
(202) 232-4300

Counsel for Campaign Legal Center,
Common Cause, Benton Foundation, and
New America Foundation

SUMMARY

Broadcasters ask the Commission to reconsider both its adoption of standardized form 355 and the internet posting requirements for public files, arguing that such requirements are unjustified and overly burdensome. These arguments overlook the extensive record compiled by the Commission detailing the need for, and the substantial public benefits of, the standardized form and online posting requirement. Form 355 not only provides members of the public with the necessary means to monitor the service of television broadcasters, it also provides the Commission with information that is essential to its decisionmaking responsibilities, and which is not readily available, if available at all, from other sources.

Additionally, broadcasters raise First Amendment objections that are wholly without merit or supportive precedent. The reporting and online posting rules impose no new burdens on editorial discretion or expressive speech – they merely regulate non-expressive conduct in an effort to facilitate access to meaningful information on how broadcasters serve their communities. Thus, consistent with the FCC’s long established reporting and inspection requirements, the newly adopted Form 355 and Online Public File Rule raise no First Amendment concerns.

Finally, broadcasters’ claims as to burden are grossly exaggerated. Television stations already keep records of their programming to complete the issues/programs lists and to bill advertisers. Accordingly, it is not unreasonably burdensome to require licensees to report this information in a quarterly form. With regards to the public file, most of the documents that make up the public file are already available online or in electronic format, and thus, the online posting requirement places a reasonable additional burden on licensees.

TABLE OF CONTENTS

SUMMARY i

I. The Record Provides Ample Evidence Demonstrating Why The New Reporting Requirements Are Necessary 2

 A. The Record Demonstrated The Need For The FCC To Revisit The Adequacy Of The Issues/Programs Lists 2

 B. Form 355 Provides Information Needed To Assess Whether Television Stations Are Serving Their Communities 6

 C. The Commission Should Not Eliminate Any Program Questions On Form 355 8

 D. Form 355 Will Provide The Commission With Data Necessary To Fulfill Its Regulatory Oversight And Decisionmaking Responsibilities 11

II. The Enhanced Disclosure Rules Are Constitutionally Permissible 14

 A. Requiring Submission of Form 355 Is Constitutional 14

 B. Requiring The Public File To Be Placed Online Is Constitutional 19

III. Broadcast Petitioners’ Burden Claims Are Greatly Exaggerated 21

Conclusion 23

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission’s rules, the Campaign Legal Center, Common Cause, Benton Foundation, and New America Foundation (CLC et al.) by their attorneys, the Institute for Public Representation and Media Access Project, respectfully submit this Opposition in response to three Petitions for Reconsideration of the *Enhanced Disclosure Order*¹ submitted by commercial broadcasters: Broadcasting Licenses Limited Partnership et al (“Broadcast Partnership”), “Block Communications et al (“Block et al”), and State Broadcasters Associations (“State Broadcasters”).²

¹ *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children’s Television Programming Report (Form 398)*, Report and Order (MM Dkts. 00-168 and 00-44), FCC 07-205 (released Jan. 24, 2008), 73 Fed. Reg. 13,452 (Mar. 13, 2008) (“Enhanced Disclosure Order”).

² We do not here address the concerns of the noncommercial broadcasters, though we acknowledge their unique situation may warrant further consideration with respect to the rules promulgated by the Commission

I. The Record Provides Ample Evidence Demonstrating Why The New Reporting Requirements Are Necessary

The broadcast petitioners argue that the record fails to justify the adoption of Form 355 and that a number of the reporting categories are ill-defined or inappropriate.³ However, these arguments ignore the extensive record in the Enhanced Disclosure Proceeding and the Localism Proceeding demonstrating that existing reporting requirements in the form of “issues/programs lists” have failed to provide sufficient information about how broadcasters are serving the public interest. Form 355 not only provides members of the public with the necessary means to monitor the service of television broadcasters, it also provides the Commission with information that is essential to its decisionmaking responsibilities, and which is not readily available from other sources.

A. The Record Demonstrated The Need For The FCC To Revisit The Adequacy Of The Issues/Programs Lists

In arguing that there is no need for enhanced reporting requirements, Broadcast Partnership principally relies on a 1984 Commission decision to eliminate broadcast programming guidelines and program logs and to rely primarily on market forces.⁴ Broadcast Partnership argues that because there is no evidence of a “significant market failure” in the provision of local and public affairs programming, *ipso facto*, there is no need to collect any evidence regarding how much local programming broadcasters are actually offering.⁵ This reasoning is entirely circular. How can the public and the FCC possibly determine whether there has been a significant market failure without any evidence about local programming? This

³ See *Broadcast Partnership* at 6; *Block et al* at 17.

⁴ *Broadcast Partnership* at 4-5 (citing *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1075 (1984) (“1984 TV Deregulation Order”).

⁵ *Id.* at 6.

suggests that the real reason they oppose new reporting requirements is that it might reveal that some are doing a less than exemplary job serving their local communities.

