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for the reasons cited by those parties and those set forth herein, the calls for changes in the noncommercial studio waiver policies must be rejected.

Moreover, some comments filed in this proceeding suggest a content-based test to determine which stations are serving the public interest by requiring stations to all broadcast specific types of programming without which a station would be singled out for further scrutiny at license renewal time. Certain comments even would extend these requirements to noncommercial operators. Such rule changes could affect hundreds of stations licensed to nonprofit organizations, including various NPR affiliates, as well as state and national networks including those that focus on spiritual, religious or family-friendly noncommercial educational operations (like that of EMF). As set forth herein, the FCC cannot take any of the proposed actions without specific notice of the rule changes that it contemplates, and without adopting standards that will require the evaluation of the content choices of broadcasters, bringing the Commission into dangerous First Amendment territory by attempting to discriminate between broadcasters based on the content of the speech that they carry.

EMF is particularly concerned with some of the *ad hominem* attacks on its operations unjustifiably leveled in the Comments of Common Frequency, Inc [sic] Filed [sic] on behalf of Todd Urick (“Common Frequency Comments”). The Common Frequency pleading, at its heart, appears to suggest nothing more than a government-mandated dismantling of the operations of EMF (and presumably other broadcasters like it) simply to allow new entrants to appropriate the station opportunities that groups like EMF identified, cultivated, and developed. EMF and other successful noncommercial broadcasters have invested the manpower, time, and money to create programming that meets unique listener needs. The success of the efforts of EMF (and of networks like NPR and other statewide and national nonprofit broadcasters) is demonstrated by the support of their listeners, including support demonstrated by comments filed in this

proceeding.² Such successful services, backed by the listeners that they serve, cannot be endangered based on some ill-defined promise of “better local service.” The actions urged by Common Frequency cannot, consistent with the Commission’s rules and precedent or with the requirements of due process, be adopted by the Commission.

INTRODUCTION AND SUMMARY

Educational Media Foundation (“EMF”) was founded in 1982 to bring a positive, wholesome, message of hope over the airwaves, to be delivered in a professional manner and to appeal to a wide audience, with a particular emphasis on young families. The vision was to do this on a listener-supported basis, as a large number of advertiser-supported Christian music stations floundered, largely due to general market resistance to advertising on commercial stations with a Christian theme. Over the years, this kind of family-friendly programming thrived, particularly as the general market turned more and more to edgier content. Audiences realized the value of the programming not only to their particular family situations, but also to their communities at large. Requests came in from listeners to bring the programming to other areas, sometimes near and sometimes far as listeners moved out of the area, or visitors heard a K-LOVE station and requested a station be initiated in their part of the community. This kind of programming strikes a common theme throughout a wide variety of areas across the United States and has a wide appeal.

Now, as licensee of approximately 220 FM stations,³ EMF provides noncommercial broadcast services featuring family-friendly music programming, with news and informational

² See, e.g., the Comments of Bonnie J. Callman filed in this proceeding, demonstrating how EMF programming has touched the lives of its listeners.

³ EMF also is the licensee of 350 FM translators and one AM station, and has applied for a construction permit for another AM station as well.

content, that caters to unique needs of diverse communities across the country. Though much of the programming on many EMF stations may not originate in a given station's community of license, it nonetheless fills local needs of its audience, as witnessed by EMF's over 4.3 million weekly listeners. In its initial Comments, EMF indicated that, while it shares the interest of the FCC and of the public in ensuring that broadcasters serve the needs of listeners in the local markets where their stations are licensed, adopting specific FCC mandates controlling how each station meets those needs would constitute a 180-degree policy shift that "turn[s] back the clock on decades of deregulatory progress."⁴

EMF noted in particular that many "issues for Commission action" and rules proposed in the *NPRM* would marginalize the ability of broadcasters to decide for themselves how they can uniquely serve communities in which they are licensed. These proposals seem to suggest there are certain types of "local" and "public interest" programs that all broadcasters should offer, regardless of how they serve their communities of license in other ways and/or what local needs and desires other stations in the market satisfy. EMF questioned whether government can achieve localism objectives through "one-size-fits-all" rules, and objected specifically to the *NPRM*'s proposals that would revive formal ascertainment obligations, impose detailed reporting, public inspection file and disclosure requirements, create processing guidelines based on implicit duties to provide specific types of content, and reinstate the "main studio rule."⁵ EMF pointed out the many ways in which such regulation would be violative of the Administrative Procedure Act as an unexplainable break with precedent, and of the First Amendment rights of broadcasters,

⁴ EMF Comments at 2 (citing Letter from Reps. Mike Ross, Marsha Blackburn, *et al.*, to Hon. Kevin J. Martin, in MB Docket No. 04-233, Apr. 15, 2008; *NPRM*, 23 FCC Rcd. at 1327).

⁵ EMF Comments at 3 (citing *NPRM* at 1335-36, 1338-39, 1345-46, 1359, 1361, 1364-65, 1374-75, 1378-79; *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd. 1274, 1275, 1287, 1292 (2008)).

