

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Broadcast Localism)	MB Docket No.04-233
)	
Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service)	MB Docket 99-325

To: Office of Secretary
Attention: The Commission

JOINT REPLY COMMENTS OF WOOD, MAINES & NOLAN, P.C.

On behalf of all those set forth in Addendum A hereto (the “Joint Reply Commenters”), Wood, Maines & Nolan, P.C., their counsel, hereby replies to all those submitting substantial Comments in the above-captioned matter (the “*NPRM*”).¹ The Comments submitted by the vast majority of participants in this proceeding suggest overwhelming opposition to the Commission's proposed changes in its localism Rules, and we concur in most of the objections set forth therein.

The opposition of many broadcasters echo the concerns identified by the Joint Reply Commenters with respect to four proposed changes in the FCC’s Rules, as follows: (1) to reduce flexibility in locating a main studio (the "Main Studio Proposal"), (2) to increase staffing burdens (the "Staffing Proposal"); (3) to impose a reign of Community Advisory Boards (the "CABs Proposal"); and (4) to mandate local production of some amount of programming (the "Origination Proposal"). We continue to oppose each of these, which we collectively reference below as the “Proposals.”

Most participants in the proceeding agree that the Commission has presented no factual basis for the Proposals and that the cost of regulatory compliance if these proposals are adopted

¹ *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218 (2008).

will greatly outweigh the unproven benefits that promulgation might obtain. These costs will disproportionately affect the same independent and small broadcasters who are already most responsive to local community concerns. Moreover, even for the largest of broadcasters, these costs will reduce resources that would otherwise be available for local community outreach efforts. Ultimately, the Proposals would decrease the ability of broadcasters to communicate effectively with their audiences. Finally, the Proposals cannot overcome the constitutional and legislative challenges that they will invite.

I. Decreased Flexibility in Locating Main Studios Is Extremely Burdensome.

The Main Studio Proposal ignores the many benefits that are derived the current policy that allows broadcasters to locate their main studio outside their communities of license. Some economically disadvantaged, small communities do not have the ability to support a main studio. The current main studio rule allows broadcasters licensed to these communities to continue to serve them from a main studio located outside the community of license.² To be competitive, a licensee must focus not only on its community of license, but on its entire service area.³

The Main Studio Proposal would disproportionately affect small market licensees.⁴ Many small broadcasters reported that adoption of the main studio rule would impose extensive financial burdens on them, such that they would be forced to shut down operations completely if the Main Studio Proposal is adopted.⁵ For those stations that might not face increased financial

² Joint Comments of Television Broadcasters, 20.

³ Comments of Fox Radio, 17, citing *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7295 (1960); *1965 Policy Statement*, 1 FCC 2d at 394; and *Policy Regarding Character Qualifications in Broadcast Licensing*, 87 FCC Rcd 836 ¶ 24 (1981).

⁴ Comments of Qantum Communications Corp., 6.

⁵ See, e.g., Comments of Marvin Glass (WGNQ), 1; KADO-LP, 1; Programmers Broadcasting, Inc., 2; and Summit Media Broadcasting, 2.

burdens, the proposed main studio rule would take away funding from local programming efforts.⁶ Such results can in no way be seen as improving broadcasters' service to their communities of license.

While there is considerable evidence of the negative impact the main studio rule would have on broadcasters, the FCC provides no evidence “that ‘location’ of a studio has any effect, whatsoever, on a licensee’s ability to successfully serve the needs of its community of license.”⁷ In fact, one Commenter attributes the Main Studio Proposal entirely to the testimony of a single person.⁸

Significantly, the Main Studio Proposal would reinstate a Rule that was rejected 20 years ago. The Administrative Procedure Act arguably prohibits such an effort to restore the old Rule as “arbitrary and capricious” after the passage of such a lengthy period and the failure to demonstrate any evidence that reinstating the Rule would serve the public interest.⁹

One party that supports the Main Studio Proposal cites as indicative conduct those events which followed a sale of a station in Edmonton, Kentucky, whereupon the new owner reportedly relocated the station's main studio some 50 miles away.¹⁰ Even if the new owner then failed to provide Edmonton with the exemplary, locally-focused service to which it had grown accustomed, the complaint is more likely attributed to the change in ownership than to the change in studio location. It is not argued that the new ownership provided coverage of

⁶ Comments of Holston Valley Broadcasting Corporation, 3.