Moreover, their argument overlooks the fact that in eliminating programming guidelines for television in 1984, the Commission affirmed that, “[o]ur action here, however, does not constitute a retreat from our concern with the programming performance of television station licensees. Thus, as in related actions involving commercial radio . . ., we are by this Order retaining the obligation of licensees to provide programming that responds to issues of concern to the community. The quarterly issues/programs lists will provide the public and the Commission with the information needed to monitor licensees’ performance under this new regulatory scheme and permit us to evaluate the impact of our decision.”⁶

When the FCC eliminated program guidelines and logging requirements for radio a few years earlier, it had adopted an annual issues/program list that was to contain examples of programming responsive to five to ten important issues in its service area.⁷ The D.C. Circuit remanded the FCC’s decision to eliminate program logging requirements on the grounds that in “*Office of Communication of United Church of Christ v. FCC*, this court made clear the crucial right of citizens to participate in the review of a station’s public interest performance at renewal time.”⁸ It continued:

We will not allow this right to be undermined indirectly by the Commission's inadequately explained refusal to require licensees to make available information on their issue-responsive programming. . . . Under the Commission's current rules, a citizen

⁶ *1984 TV Deregulation Order*, 98 FCC Rcd 1076, at ¶3.

⁷ *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, at ¶105 (1981) (aff’d in part and rev’d in part by *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1441 (D.C. Cir. 1983) (“UCC III”).

⁸ *UCC III*, 707 F.2d 1413 (citing *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1003-1004, 1005 (D.C. Cir. 1966)).

seeking to support his petition to deny based on a station's inadequate nonentertainment programming would now find very little information of any value in the station's public file. The issues/programs list would provide only illustrative examples of certain issue-oriented programs; there appears to be no way, short of constant monitoring, to gauge a station's *overall* public service performance. Such a dearth of information is hardly conducive to encouraging the public participation envisioned by the Congress and by this court as essential to the formulation of an informed regulatory policy.⁹

On remand, the FCC modified its rules to remove the limit on the number of issues presented in issues/programs lists and to require stations to place the issue/programs lists in their public files every quarter. While finding that “when a programming issue is raised in a petition to deny, . . . these lists will serve as a significant source of information for any initial investigation by a member of the public or by the Commission,”¹⁰ the Commission emphasized that “if experience in the future indicates that the public interest would be served by easing the documentation burden of petitioners to deny at the cost of imposing logging requirements on radio licensees, we can revisit this issue.”¹¹ The FCC’s *1984 TV Deregulation Order*, which similarly replaced program logs with issues/programs lists, also promised to revisit the issues in virtually identical language.¹²

The Commission had ample evidence demonstrating that the issues/programs lists have in practice proven to be an unreliable and ineffective tool for monitoring broadcaster service. It found that “[a]llowing broadcasters complete discretion to decide what kinds of programming to list in their quarterly forms may result in a broadcaster’s failure to give a complete picture of

⁹ *Id.* (internal citation omitted.)

¹⁰ *Deregulation of Radio*, Second Report and Order, 96 FCC 2d 930, at ¶25 (1984) (“2nd Radio Deregulation Order”).

¹¹ *Id.* at ¶26.

¹² *1984 TV Deregulation Order*, 98 FCC 2d 1076, at ¶78.

how they are trying to fulfill their public interest obligations.”¹³ It noted that commenters reported that broadcasters seem “confused about what they should put in their public files and describe[d] instances in which documents were missing and files outdated.”¹⁴ Others found that some broadcasters “listed everything and anything they considered to qualify while others listed only a few programs.”¹⁵ As result, “the lack of uniformity and consistency of the issues/programs lists [made] it difficult to discern both how much and what types of public interest programming a broadcaster provided, which [made] any overall assessment or comparison between broadcasters virtually impossible.”¹⁶

Moreover, the many hours of public testimony in hearings held around the country and the thousands of public comments filed in the closely related Broadcast Localism Proceeding (Docket 04-233) provide additional evidence that that some licensees are failing to meet community needs and/or that issue/programs list do not provide sufficient information for the public. The *Enhanced Disclosure Order* notes that “comments submitted in the Localism Docket and testimony received during several localism field hearings indicate that many members of the public are not fully aware of the community-responsive programming that their local stations have aired.”¹⁷ The Media Bureau’s summary of the over 80,000 brief comments identifies some of the main issues as:

- the FCC’s broadcast license renewal process should be more rigorous than the current “postcard” procedure;
- criticism of program content including the absence of localism efforts;

¹³ See *Enhanced Disclosure Order* at ¶43.

¹⁴ *Id.* at ¶35, citing Comments of People for Better TV, MM Dkt. 00-168, at 4.

¹⁵ *Id.* citing Comments of UCC, MM Dkt. 00-168, at 3.

¹⁶ *Id.* (internal quotations omitted).

¹⁷ *Id.* at ¶39.