Comments at 18-29, and generally showed the folly of the FCC trying to make all “station[s] all things to all people, “because it makes no sense” to adopt rules that “clash[] with the reality of the radio market, where each station targets a particular segment.” *Comments* at 3 (quoting *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998)).

Central to EMF’s showing was rejection of the premise that only locally produced programming, created in consultation with designated individuals in every station’s community of license, is the sole or even best way broadcasters can serve local needs. Broadcasters already are driven by, if nothing else, self-interest to discern needs in their communities and to address them, so as to not become irrelevant to their audiences. All kinds of noncommercial broadcasters serve niche audiences with unique formats often ignored by commercial broadcasters. EMF provides such a service by offering family-oriented news, information and contemporary Christian music via the K-LOVE or Air-1 radio networks. Other noncommercial broadcasters do it in other ways, by targeting their own unique programming niche. Listeners value this programming – even if it does not comprise what is traditionally considered “local” in that it may not cover all aspects of local traffic, school boards, etc. – because it nonetheless addresses issues that listeners find just as vital to their lives and to their communities. EMF showed that, not only would the *NPRM*s proposals impose costs that would undermine rather than bolster locally responsive programming and ignore market forces that more organically signal local needs to licensees, they are paternalistically imbued with content-based preferences about what kinds of programming “should” be carried.

In initial comments, several groups, including Common Frequency and, to a lesser extent, Prometheus Radio Project (“Prometheus”), pick up on the *NPRM*’s theme of content-based mandates and advocate their own visions of which broadcasters are most deserving of regulatory largesse, based largely on the content they offer. Significantly, Common Frequency and

Prometheus both share EMF's reservations over some of the *same* proposals proposed in the *NPRM* that are unnecessarily costly and counter-productive, including the requirements for main studios within the boundaries of each station's city of license and the need for 24/7 manning of main studios.⁶ In addition, Common Frequency and Prometheus both support the use of studio waivers for noncommercial operations, though both contend that the policy should be reexamined and limited. Prometheus Comments at 5, Common Frequency Comments at 44. Yet both seek to impose specific requirements for public interest showings on broadcasters, with Common Frequency going so far as to propose a series of operational requirements that would have every broadcaster having to meet certain programming standards to avoid a license challenge, exceeding even the criteria that the FCC posed in the *NPRM*.

Common Frequency recommends that “[a]ll stations,” regardless of what the rest of their format may be or how they otherwise serve their communities of license, “should be accountable for a certain number of hours a week devoted to licensee-originated ‘local topics of community interest’” consisting of, among other things, programs featuring “local artists,” “community-specific entertainment/concert calendars,” “interview[s with] local community members” and other “local topics.” Common Frequency Comments at 53. But Common Frequency's comments are based on incorrect factual assumptions and an incomplete and misleading view of the reality of broadcast operations. Moreover, as EMF has already shown in this proceeding, such proposals are attempts to quantify the unquantifiable in trying to adopt specifics as to what it means to

⁶ See, e.g., Comments of Prometheus Radio Project (“Prometheus Comments”) at 2 (FCC “should consider alternative requirements for 24-hour staffing), *id.* at 3 (“the proposed [enhanced disclosure] requirement would be most burdensome for stations that broadcast a variety of local programming”); *id.* at 4 (proffering “interesting option in lieu of community advisory board”); Common Frequency Comments at 46-47 (“Changing the studio location by mere miles is not going to force a station to increase local coverage, nor will it allow the public to access the station any better.”); *id.* at 47 (“someone present at a station 24 hours a day will achieve no added benefit”). *But see id.* at 54 (advocating for advisory boards).

“increas[e] locally responsive programming,” *NPRM*, 23 FCC Rcd. at 1361, and any attempt to adopt specific regulatory obligations to mandate specific types of programming would impose substantial cost burdens and violate the First Amendment. Thus, these proposals must be rejected.

I. THE ADOPTION OF FCC RULES ON THE BASIS OF THE *NPRM*'S ASSUMPTIONS AND/OR ON CLAIMS SUCH AS THOSE ADVANCED BY COMMON FREQUENCY AND PROMETHEUS WOULD VIOLATE STATUTORY AND CONSTITUTIONAL LAW

The central conceit of Common Frequency's comments is that all broadcasters should be forced to broadcast programs that address the same specific issues that Common Frequency deems to be truly "local." Common Frequency recognizes that there are local issues that can be addressed through national programming such as that offered by EMF, NPR and others, yet it submits that all broadcasters must also address unique local issues or face having their licenses subject to challenge or their rights to operate restricted. While certainly there are some broadcasters who may choose to address very specific local issues in a community, there is a value-laden judgment that Common Frequency makes that this programming is some how more important than the local issues that are addressed by national or regional programming. In fact, these needs are just as important as the more granular issues, as is evident from the growing audiences enjoyed by services like that of EMF, or services provided by organizations such as NPR. The bottom line is, some "localism can be fulfilled solely by regional or national programming," *Common Frequency Comments* at 46 (original emphasis deleted, new emphasis added). As the regional or national programming sources admittedly address local needs, there simply is no need for "new rules concerning localism" to change that state of affairs.⁷