⁷ Comments of Fox Radio, 17; *see also* Comments of Qantum Communication Corp., 5.

⁸ Comments of the Broadcaster Coalition, 25.

⁹ *See, e.g.*, Comments of CBS Corporation, 36.

¹⁰ Comments of Judy Crabtree, ¶2.

community issues facing residents 50 miles away to the exclusion of those in Edmonton.¹¹ Rather, this anecdotal evidence merely suggests that new ownership can result in a reduced, or a heightened, responsiveness to the local community; it depends on the new owner. In any event, the experience of one local station should not dictate a wholesale change in Commission policy to the detriment of broadcasters as a whole.

Another Commenter -- founded to promote public participation in broadcasting and supportive of greater scrutiny of the process of waiving main studio requirements -- nonetheless acknowledges that the Main Studio Proposal is unnecessary and "will not effectively increase localism."¹² This is a telling assessment.

II. The Staffing Proposal.

The Staffing Proposal is similarly assailed by the vast majority of participants in the *NPRM*. Again, the record reveals no evidence that the Staffing Proposal would advance the cause of "localism."¹³ Instead, the significant costs that independent, small broadcasters would incur in order to comply with the proposed Rule, along with technological developments that allow for unattended operation, evidence no need to revise the Commission's staffing requirements.

Several Commenters emphasized the devastating impact that the Staffing Proposal would have on small broadcasters. Forced 24-hour staffing of stations would cause many small stations

¹¹ *Id.*

¹² Comments of Common Frequency, 2, 46. "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.*

¹³ Comments of the National Religious Broadcasters, 12.

to simply shut down at night.¹⁴ The costs of employing additional staff and of operating a station overnight could not be justified.

Significantly, minority-owned and women-owned stations, as well as other small stations, would have strongly opposed the Staffing Proposal due to the harm it would pose to small broadcasters and, thus, to diversity of media ownership.¹⁵ Requiring overnight staffing would also eliminate funding for local programming.¹⁶

Finally, remote control and unattended Emergency Alert System equipment has virtually eliminated the need for 24 hour staffing. Commenters emphasized that the equipment has become "so reliable that late night and overnight staffing of radio stations is simply not required."¹⁷

III. "Ascertainment Revisited" Is Not A Justifiable Policy.

The Joint Reply Commenters shared an apprehension that the Community Advisory Board Proposal would prove no more effective than the failed policy "ascertainment." The vast majority of those filing Comments on the CAB Proposal likewise opposed the notion. Many pointed out that the Commission has already concluded that broadcasters need not ensure that "no [one] is left out" since each station's specialized programming for its own audience acts

¹⁴ Comments of Florida Public Radio, Inc., 4; Cromwell Group, Inc., 4; and Summit Media Broadcasting, 2.

¹⁵ See Comments of the Minority Media Council, 7. "Many of the proposals presented for comment would have a disproportional negative impact on minority broadcasters because of their relatively small size and limited access to capital." *Id.* at 1.

¹⁶ See Comments of ZGS Communications, Inc., 14.

¹⁷ Comments of IHR Education Broadcasting, *et al.*, page 15. See also Comments of Common Frequency, 47, arguing that requiring around-the-clock attendance would "achieve no added benefit." *Id.*

cumulatively to address more issues than could be addressed through a generalized “something for everyone requirement.”¹⁸

Some of those filing Comments emphasized the extraordinary burden faced by the agency “in justifying a decision to reinstate the very same type of regulation” it rejected almost 25 years ago.¹⁹ Others emphasized that the *NPRM* contained no attempt to satisfy this burden by showing that many stations in fact fail to communicate effectively with their communities,²⁰ or that CABs would impose less expensive costs than the unjustifiable burdens that the agency had rejected after the failed experiment with ascertainment.²¹ Still others filing Comments highlighted the undue burden on the regulator and the regulated alike when the door is opened to an influence on programming content by third parties ultimately outside the control of the broadcast licensees or of the broadcast licensing agency.²²

Among the Joint Reply Commenters, religious broadcasters in particular argued against compelling such licensees to subjecting their programming content to referenda. In fact, they asserted, religious broadcasters contribute best to true localism and diversity by providing programming that their own audience craves and is not receiving elsewhere.