- local public affairs programming is virtually non-existent.¹⁸

Similarly, testimony from members of the public at the Monterrey hearing, for example, complained about lack of local programming, the lack of diversity in news, the lack of service to minority communities, the lack of service to children, and the failure to cover labor issues.¹⁹ Thus, there is ample evidence demonstrating that issues/programs lists were ineffective and that substantial revisions to broadcaster reporting requirements were sorely needed.

B. Form 355 Provides Information Needed To Assess Whether Television Stations Are Serving Their Communities

Under the Communications Act, the FCC may only renew the licenses of broadcast stations that have served the public interest.²⁰ Public participation is fundamental to the proper function of the broadcast licensing system.²¹ To ensure that stations serve the public interest, the FCC has traditionally urged broadcasters to engage in ongoing dialog on how to best serve community needs. When this process has proved insufficient, however, the FCC has primarily relied on members of the public to bring to its attention where broadcasters are falling short by filing complaints or petitions to deny.²²

For citizens to engage in dialog and/or file complaints or petitions to deny with the FCC, they need access to information about the programming provided by broadcast stations. With the

¹⁸ *Media Bureau's Broadcast Localism MB Docket No. 04-233 Comment Summary*, MB Docket 06-121, at 1-2 (filed October 20, 2006).

¹⁹ *Id.* at 221. Similar concerns were raised at the other hearings as well.

²⁰ 47 USC §309(k).

²¹ *See 2nd Radio Deregulation Order*, 96 FCC 2d 930, at ¶25 (noting that complaints from members of the broadcast audience “have long aided our regulatory efforts, and we assume that they will continue to do so.”).

²² *See, e.g., 1984 TV Deregulation Order*, 98 FCC 2d 1076, at ¶3 (noting the important function of petitions to deny in holding broadcasters accountable to their public service obligations); *see also Policies and Rules Concerning Children's Television Programming*, Report and Order, 11 FCC Rcd 10660, 10701 (1996).

proliferation of broadcast stations and the expansion of their service through multicasting allowed by the transition to digital, public access to comprehensive and understandable program information is more important than ever. As demonstrated above, the issues/programs lists adopted nearly 25 years ago have failed to provide consistent reporting, or adequate detail about how TV stations serve their communities. Because Form 355 program categories require stations to report on programming traditionally identified with public service, including local news, local civic affairs programming, electoral affairs programming, religious programming, public service announcements, and emergency information,²³ it will provide the public with a comprehensive way to assess the amount and types of community-responsive programming broadcasters are providing.

Broadcast Partnership argues that the FCC should not have adopted the new form because “comparison of one station’s issue-responsive programming to that of another station is not permitted or relevant under the statutory standard.”²⁴ However, Broadcast Partnership cites no statute or case to support this claim. Moreover, the fact that the FCC no longer conducts comparative license renewal hearings does not render information about how stations serve their communities irrelevant. Under Section 309(k), the FCC may only grant license renewals where, among other things, it “finds with respect to that station, during the preceding term is its license—(A) that station has served the public interest, convenience, and necessity.”²⁵ In

²³ *Enhanced Disclosure Order* at App. B (“Form 355”).

²⁴ *Broadcast Partnership* at 8.

²⁵ 47 USC §309(k).

assessing whether a licensee has served the public interest, nothing in the statute prohibits either the FCC or petitioners to deny from comparing one station's performance to another.²⁶

C. The Commission Should Not Eliminate Any Program Questions On Form 355

Block et al. argue that some Form 355 questions should be eliminated either because they are unnecessary or use categories such as “news,” and “programming directed at underserved communities” that are too vague and should be eliminated.²⁷ Except for the question about ownership, which could be replaced with a link to the licensee's ownership form, CLC et al. oppose elimination of any questions. In particular, we believe that the questions regarding closed captioning and emergency information are necessary to ensure station compliance with FCC requirements in these areas, while the question about video description is important to accurately assess the availability of this service.

In *NAITPD v. FCC*, the court rejected similar arguments made by broadcast networks regarding program categories. There, the FCC had exempted news, children's, documentary and public affairs programs from the prime time access rule. The networks argued that the classifications of the categories were “too vague.” The court upheld the FCC's definitions, finding that, for example, that a “precise definition of [children's programs] is probably unattainable, and indeed, undesirable.”²⁸ Moreover, it noted that “a more sharply defined category probably would be attacked as an intrusion by the Commission upon program

²⁶ In contrast, in considering an application for assignment or transfer, the Act does prohibit the FCC from considering whether someone other than the applicant would better serve the public interest. 47 USC § 310(d).

²⁷ *Block et al* at 16-23.

²⁸ *Nat'l Ass'n of Indep. TV Producers & Distributors v. FCC*, 516 F.2d 526, 539 (2d Cir. 1975).

content.”²⁹ The court also noted that that the FCC would defer to licensees’ good faith interpretations of the program categories.

The same considerations apply here. Indeed, event, the Commission explicitly stated that it will “as it does in other contexts, generally rely on the good faith judgment of the broadcaster” in reporting its programming information.³⁰ However, if broadcasters truly think the categories are too vague, they are free to suggest how they could be better defined.