⁷ Common Frequency's accusation that EMF "does not support the Commission's efforts regarding diverse access" to new broadcast facilities is simply untrue. Just recently, for example, EMF noted in the LPFM proceeding that it is "willing to support future actions that would combine FM translator and LPFM filing windows for new stations," even if it involves "giving LPFM priority status in the selection of new facilities, while still allowing new translator service

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Common Frequency's position, at its most basic, is to advocate the displacement of existing licensees who do not meet the programming standards that it suggests. For example Common Frequency urges that incumbent broadcasters "should yield to new local content-savvy licensees" if they are "studio waived" and/or cannot increase what, in Common Frequency's narrow view outlined above, qualifies as "local content." Common Frequency at 30. It also would have shared-time arrangements forced on NCE licensees – even for those fully utilizing their frequencies round-the-clock – simply because Common Frequency would like to see a station used for what it considers in its own view to be higher purposes.⁸ Similarly, Common Frequency advocates that "[i]f a licensee owns multiple frequencies in a satellite community," over which it broadcasts what is derisively characterized as "redundant programming," the public "should be able to demand better use for the channels." *Id.* at 51. Of course, such "better uses" are only those that dovetail with Common Frequency's view of what every good broadcaster should do.

EMF is not blind to the fact that the radio dial is crowded, and that there are many who would like to join the ranks of broadcasters serving local communities across the country, including Common Frequency and its constituents.⁹ However, Radio ownership is not an

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in areas with little or no LPFM demand." Comments of EMF, In the Matter of Creation of a Low Power Radio Service; MM Docket No. 99-25, submitted April 7, 2008 at 5. However, what Common Frequency is talking about is the displacement of *already-licensed* facilities, and that is not only something EMF cannot support, as "existing service, already relied on by the public, must be preserved." Common Frequency also argues that EMF was the only party opposed to the ten-application limit in the most recent NCE filing window. In fact, that is simply untrue. Many other parties, including NPR and Minnesota Public Radio, opposed the 10 application limit.

⁸ Common Frequency at 20-21 (advocating that FCC adopt rules "requiring current broadcasters that don't provide any local programming to allow community members to utilize airtime for community affairs programming").

⁹ Common Frequency claims that EMF has been unwilling to cooperate with broadcasters who want to seek new noncommercial radio opportunities, citing a single instance in the Bakersfield, California area where EMF rejected a proposal to dismiss an increase in one of its station's facilities so that a new low power station in Mettler, California could be constructed.

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individual birthright. The government does not simply hand out an FCC license to everyone who may think that they want one. Instead, it requires careful planning and a significant financial investment to acquire a station, and an even greater investment to program one in a manner that will create an audience that can sustain the operation. Many of the stations that EMF has acquired have been troubled operations, started by individuals or groups who thought that they could run a radio station and receive financial support only to find that it simply is not as easy as it may seem. Licensees like EMF have undertaken the difficult and costly legwork of identifying available frequencies for their stations, prosecuting licenses through FCC procedures, securing antenna and transmitter sites, constructing stations, and developing compelling content that attracts and maintains a loyal following. The fact that there are others who may wish to begin radio operations now does not mean those who came before must simply yield or face displacement by regulatory fiat. And it is especially true that such displacement may not be based on mere assertions that some newcomer might do a better job programming the station—such claims are easy to make on paper, but much more difficult to pull off when marketplace realities set in. It would also create serious First Amendment tensions if the Commission attempted to make decisions as to who can best operate a station based on the respective claimants programming proposals. Congress long ago forced the FCC to abandon its comparative renewal policies, which discouraged investment and stability in the broadcast industry. Common Frequency’s invitation for *de facto* FCC reinstatement of that regime should be soundly rejected.

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Common Frequency does not inform the Commission that the new station would serve approximately 600 people, while the increase that EMF is being asked to forego would serve an additional 100,000 people. In fact, EMF has accommodated many applicants where there was a public benefit in doing so, even where EMF itself did not receive any benefit.