¹⁸ See *Deregulation of Radio*, 84 FCC 2nd 968, ¶ 48 (1981); see also *Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Logs for Commercial Television Stations*, 98 FCC Rcd 1075 (1984).

¹⁹ Comments of CBS Corporation, iv-v.

²⁰ Comments of Ohio Association of Broadcasters, 3.

²¹ Comments of Belo Corp., 14-15. Significantly, Belo Corp. also points out that the FCC has already recognized that “[b]roadcasters do not operate in a vacuum and...it is in the economic best interest of the licensee to stay informed about the needs and interests of its community.” *Id.* at 6, citing *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order*, 98 FCC 2d 1076, 1100-01 (¶54) (1984).

²² Comments of Clear Channel Communications, Inc., 67, 70; and Qantum Communications Corporation, 10; and Walt Disney Company, 10.

At the very least, such broadcasters argued, noncommercial educational broadcasters, and religious broadcasters operating throughout the band, should be exempted from the requirement. This notion is consistent with one CAB supporter's confession that "it may not be feasible or desirable for the Commission to mandate a 'one size fits all' CAB requirement for all broadcasters."²³

Only a handful of the substantive Comments that were submitted actually favored the idea, speculating that CABs *might* empower the disenfranchised.²⁴ Such daydreaming does not comport to reality. Rather, as expressed in the Comments of the Joint Reply Commentators, the agency's proposed CABs ultimately would undermine the Commission's goal of promoting diversity of programming content.

IV. The CAB Proposal Is Constitutionally and Statutorily Problematic.

In their initial Comments, many of the Joint Reply Commenters also argue that the CABs would prove highly problematic from a constitutional (First Amendment) or statutory perspective (pursuant to the Religious Freedom Restoration Act, or "*RFRA*"²⁵). At least one secular noncommercial broadcaster²⁶ agreed with the many religious broadcasters²⁷ who weighed in with similar observations.

²³ See Comments of The Public Interest Public Airwaves Coalition, 23.

²⁴ See Comments of Common Frequency, 54; National Association of Black Owned Broadcasters, 5; Minority Media Telecommunications Council, 5; Judy Crabtree, 2; and Public Interest Public Airwaves Coalition, 20, 22.

²⁵ 42 U.S.C. §2000bb. Any "substantial burden" on religious exercise must be justified under strict scrutiny. See 42 U.S.C. §2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

²⁶ Comments of Florida Public Radio, 1. "On its face, the *NPRM*'s proposal to mandate methods for determining content exerts a chilling effect on the exercise of the rights of freedom of speech and of the press." *Id.*

One Commenter predicted that compelling Christian broadcasters to “take programming advice” from any “well organized group of atheists, abortionists or secular humanists” and would thereby “give Christian Radio’s opponents powerful new tools to harass and possibly silence” radio ministries.²⁸ Another noted that the FCC has come nowhere close to identifying a compelling governmental interest that would allow such a burden on religious broadcasters²⁹ and such “excessive entanglement” between religious and government actors in determining programming content.³⁰ Thus, at the very least, religious broadcasters must be exempted from any CAB regime.³¹

We have already shown that CABs would be “ascertainment revisited” and, as such, are impossible to justify. In any event, the First Amendment and RFRA problems posed by CABs make them much more troublesome than they could be worth.

²⁷ See, e.g., Comments of IHR Education Broadcasting, et al., 11. “[I]f the federal government cannot force a religious broadcaster to employ a person that does not hold the same religious beliefs, then it can’t force a broadcaster to broadcaster programs or materials that violate its religious beliefs.” *Id.* See also Comments of Religious Voices in Broadcasting, 2.

²⁸ Comments of Mid Atlantic Engineering Service of Utica, New York, 1.