I. News. As an initial matter, it’s troubling that licensees, who have been given the right to use the public airwaves for the express purpose of serving the public, claim they do not know what constitutes news.³¹ “News” is a category that is generally well known and understood, and is used in a number of other Commission rules and policies. Indeed, the Commission has recently adopted a rule where the presumption against owning a TV/newspaper combination will be reversed if applicants can show that “a proposed combination results in a new source of a *significant amount of local news* in a market,” specifically, an additional seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations.³²

However, if broadcasters feel they need a more explicit definition, the one employed by the FCC for many years in its old license renewal Form 303 may be an appropriate guidepost. Form 303 characterized “News Programming” as “include[ing] reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news.”

²⁹ *Id.* at 540.

³⁰ *Enhanced Disclosure Order* at ¶43.

³¹ *See Block et al* at 18.

³² *2006 Quadrennial Media Ownership Review, Report and Order and Order on Reconsideration*, 23 FCC Rcd. 2010, at ¶97 (2007) (emphasis added).

2. *Underserved Communities.* Block et al. argue that the Commission failed to adequately define programming directed to “underserved communities.”³³ This argument altogether misses the purpose of requiring such information in the first place. Broadcasters are licensed to their local communities; accordingly, it is both legitimate and desirable for the Commission to inquire whether different segments of the listening audience are being served. Because the make-up of communities varies widely, it would be impracticable and inappropriate for the FCC to delineate universally applicable categories of “underserved” groups. Instead, it is broadcasters who are in the best position to determine the needs of their communities, as well as which segments of those communities may be underserved. Thus, as with other categories contained in Form 355, the FCC simply asks broadcasters to exercise their good faith judgment to determine if they have offered programming or addressed issues of importance to communities outside of their stations’ core demographic.

3. *Independently Produced Programming.* Block et al. also seeks elimination of the question about “Independently Produced Programming,” because the FCC no longer has any rules concerning it. The fact that the FCC does not require stations to afford access to independent programmers does not mean that the FCC has no legitimate interest in ascertaining whether stations are airing independently produced programming. Independently produced programming promotes diversity of opinion, voices, information, as well as competition, which are all long-held FCC policy goals.³⁴ Indeed, the FCC undertook a study of this very subject in the 2006 Quadrennial Media Ownership Review.³⁵

³³ *Block et al* at 22.

³⁴ See 2002 Biennial Media Ownership Review, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, at ¶21 (2002), “‘promoting the widespread dissemination of information from a multiplicity of sources’ is a government interest that is not only important, but is of the ‘highest

(continued on next page)

Nor do we agree that the Commission’s definition is too vague. However, we have no objection to reasonable clarification of the terms. For example, to clarify the term “network,” the Commission could use the same definition it uses for the dual network rule.³⁶

D. Form 355 Will Provide The Commission With Data Necessary To Fulfill Its Regulatory Oversight And Decisionmaking Responsibilities

Section 303(j) of the Communications Act grants the FCC authority to “to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable” in the public interest, convenience, or necessity.³⁷ In adopting Form 355, the FCC has restored its ability to collect the data necessary to make reasoned and informed regulatory decisions. Both the courts and federal statutes, such as the Data Quality Act, place increasingly rigorous demands on agencies to justify their decisions on the basis of their evidentiary record.³⁸ In particular, scholars have noted that

(footnote continued)

order.” (citing *Turner Broadcasting System v. FCC*, 520 U.S. 180, 185-86 (1997) (“Turner II”) and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“Turner I”).)

³⁵ Austin Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, April 2007, at 11, available at http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A10.pdf.

³⁶ 47 C.F.R. § 73.658(g). “Dual network operation. A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were “networks” as defined in § 73.3613(a)(1) of the Commission’s regulations (that is, ABC, CBS, Fox, and NBC).”

³⁷ 47 U.S.C. §303(j).

³⁸ See Philip M. Napoli & Michelle Seaton, *Necessary Knowledge for Communications Policy: Information Asymmetries and Commercial Data Access and Usage in the Policymaking Process*, 59 FED. COMM. L.J. 295, 298-299 (March 2007) (“many observers of the policymaking process have identified a continued trend toward a greater reliance upon empirical research as part of a greater “rationalization” of policy decision making.”) (“Necessary Knowledge”). See also Administrative Procedure Act, 5 U.S.C. § 553 (2007); see also Data Quality Act (uncodified but contained in *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, 67 Fed. Reg. 8452 (2002).

“both the demand for – and utilization of – research have become more pronounced in communications policymaking.”³⁹ As a result, federal agencies are coming under greater pressure to produce quality data to justify their policy decisions and rulemakings.⁴⁰ To accomplish this, agencies are forced to purchase expensive data from outside sources that are often ill-suited for regulatory decisionmaking. Additionally, because of licensing agreements that agencies must enter into to secure such data, the public and outside researchers are often unable to review and ensure the validity of the statistics on which the FCC bases its decisions.