Proposals to displace existing broadcasters and/or to limit their ability to decide for themselves how best to serve their communities of license face insurmountable hurdles under the Communications Act, Administrative Procedure Act, and the First Amendment. As alluded to above, any notion of incumbent broadcasters “yielding” to what commenters like Common Frequency exalt as “new local content-savvy licensees,” because they promise to offer programming more palatable to “public interest” groups, is fundamentally incompatible with the stability in the industry which has developed since the FCC abandoned its comparative renewal process. Under that process as originally implemented, competing applicants could challenge a station’s license renewal application, and these applicant’s paper promises would be compared with the renewal applicant’s actual performance. As such paper promises are easy to make but difficult to enforce, the FCC was faced with many renewal challenges, which would take decades to resolve as they involved subjective judgments that could be questioned and challenged at every level of appeal. Eventually, the “renewal expectancy” concept was adopted, limiting this comparison of promises of new applicants versus performance of existing licensees. The expectancy favored the renewal of the existing licensee unless some serious underperformance could be shown, thus encouraging stability in the broadcast industry and the investment in programming and facilities that such stability facilitated. But even this standard proved hard to enforce, still leading to numerous protracted and expensive comparative license renewal proceedings – and it was abandoned by Congressional legislation in 1996. To bring back a practice of comparing promises versus actual performance would be to roll the clock back more than 30 years, to discourage stability and investment in the broadcast industry, and to penalize the broadcasters who have made significant investments in successful and popular broadcast operations – merely because someone has asserted that “I can do it better.”

Resting any proposed change in policy on changes to the Commission's long-standing main studio waiver policy,¹⁰ is a step not even proposed among the *NPRM*'s items for Commission action. Consequently, it could not be a lawful "logical outgrowth" of the *NPRM* as the Administrative Procedure Act requires, because rules cannot be an "outgrowth" of a void, which would be the case with any change to the main studio waiver policy in this proceeding.¹¹ Indeed, the manner in which an agency applies its rule "cannot be modified without the notice and comment procedure ... required to change the underlying regulation – otherwise, [it] could easily evade notice and comment requirements by amending a rule under the guise of reinterpreting it." *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999). Here, while the Commission proposed changes to its main studio rule, the *NPRM* is totally silent on the altogether different issue of noncommercial waivers of that rule – a practice that has been in effect for decades regardless of the requirements of the underlying rule itself. Moreover, even if the main studio waiver policy were considered to be fairly "on the table" under the *NPRM* (which it cannot), the FCC still must show there are "sound reasons for" departing from long-standing policies such as this, and "provide a reasoned analysis" for its departure there from.¹² This will be especially difficult in this case, where even proponents of the change question how much of an impact changes to main studio rules can have on the overarching goal here, *i.e.*, ensuring that "stations are airing a sufficient amount of community-responsive programming."¹³

¹⁰ See Common Frequency Comments at 24-27; Prometheus Comments at 5.

¹¹ See, *e.g.*, *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("The 'logical outgrowth' doctrine does not extend to a final rule that finds no roots in the agency's proposal because something is not a logical outgrowth of nothing[.]").

¹² *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2d Cir. 2007) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)).

¹³ *NPRM, passim, Cf., supra* note 6 (quoting Common Frequency Comments at 46-47 regarding merits of rules that might require "[c]hanging the studio location by mere miles");

While both Common Frequency and Prometheus admit that some studio waivers are beneficial, both suggest that some restrictions are necessary but yet neither proposes any revised standards by which such waivers should be governed. EMF submits that the current system is working exactly as it is supposed to by making possible the distribution of niche noncommercial programming to geographically dispersed audiences where it would not otherwise be received. EMF alone saves approximately \$20,000,000 a year that it would have to spend if it had to have a fully manned, operational main studio staffed 24/7 in each of its communities of license. While Common Frequency suggests that this service is provided to large markets where studios could be constructed and manned, in fact fully 109 of EMF's stations serve areas with populations within their 60 dbu contour of less than 100,000 people. Only 12 of its stations serve coverage areas of more than a million persons (and EMF operates studios in several of those larger markets). If EMF was not able to operate with studio waivers, many of those smaller communities would not get service, and many of the 4,000,000 plus people who listen to EMF programming each week would not be able to receive the service that they have come to rely on and enjoy. EMF believes, and the comments of other noncommercial broadcasters support, that other nonprofit broadcasters have found the waivers to be of similar value. Without demonstrating the harm that is created, or where any line should be drawn as to where waivers are good and where they are not, the Commission has no record on which to change its current policy.

Finally, the Commission could not adopt rules and/or policies on the bases that Common Frequency advocates without violating the First Amendment. EMF explained at length in its Comments how granting regulatory advantages to some licensees based on content-specific preferences like those Common Frequency and the *NPRM* advocate would violate the First

Amendment.¹⁴ In addition, EMF showed in the context of parties seeking special treatment in the LPFM proceeding – and it is equally true with groups seeking preferred treatment here– that FCC bestowal of favored status on parties based on their “local” character faces insurmountable First Amendment obstacles, regardless of whether it reflects promises to provide certain types of programming.¹⁵ If such favored status comes without assurances about what programming will ensue, it would be unconstitutional regulation favoring one speaker over another without a showing of how it advances any government objective; conversely, favoritism based on expectations that certain types of programming will be provided would be content-based regulation that is presumed unconstitutional.¹⁶

Although Common Frequency acknowledges that communities are entitled to “the full spectrum of cultures, ..., music, and community affairs programming,” there apparently is room in Common Frequency’s “spectrum” for only that programming in which its members find value. Common Frequency at 36. It is not at all shy in urging that “the FCC ... stipulate ...minimum

¹⁴ See EMF Comments at 24-29 (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940); *CBS, Inc. v. DNC*, 412 U.S. 94, 122 (1973); *Lutheran Church-Missouri Synod*, 141 F.3d at 353-4; *PIRG v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 637 (1994); *Accuracy in Media v. FCC*, 521 F.2d 288, 296-297 (D.C. Cir. 1975); *Community-Service Broad. of Mid-America v. FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978) (*en banc*); *MD/DC/DE Broad. Ass'n*, 236 F.3d 13, 19 (D.C. Cir. 2001)).