In light of these new evidentiary demands, the information collected in Form 355 is not only useful, but essential.⁴¹ Form 355 is tailored to meet the data needs of the public and the Commission, and is more comprehensive, efficient, and cost-effective than contracting with outside parties. Equally important, Form 355 will be publicly available, thereby allowing citizens and outside researchers to review the data and “point out where information is erroneous or where the agency may be drawing improper conclusions from it.”⁴²

Several ongoing Commission proceedings would greatly benefit from the data collected in Form 355. For example, an important issue in the Commission’s proceeding on the transition to digital television is how broadcasters can best serve the public in light of new technologies allowing them to multicast several program streams in one channel allotment.⁴³ Form 355

³⁹ Napoli, *Necessary Knowledge*, 59 FED. COMM. L.J. at 296.

⁴⁰ See, e.g., *Am. Radio Relay League v. FCC*, 524 F.3d 227, 237-241 (D.C. Cir. 2008) (finding that the Commission failed to comply with the APA by not disclosing in full certain studies by its staff upon which the Commission relied in promulgating the rule).

⁴¹ See *id.* at 237 (“It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.” (citing *Portland Cement Ass’n v. Rukelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973))).

⁴² *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984)

⁴³ See, e.g., *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633, at ¶3 (1999) (“*DTV Public Interest NOI*”).

requires broadcasters to report on their utilization of digital multicast capabilities, thereby supplying the FCC and the public with otherwise unavailable data.⁴⁴

Likewise, in issuing its recent Localism Report and Further Notice of Proposed Rulemaking, the FCC cited the program information collected by Form 355 as an important tool in assessing the amount of locally responsive programming offered by broadcasters.⁴⁵ Many questions in Form 355 are relevant to assessing the extent to which TV stations are serving local needs. For example, question 2(a) requires broadcasters to report on total amounts of local news, civic affairs, and local electoral affairs programming.⁴⁶ Conversely, the old issues/programs list did not provide sufficient or relevant data and often resulted in broadcasters' failure to give a complete picture of what they are doing to serve local audiences.⁴⁷ Thus, without the specificity and consistency of the data collected by Form 355, neither members of public nor the FCC will have readily available information to make this determination.

Similarly, in the Quadrennial Media Ownership Review, the FCC commissioned a number of studies to determine whether media consolidation harms or helps the coverage of local news and community issues.⁴⁸ Because the Commission had no data on local programming, a number of the studies relied on outside information collected by researchers and private

⁴⁴ See Form 355 question 2(a).

⁴⁵ *Broadcast Localism*, Report and Notice of Proposed Rulemaking, 23 FCC Rcd. 1324, at ¶20-21 (2008).

⁴⁶ See also Form 355 questions 2(c) through 2(g) (requiring broadcaster to report on specific programs offering local news, civic affairs, local electoral affairs, other local programming, public service announcements, underserved communities, and religious programming).

⁴⁷ See *Enhanced Disclosure Order* at ¶43 (“For example, the broadcaster could simply ignore [reporting on] electoral programming (even if it aired some), leaving members of the public reviewing the report in the dark concerning this aspect of the broadcaster’s service.”).

⁴⁸ *2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, MB Dkt. 06-121, 73 FR 9481-01 (Feb. 21, 2008).

companies. Unfortunately, many of these outside data were either incomplete or ill-suited to the analysis, and were heavily criticized by peer reviewers. One study attempting to evaluate how media ownership affected the amount of local television was forced to rely on TV program schedules to quantify the amount of local news offered by stations.⁴⁹ As peer reviewers pointed out, relying on program schedules meant that commercials and cross program promotions were counted as “news.”⁵⁰ The peer reviewers ultimately concluded that these data deficiencies made the “study irrelevant and useless to policy makers.”⁵¹

These examples illustrate how vital access to reliable data is for Commission decisions. Since the FCC is required to review whether ownership limits continue to serve the public interest every four years, it is essential that the Commission and the public have access to the information collected in Form 355.

II. The Enhanced Disclosure Rules Are Constitutionally Permissible

A. Requiring Submission of Form 355 Is Constitutional

Broadcast Partnership, the only petitioner to invoke the First Amendment in an attempt to invalidate the new reporting form, suggests that the commission has “brush[ed] aside” First Amendment concerns.⁵² This argument appears premised in part on the Commission’s tentative

⁴⁹ Shiman, Lynch, Stroup, and Almoguera, *Media Ownership Study 4: News Operations*, available at http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A5.pdf.

⁵⁰ Kenneth Goldstein, Matthew Hale, and Martin Kaplan, *Peer Review of FCC Media Ownership Study 4 Section I, The Impact of Ownership Structure on Television Stations’ News and Public Affairs Programming*, at 1, available at http://www.fcc.gov/mb/peer_review/prstudy4.1.pdf.

⁵¹ *Id.*

⁵² *Broadcast Partnership* at 10. Broadcast Partnership also argues that in 1984 “the Commission specifically warned that broad program reporting requirements such as those embedded in the Standardized Form, naturally heighten First Amendment concerns.” *Broadcast Partnership* at 9, citing *1984 TV Deregulation Order*, 98 FCC 2d 1076, at ¶27. This statement is just wrong – both as a matter of fact and a matter of law. It is clear from any reasonable reading of that order that

(continued on next page)

proposal to adopt a local programming guideline in the Localism proceeding. However, since the proposed guideline has not yet been, and may never be, adopted, such arguments are appropriately addressed in the Localism proceeding. Whether or not a guideline is adopted, Form 355 will provide the public and the Commission with valuable and much-needed data to evaluate whether broadcast stations are meeting their public interest obligations.

Section 303(j) gives the FCC authority to make rules requiring stations to keep records of programs. As the D.C. Circuit has held “[t]here is no question but that the Commission has the statutory authority to require whatever recordkeeping requirements it deems appropriate.”⁵³ In adopting Form 355, the Commission expressly did not “adopt quantitative programming requirements or guidelines,” and did not “require broadcasters to air any particular category of programming or mix of programming types.”⁵⁴ Rather, broadcasters remain free to exercise their discretion to decide what the programming best serves their communities.

Broadcast Partnership is correct that “Congress intended to permit private broadcasting to develop with the widest journalistic freedom *consistent with its public obligations*.”⁵⁵ Form 355 enables the FCC and public to effectively assess whether broadcasters are meeting those public obligations. It will not “chill” editorial discretion any more than the uncontested reporting requirements previously in effect.⁵⁶

(footnote continued)

the FCC was referring to the quantitative programming guidelines in place at the time, not the reporting requirements

⁵³ *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985).

⁵⁴ *Enhanced Disclosure Order* at ¶36.

⁵⁵ *Broadcast Partnership* at 8-9 (citing *CBS v. DNC*, 412 U.S. 94, 110(1973)).

⁵⁶ *Broadcast Partnership*'s reliance on *Nat'l Black Media Coal. v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) is erroneous. *Broadcast Partnership* at 9-10. In that case, the Commission refused to “adopt quantitative programming requirements or guidelines” for comparative license renewals.

(continued on next page)

Nevertheless, Broadcast Partnership argues that the new regulations are content-based because Form 355 amounts to a “raised eyebrow approach to regulation” that creates “sub-silentio” pressures to air programming in each category on the form, which in turn “create[s] a disincentive to broadcast other types of programming.”⁵⁷ To support this contention, it relies on *Community-Service Broadcasting of Mid-America, Inc., v. FCC*.⁵⁸ There, in an *en banc* opinion, the D.C. Circuit invalidated a statute requiring public broadcasters to record programs “in which any issue of public importance is discussed,” and to provide a copy of the recording to any member of the Commission or public who requested it.⁵⁹ The majority found the statute unconstitutional under the Equal Protection Clause because it applied only to public broadcasters.⁶⁰ Only one judge joined the Chief Judge’s First Amendment analysis.⁶¹ Thus, Broadcast Partnership’s First Amendment argument is based solely on *dicta*.

In any event, Form 355 is entirely distinguishable from the statute challenged in *Community-Service*. Because the recording requirement in *Community-Service* was only triggered if broadcasters chose to air a programs containing “issues of public importance,” it provided a disincentive to air that type of programming. In contrast, completing Form 355 is not triggered by any programming nor does it penalize broadcasters’ program choices.

Even assuming for purposes of argument that Form 355 would create “sub silentio” pressure to air particular program types, that does not make it unconstitutional. Under *Red Lion*

(footnote continued)

The Enhanced Disclosure *Order*, however, does not “require broadcasters to air any particular category of programming or mix of programming types.” *Enhanced Disclosure Order* at ¶36.

⁵⁷ *Broadcast Partnership* at 10-11 (citing *Community-Service Broadcasting of Mid-America, Inc., v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)).

⁵⁸ See *Broadcast Partnership* at 10-11.

⁵⁹ *Community-Service*, 593 F.2d at 1105 n.4.

⁶⁰ *Id.* at 1122-1123.

⁶¹ *Id.* at 1104.

and other Supreme Court decisions, it is well-recognized that broadcasters, because they are licensed by the government, are subject to a lower level of constitutional scrutiny. Moreover, *Red Lion* held that that it is “the right of the viewers and listeners, not the right of the broadcasters, which is paramount” and that “[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.”⁶² Thus, even if reporting requirements influence broadcaster speech, they are the very type of regulation which the Supreme Court has upheld as consistent with the “First Amendment goal of producing an informed public capable of conducting its own affairs.”⁶³ In fact, in *CBS, Inc. v. FCC*, the Supreme found that Section 312(a)(7) of the Communications Act, which requires broadcast stations to afford reasonable access to candidates for federal office, did not violate broadcasters’ First Amendment rights.⁶⁴ If requiring a station to air political programming does not violate the First Amendment, then surely requiring a station to report the information in Form 355, such as Question 2(e) which asks station merely to report on the local electoral affairs programming it chooses to air, is constitutional.