¹⁵ See EMF LPFM Comments at 15-17 (citing *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-643, 644-46 (1994) (“*Turner I*”); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225, 228 (1997) (“*Turner II*”); *Bechtel v. FCC*, 10 F.3d 875, 879-80 (D.C. Cir. 1993)).

¹⁶ See, e.g., EMF LPFM Comments at 15-6 (quoting, *inter alia*, *Rosenberger*, 515 U.S. at 828 and cases cited therein). Prometheus’ points-based, content-specific proposal is the same as that it offered in its comments on the *LPFM Second FNPRM*. Compare Prometheus Comments at 4, with Prometheus LPFM Comments at 14. The EMF LPFM Reply summarized that system, and explained why it would be unconstitutional if adopted into FCC rules or policy, and is incorporated by reference herein. See EMF LPFM Reply at 19.

local programming,” *id.* at 22-23, and that it should take the form of a “legal obligation to cover [] community-specific issues” in the so-called “white zone” demarcated by content *about* local matters that Common Frequency has taken it upon itself to designate for all listeners as being the most important programming broadcasters can offer.¹⁷ Of course, such FCC regulation based on “agreement ... with [its] message” is unconstitutional.¹⁸ Indeed, “common sense, not to mention the First Amendment, counsel against the [FCC] trying to decide what America should see and hear over the airwaves. Further, the ability to pick persons and firms who will be ‘successful’ at delivering any kind of services is a rare one, however success might be defined; that is why it commands generous rewards in the market.” *Bechtel v. FCC*, 10 F.3d 875, 886 (D.C. Cir. 1993).

Common Frequency manages to muster “respect” for the “quality public programming [] NPR provides” and for “free speech concerns of Christian broadcasters” if not for their programming itself. Common Frequency at 41. But at the end of the day, Common Frequency is simply saying there is other content it prefers and that the FCC should elevate to preferred status by granting inroads to putative licensees who offer it, while imposing regulatory burdens – up to and including displacement – on those who do not. Common Frequency speaks in terms of how hard it is for the Commission or the public to “get NPR to devote a show” to subject matters that NPR usually does not cover, or to “convince a Christian satellite broadcaster to broadcast a general non-Christian-themed Latino community affairs show.” *Id.* But it is not the FCC’s role to impose its will, or that of vocal public interest groups, on broadcasters’ editorial discretion. In

¹⁷ *Id.* at 46. See also *id.* at 50 (“licensees should devote a minimum number of hours to ... ‘white zone’ topics ... exclusive to the community of coverage”). Cf., Common Frequency at 20 (arguing that efforts such as KPRX’s “Kern Advisory Council” should receive preferential treatment over religious and public broadcasters).

¹⁸ *Turner I*, 512 U.S. at 642. When such “speaker-partial laws ... reflect,” as would what Common Frequency proposes here a “Government[] preference for the substance of what the

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fact, it is prohibited from doing so by Section 326, which establishes that “[n]othing in [the Act] shall be understood or construed to give the [FCC] the power of censorship over ... any radio station, and no regulation or condition shall be promulgated ... which shall interfere with the right of free speech by means of radio communication,” not to mention by the First Amendment.¹⁹ Broadcasters cannot possibly accommodate every interest group within every community that they serve. One would end up with programs being broadcast to audiences of one or two people, disenfranchising the vast majority of the listening audience. Broadcasters must be free to make the editorial decisions left by the First Amendment in their hands, unfettered by government mandates restricting this discretion.

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avored speakers have to say,” they “demand strict scrutiny” *id.* at 658, that such laws and regulations “rarely” survive. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion).

¹⁹ See, e.g., *PIRG v. FCC*, 522 F.2d at 1067 (expressing “doubts as to the wisdom of mandating ... government intervention in the programming ... decisions of private broadcasters”); *Anti-Defamation League v. FCC*, 403 F.2d at 172 (“the First Amendment demands that [the FCC] proceed cautiously [in regulating content] and Congress ... limited [FCC] power in this area”). Cf., *Lutheran Church-Missouri Synod*, 141 F.3d at 354 (conceptually, notions of “diverse programming” may be “too abstract to be meaningful” while a “content-based definition of the term may well give rise to enormous tensions with the First Amendment”).