Broadcast Partnership errs in relying on *League of Women Voters* to argue that the reporting requirements would be subject to elevated scrutiny.⁶⁵ That case involved a law prohibiting recipients of CBP funds from editorializing that had the effect of suppressing editorial expression. Conversely, the reporting requirements here, even if construed as favoring particular programming, would enhance speech and, moreover, do not pose any “threat that a

⁶² *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390, 394 (1969).

⁶³ *Id.* at 392.

⁶⁴ *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

⁶⁵ *Broadcast Partnership* at 8 (citing *FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984)).

broadcaster would be denied permission to carry a particular program or to publish his own views.”⁶⁶ Thus, Form 355 is not subject to the elevated First Amendment scrutiny applied in *League of Women Voters*.⁶⁷

Additionally, Broadcast Partnership’s reliance on language from *NAITPD v. FCC* suggesting that “it may be that *mandatory* programming by the Commission even in categories might raise serious First Amendment questions” is misplaced.⁶⁸ In the next sentence, the court notes that “the general power of the FCC to interest itself in the kinds of programs broadcast by licensees has consistently been sustained by the courts against arguments that the supervisory power violates the First Amendment.”⁶⁹

More recently, the Supreme Court in *McConnell v. FEC* affirmed the constitutionality of expanded reporting requirements for broadcasters. Citing *Red Lion*, the Court noted that the FCC had “broad” regulatory authority to ensure that broadcasters operate in the public interest, and likewise, the Court had “previously found broad governmental authority for agency information demands from regulated entities.”⁷⁰ In upholding the Bipartisan Campaign Reform Act of 2002 provisions requiring broadcasters to keep publicly available records of politically related broadcasting requests, the Court found that disclosure “can help the FCC carry out other

⁶⁶ *League of Women Voters*, 468 U.S. at 378 (citing *Red Lion*, 395 U.S. at 396).

⁶⁷ Even if elevated scrutiny did apply, the reporting requirement would pass constitutional muster because it directly advances the government’s important interest in overseeing licensees’ fulfillment of their public interest obligations in exchange for use of valuable public spectrum. Additionally, Form 355 burdens no more speech than necessary to further the important governmental interests of oversight and accountability, the rule would clearly pass muster because they advance important governmental interest and burden no more speech than necessary to accomplish this.

⁶⁸ *Broadcast Partnership* at 9 (citing Comments of Viacom Inc., MM Docket No. 00-168, at 14 (citing *NAITPD*, 516 F.2d at 536).

⁶⁹ *NAITPD*, 516 F.2d at 536.

⁷⁰ *McConnell v. FEC*, 540 U.S. 93, 237 (2004).

statutory functions, for example, determining whether a broadcasting station is fulfilling its licensing obligation to broadcast material important to the community and the public.”⁷¹

Thus, while the FCC did not impose any program requirements when it adopted Form 355, even if the reporting requirements could be construed to influence broadcaster content, the rules would still be entirely consistent with the purpose of the First Amendment, and with broadcasters’ fiduciary “obligations to present those views and voices which are representative of his community.”⁷²

B. Requiring The Public File To Be Placed Online Is Constitutional

Just as the reporting requirement does not hinder broadcasters’ ability to publish their own views, the online public file requirement does not burden broadcasters’ speech. The Commission’s public inspection file rule has existed, in various forms, for over forty years.⁷³ The new rule seeks only to facilitate public access by making a station’s file accessible via the internet.

State Broadcasters nonetheless claim that the online posting requirement triggers strict scrutiny because it “is not intended to control content that is to be published using a station’s licensed spectrum,” but instead “is intended to control the speech of a television broadcaster published over the internet for which the broadcaster needs no license.”⁷⁴ This argument is simply wrong. They cite no evidence to support their claim that the government is attempting to control the content of TV station’s websites. Moreover, while broadcasters do not need a license to “publish” information on the internet, they do need a license to broadcast. As discussed

⁷¹ *Id.* at 239 (citing 47 U.S.C. §315(a)).

⁷² *Red Lion*, 395 U.S. at 389.

⁷³ *Enhanced Disclosure Order* ¶3.

⁷⁴ *See State Broadcasters* at 6.

above, those licenses are constitutionally conditioned upon broadcasters serving their communities. Thus, reasonable regulations that enable the public to more effectively evaluate how broadcasters are meeting their public interest obligations, do not trigger strict scrutiny, even if they impose incidental burdens on broadcasters' speech.

State Broadcasters also make inconsistent arguments that the posting requirement both deters broadcasters from speaking via a website and involuntarily forces broadcasters to use websites.⁷⁵ Both are wrong. The Order explicitly provides that broadcasters that do not have a website are not required to create one.⁷⁶

Nor does the requirement deter broadcasters from speaking on a website. The requirement to post public files on line is not triggered by anything the licensee says or does not say on the website. And even if broadcasters with websites fail to post their public files online, the FCC has absolutely no authority to shut down their website or otherwise prevent them from speaking over the internet.