What Common Frequency is suggesting in this regard should be met with great concern by any who hold the First Amendment in high esteem. Unless we are grossly misunderstanding – and we do not believe we are – Common Frequency is suggesting that the FCC should compel Christian broadcasters broadcasting in English to carry not only Latino community affairs shows based solely on market demographics, and not only non-Christian-themed programming some of the time, but programming as narrowly focused as “general non-Christian-theme Latino community affairs.” Common Frequency at 41. There is no doubt such programming may have merit to some audience members. But there also is no doubt that the Commission is powerless to force anyone to provide it when that is not the audience that their station targets. Moreover, there certainly is no basis for forcing a broadcaster like EMF to provide it if others in the market already are meeting that need. It is simply inimical to First Amendment values, and contradicts Common Frequency’s claim that it “respects ... free speech concerns.”

II. EMF UNDENIABLY SATISFIES IMPORTANT NEEDS FOR RESIDENTS OF EVERY COMMUNITY IT SERVES, REGARDLESS OF MISGUIDED ATTEMPTS TO DEVALUE RELIGIOUS AND CHAIN BROADCASTING

There is no merit to Common Frequency's broadside against EMF that "it is unclear [EMF] is providing any programming in terms of local public service to any of its [sic] satellite station communities." Common Frequency at 33. As Common Frequency itself notes, "the obligation of each broadcast licensee, commercial and non-commercial alike, is and always has been to serve the problems, need [sic] and interests of the communities in which it is licensed' regardless what kind of programming distribution (local station or network) the licensee has developed.'" *Id.* at 31-32 (quoting *Georgia State Bd. of Educ.*, 70 FCC.2d 948 (1979)). Nonetheless, it still asks "how does EMF serve localism in satellite communities from its small town California studios," *id.* at 40, when in fact the answer is simple.

As EMF has explained, even though its stations may not address every local event in a community, it does not mean that its stations do not serve their communities of license. Such stations must be meeting local needs and interest, or else they would not be garnering the audiences necessary for the stations to stay on the air. If there is demand for "local" programming that a given station does not offer, it will either lose listeners to competitors offering such programming, identify incentives to offer "local" programming no station in the market has, or replace programming that is not "local" with content that is and draw larger audiences. But so long as the audience continues to tune in to what the station offers, in numbers sufficient to support its programming, it cannot be said the station is not "airing programming ... responsive to the needs and interests of [its] communit[y] of license." *NPRM*, 23 FCC Rcd. at 1325. Some stations serve some needs for some individuals, while different stations serve others of those needs. Regardless of the desire of commenters like Common Frequency's to substitute what they view as "quality programming" in place of one or more incumbent offerings in areas with

“multiple religious and public broadcasters,” Common Frequency at 18, there is no doubt many listeners value the existing programming, and that it has relevance to their communities and how they live their lives there.

There is no reason to elevate some categories of interests, such as news or public affairs, over religion, sports, music, or other categories, in the name of ensuring favored types of content are available. If there is sufficient audience demand for any given type of programming, market forces will ensure it becomes available. The FCC should not override these organic forces based on notions of what types of content are – or should be – preferable to members of a community.

This is particularly so in the context of broadcasters like EMF, who proactively pursue one-to-one contact with audience members on a regular basis. The EMF Phone Ministry Team reaches out to listeners on a regular basis throughout the year, and the audience responds back, not only with financial support, but also with over 20,000 prayer requests a month. Phones are answered 24 hours a day by EMF staff, and it is not unusual for those on the verge of suicide to be aided by one of EMF’s full time pastors (even in the middle of the night). EMF is thus in regular contact with our listeners, and it makes a point of replying to each and every letter or e-mail that is received. Moreover, EMF calls each of its donors on a regular basis to see if EMF can help with any spiritual needs through prayer requests or other services, and to solicit information about the listener’s views of the programming of EMF stations. Clearly, EMF is in touch with its listeners.

In addition, as required under terms of EMF’s studio waivers, ascertainment is done in each community of license on a regular basis, and the results are used to develop public affairs programming that not only covers needs of national interest, but regional and local interest as well (local interest programming often runs just over a local station or group of stations). Its long-form “Closer Look” program airs weekly with short-form features running throughout the week. Community calendars are also featured over many of our local stations. And EMF is making more

efforts throughout its programming to make it customized to local and regional needs as financial resources and technology allow.

Common Frequency makes the same mistake as that which runs through the *NPRM* and this proceeding generally, *i.e.*, prejudging what programming will be “locally responsive.” As a threshold matter, as EMF noted in the *LPFM* proceeding, there is some ambiguity regarding what it means for broadcasts to be “local,” and Common Frequency unwittingly reinforces that point here. If the Commission simply means to require that some programming a community of license receives must *originate* locally, regardless of content, there is no guarantee it will include local politics, issues, news, etc. Conversely, if the Commission means that all broadcasters must touch on certain topics at some preset, FCC-dictated, minimum levels, it would constitute compelled speech in violation of the Act and First Amendment.²⁰ Common Frequency’s comments here incorporate the same disconnect, when it talks about “local-specific programming” in one breath (Common Frequency at 24) and “local-originated content” in the next. *Id.* at 30.

In any event, whatever those at Common Frequency (and the Commission) believe makes broadcasts “locally responsive,” it is ludicrous to claim “the FCC has given NCE licensees an exemption on any local public service requirement.” Common Frequency at 40. To the extent this reflects a belief that “[l]arger national networks rarely if ever tackle local issues... specific to individual communities,” *id.* at 24, that simply assumes – erroneously, for reasons already stated – that content generated at a distant source cannot speak to concerns held by a local populace. At some places in its pleading, Common Frequency itself acknowledges that such programming

²⁰ See EMF *LPFM* Comments at 12 (FCC “role in overseeing program content is limited by the First Amendment and Section 326 of the Act, which prohibit interfering with broadcasters’ free speech rights that afford the licensee broad discretion to choose the programming it believes serves the needs and interests of its audience”) (quoting *Infinity Media Corp.*, 23 FCC Rcd. 1820, 1821 (MB 2008)) (internal quotes and editing omitted).

addresses local needs – though perhaps not every need in the community. Nonetheless, Common Frequency suggests that only “specialized local programming” (whatever that means) serves the public interest. *Id.* at 24. But as already shown above (and as Common Frequency admits in its “gray area”/“white area” dichotomy), the religious and spiritual needs EMF serves, and the social interests other noncommercial broadcasters serve, are just as important to local audiences as programming *about* local affairs.

In this regard, what Common Frequency means in saying “[m]arket forces [] cannot always serve the public interest in broadcast localism standards,” Common Frequency at 6, is in reality that someone – the FCC? public interest groups? late-arriving would-be broadcasters? – should dictate what programming must be offered.²¹ Common Frequency’s whole “white area,” “gray area” “middle zone” model of localism is misguided. Common Frequency at 44-46. It wonders how “local issues [can] be addressed simultaneously with one general topic,” *id.* at 44, but then answers its own question by explaining there are some topics of universal interest – and thus of “local” import in most communities – such as “national news, *morality*, US economy, music, national stories, health, *religion*, culture ...” that satisfy many “local” needs. *Id.* at 45. Significantly, EMF’s programming addressed to the religious and spiritual needs of its audience is among the areas Common Frequency admits serve local needs. *See id.* Yet it vilifies EMF– and others such as NPR and network programmers – for perhaps not covering “city elections, community events, debates on city issues, local artists, city planning,” and similar matters. *Id.*

²¹ We note here that even Common Frequency’s fictional hypotheticals reflect unconstitutional content-based preferences, such as where Common Frequency suggests broadcasters who provide “local weather advisories, cover local elections, generate local news, and play local artists” and those that instead offer certain types of educational programming are somehow “unequal.” Common Frequency at 7. *Cf.* GEORGE ORWELL, *ANIMAL FARM*, 133 (New American Library 1996) (1946) (“All animals are equal, but some animals are more equal than others.”).

But if others in the community (including, in this online era, not only broadcasters, but non-broadcast outlets) cover these issues, they should not be forced on all broadcasters whose signals reach a locality. Every station cannot be expected to cover every issue within a community. It is redundant for all stations to try to reach all audiences, and impossible to reach the issues of every person within a community and still serve the needs of the majority of listeners. Radio is not a personalized medium, delivering an individual message to individual listeners. Instead, it is a mass medium, delivering a message to a broad audience. As such, station operators must make judgments as to what programming best serves the needs of the audience they serve. They cannot be faulted for not serving every need of every listener. In the same vein, other broadcasters should not be compelled to serve community interests in “morality,” spirituality, and “religion” that Common Frequency cites as serving local interests, if EMF or others like it satisfy those needs. Broadcasters must be given the discretion to choose the programming responsive to the audiences they serve, and not be compelled to broadcast programming that may otherwise be available, or that may not best serve the needs of their particular audience.

III. MANY FACTUAL PREMISES COMMON FREQUENCY RELIES UPON TO ATTACK EMF AND TO ADVANCE POLICY PROPOSALS IN THIS PROCEEDING DO NOT WITHSTAND SCRUTINY

While, as set forth above, Common Frequency’s pleading raises issues that conflict with statutory and constitutional requirements, the Commission should also be aware that its factual assumptions are themselves flawed, or unduly influenced by the results that it seeks. Among the points where Common Frequency is incorrect is in its threshold supposition that technology has progressed to a point that anyone with a computer can set up and run a radio station. Common Frequency at 6, 28. This supposition simply ignores the realities of operating a broadcasting station that will generate the listener support necessary to sustain its operations. Its supposition ignores the significant expenses incurred in operating real radio stations, rather than glorified and

FCC-blessed versions of pirate radio, including the engineering costs of identifying a suitable frequency, constructing a station with appropriate technical equipment, and maintaining that station in compliance with FCC rules and standards of good engineering practice. It ignores the costs of locating and paying for space for a tower and/or antenna. It ignores the costs of hiring personnel and paying related salaries, benefits, and costs for personnel to operate the station, hiring and paying someone to comply with regulatory minutia, and attracting, hiring and paying personnel to ensure there are sufficient revenues to afford the foregoing costs.²² Instead, Common Frequency suggests that a station can be operated by a “kid” with a computer. Perhaps, once a station has been authorized and constructed a “kid” with a computer could program it, though one wonders how such a station will accomplish the lofty public service goals that Common Frequency seeks. EMF has a staff of several hundred people to program its stations, keep their operations legal, and to reach out to its listeners. Will the kid with a computer be able to provide similar public service? We think not.