State Broadcasters fare no better with their "compelled speech" claim. Compelled speech violations are found only when "the complaining speaker's own message was affected by the speech it was forced to accommodate."⁷⁷ For example, *Miami Herald* involved a regulation requiring newspapers to give equal reply space to those they editorially criticized.⁷⁸ In contrast,

⁷⁵ *State Broadcasters* at 6.

⁷⁶ *Enhanced Disclosure Order* at ¶9.

⁷⁷ *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 49 (2006) (comparing the Solomon Amendment's regulation of conduct with the true compelled speech violations in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)).

⁷⁸ *Miami Herald v. Tornillo*, 418, U.S. 241 (1974). Moreover, the Court recognized that due to economic realities, a newspaper could not infinitely expand column space to accommodate the replies. *Id.* at 256-57. In addition, since a website's capacity is much greater than a printed newspaper's column space, adding links to the public file should have no impact on a broadcast

(continued on next page)

here, the online posting requirement has no impact on the broadcaster's own message.

Broadcasters are free to say whatever they wish on their websites.

Just as “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed,” so, too, no abridgement of freedom of speech or press occurs by *requiring* conduct merely because that conduct is “in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.”⁷⁹

The conduct required by the online posting requirement is not the type of conduct warranting First Amendment protection. Such protection extends “only to conduct that is inherently expressive.”⁸⁰ As the Supreme Court recently noted, “[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.”⁸¹ Thus, because the new rule regulates *non-expressive conduct*, as opposed to speech, it does not invoke the protections afforded by the First Amendment.

III. Broadcast Petitioners' Burden Claims Are Greatly Exaggerated

The FCC correctly concluded that Form 355 provides the Commission and the public with “a better mechanism for reviewing broadcaster public interest programming and

(footnote continued)

stations own use of the website. Nor is *Riley v. Nat'l Fed. Of the Blind of N.C.*, 487 U.S. 781 (1988) applicable. See *State Broadcasters* at 5. That case, which involved a law requiring professional fundraisers to disclose to potential donors the percentage of charitable contributions collected, was triggered by a particular type of speech – i.e. charitable solicitations. Conversely, the online posting requirement is not triggered by any type of speech or particular content, and thus does not warrant First Amendment review, let alone strict scrutiny.

⁷⁹ *Rumsfeld*, 547 U.S. at 62 (citing *Gibony v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

⁸⁰ *Id.* at 66.

⁸¹ *Id.*

activities.”⁸² At the same time, completing the form “will not be unduly burdensome for licensees.”⁸³ Since television stations already need to keep records of their programming to complete the issues/programs lists and to bill advertisers, it is not unreasonably burdensome to require broadcasters to report this information in quarterly filings. Additionally, technology is already available to simplify the process. Two broadcast technology manufacturers have already created software that will automate Form 355 by using existing data stored in a station’s programming system and trafficking equipment.⁸⁴

Similarly, requiring broadcasters to make their public files available via the internet reduces the burden on the public and does not place an unreasonable burden on broadcasters. Many of the documents that make up the public file are already available online, either on station websites or on the FCC’s website.⁸⁵ In the *Enhanced Disclosure Order*, the Commission noted that “[almost] half the items that are required to be placed in a licensee’s public file are also available on the Commission’s website” and may be linked to in lieu of licensees posting such materials in their entirety on their own websites.⁸⁶ Other public file materials, such as public emails, joint sales agreements (if any), and time brokerage agreements (if any), are available or are readily available in electronic formats like *Microsoft Word*®. In fact the only substantive part of broadcasters’ public files not available in electronic format consists of letters from the

⁸² *Enhanced Disclosure Order* at ¶32.

⁸³ *Id.* at ¶34.

⁸⁴ For more information on the two manufacturers, XOrbit, Inc. (Columbia, MD) and BroadView Software (Toronto, Ontario), go to <http://www.xorbit.com> and <http://www.broadviewsoftware.com> respectively.).

⁸⁵ Examples of such documents include the license applications, ownership reports, equal employment opportunity files, *The Public and Broadcasting*, and contour maps.

⁸⁶ *Enhanced Disclosure Order* at n. 27 and ¶9-10.

public, which the Commission explicitly excluded from the online posting requirement.⁸⁷ In sum, the online posting requirement would remove a significant hurdle to accessing the public file while placing a reasonable burden on broadcasters.

Conclusion

For the foregoing reasons, CLC et al respectfully requests that the Commission deny the Petitions for Reconsideration submitted by the Broadcast Petitioners.

Of Counsel:
Kraig Jennett
Anthony Kim
Georgetown University Law Center
Law Student

Dated: May 30, 2008

Respectfully Submitted,

/s/ Angela J. Campbell

Angela J. Campbell, Esq.

Coriell S. Wright, Esq.

Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Andrew Jay Schwartzman, Esq.
Media Access Project
1625 K St NW
Washington DC 20001
(202) 232-4300

Counsel for Campaign Legal Center,
Common Cause, Benton Foundation, and
New America Foundation

⁸⁷ *Id.* at ¶25.