Next, Common Frequency’s claims “dangerous situation[s] where local emergencies cannot be adequately addressed” by what it deems “non-local program sources.” While its claims sound dire on paper, they do not reflect reality. Common Frequency at 21. Here, too, Common Frequency asks a question – “[h]ow can studio waived networks effectively react to local

²² Indeed, Common Frequency claims it “performed outreach to student and community groups before the October 2007 [NCE] filing window” but most of the groups “were unaware of the [] window, had no time to prepare (it takes months to years for student groups to receive permission from University officials, or colleges or state universities to change their by-laws to conform to the FCC point system), and had problems finding engineers and lawyers to help them file because those services were already booked.” Common Frequency at 19 n.16. These complaints by Common Frequency serve only to reinforce the hurdles that existing licensees had to clear to become broadcasters – broadcasters that Common Frequency casually dismisses in advocating for their displacement. Significantly, none of the cited problems were created by incumbent licensees like EMF, that Common Frequency would have the Commission nonetheless punish for the existence of obstacles to the acquisition of broadcast licenses.

emergencies in satellite communities?” – that also is easily answered. *Id.* at 40. As noted in the record on the *LPFM Second FNPRM* for all to see – weeks before comments were due here – EMF “is currently in the process of expanding its news department into a 24/7 operation, *with the capability of going on the air live on any station at any time ... to allow for immediate coverage of local emergencies.* EMF LPFM Comments at 13 n.19. Ancillary to this initiative, EMF contact information will be provided to local officials in each of its cities of license, and the news department will be working with its local regional managers and volunteers in order to facilitate timely information as necessary. *Id.*

In addition, K-LOVE and Air 1 stations air hundreds of Emergency Alert (EAS) announcements on a weekly basis, many relating to local weather emergencies and child abductions (“AMBER alerts”). Clearly emergency messages are getting through without the need for additional regulation. Advancements in technology now allow the K-LOVE and Air 1 News Department (with a fulltime staff of nine employees) to go live not only on the Networks, but also on individual stations or groups of stations as circumstances warrant. Regional news centers are also being developed in each time zone around the country. All these steps are being taken voluntarily by EMF, as finances and technology permit, so as to better serve its audiences. Government mandates to require such actions simply are not necessary.

Common Frequency also makes much of its market-by-market studies, which purportedly show the lack of local noncommercial programming in a number of broadcast markets. Yet these “studies” are clearly driven by the results that they seek and by the narrow definition of what a “local” station is. EMF notes that, in virtually all of the studies, local NPR affiliates are omitted, often totally, even from the list of noncommercial stations in the market, and always from those deemed by Common Frequency to be “local” stations. The very exacting criteria used by Common Frequency thus gives it the results that it wants – that there are few stations meeting its

own peculiar definition of “local.” It is also interesting that no mention is made of how these particular markets were selected. EMF seriously questions whether any scientific study would find these markets are truly representative – even by Common Frequency’s standards.

EMF can agree with Common Frequency, however, that there is a solution to frequency congestion that would not involve displacing the broadcasters who have already worked so hard to establish the service that they now provide to the public. With the DTV transition just months away, the FCC has a unique opportunity to reclaim Channel 6 for FM use, which would provide an outlet for many new broadcasters. In the upcoming comments in the Diversity Rulemaking, parties should take the opportunity to urge the Commission to make this reallocation of the spectrum to radio use. This will allow room for new entrants, without the statutory and constitutional issues that the proposals in this and other proceedings raise.

IV. CONCLUSION

As noted in EMF’s initial Comments, “[b]roadcasters have served their communities of license for decades, and are better positioned than any non-local competitor – or Washington, D.C. regulator – to determine what will best serve local interests,” EMF Comments at 30, and the same is true of so-called “public interest” groups wielding their own notions of what constitutes the “best” local radio programming. Any unwarranted disparagement of EMF aside, there simply is no basis for the Commission to adopt the formal-ascertainment/advisory board obligations, detailed reporting and public file requirements, and main studio rule reinstatement proposals in the *NPRM*, nor any of the content-based preferences or other proposals offered by any other commenters. Rather, the Commission should reject proposals that would only preclude

broadcasters from exercising their discretion to serve their communities of license the best way they know how, given their stations' resources and niche in the broadcast market.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

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