²⁹ Comments of National Religious Broadcasters, 4, 8.

³⁰ *Id.* at 8-9.

³¹ Supplemental Comments of National Religious Broadcasters, 4. This would follow the precedent the agency set in promulgating Equal Employment Opportunity Rules that treat differently “the separate category of ‘religious broadcasters’” and that “has not created any definitional or administrative problems.” *Id.* at 5-7.

Conclusion

The majority of comments manifest the counter-productive impact of the Proposals in the context of the Commission's goal to foster increased responsiveness by broadcasters to local communities. Crippling regulations that threaten to eliminate independent small broadcasters will not increase diversity in programming, interaction between broadcasters and the communities they serve, or the accountability of broadcasters to these communities. Accordingly, the Commission should decline to adopt the Studio, Staffing, Community Advisory Board, and Origination Proposals.

Respectfully submitted,

JOINT REPLY COMMENTERS*

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* The Joint Reply Commenters are identified at Addenda A & B.

Joint Reply Commenters

Alpha & Omega Communications, LLC

Ted W. Austin, Jr.

Paulino Bernal

Paulino Bernal Evangelism

Butte Broadcasting Company, Inc.

Catholic Radio Apostolates,* as further identified in Addendum B

Consolidated Radio, Inc.

Fort Wayne Catholic Radio Group, Inc., dba “Redeemer Radio”

Guild of St. Peter Educational Association

Holy Family Communications

Inter Mirifica, Inc.

KASA Radio Hogar, Inc.

La Radio Cristiana Network, Inc.

Las Vegas Broadcasters, Inc.

Monterey County Broadcasters, Inc.

Pollack Broadcasting Co.

Pollack/Belz Broadcasting Company, LLC

Pollack/Belz Communication Company, Inc.

Saint Michael Radio, Inc.

SM Radio, Inc.

The Defenders of the Faith

United Communications Corporation

WDAC Radio Company

ADDENDUM B

Applicant	Community of License	FCC File # (BNPED-200710_____)		Applicant	Community of License	FCC File # (BNPED-200710_____)
601 Reed Road Corp.	Woodburn, IN	22AXF		Light of Life Community, Inc.	Morgantown, WV	22BOQ
Andy Valley Council	Greene, ME	18ARP		Marian Central Catholic H.S.	Harvard, IL	22BJW
BVM Helping Hands	Antioch, IL	22BJE		Ministry to Catholic Charismatic Revival	Bowling Green, OH	22BTV
Brazos Valley Coalition for Life	Hearne, TX	22AVC		Newman Central Catholic H.S.	Polo, IL	22BQP
Catholics in Action	UnionGap, WA	22ARP		Noll Club, Inc.	Rochester, IN	22AXS
Catholic Social Club of Putnam County TN, Inc.	Cookeville, TN	22BSO		Port Clinton Knights of Col. Home Assoc.	Sandusky, OH	22BMJ
Club 1915, Inc.	Edon, OH	22AXX		Roman Catholic Diocese of Portland, Maine	Scarborough, ME	18ATK
Columbus Home Association	Augusta, ME	18ASH 18ASU		St. Anthony of Padua Roman Catholic Parish	Greene, NY	22BON
Concordia Ministries	Picayune, MS	176789*		St. Edward Central Catholic H.S.	South Elgin, IL	22BPK
Congregation of the Servants of the Blessed Sacrament	Madison, ME	18AUI		St. Francis Xavier Gift Shop	Wenatchee, WA	22ARM
Dominican Monastery of Mary the Queen	Elmira, NY	22ARS		St. John Vianney Roman Catholic School	Lebanon, TN	22AQY
Divina Misericordia	Del Rio, TX	171738*		St. Mary's Hospital, Decatur	Oreana, IL	22BFD
Divine Mercy Broadcasting	Moses Lake, WA	22AAE		St. Michael's Church of Galena	Galena, IL	22BOZ
Father Pettit Home Association	Peru, IN	22AXI		St. Paul Center for Biblical Theology	Martin's Ferry, OH	22BDY
Fraternal Building Association, Inc.	Madawaska, ME	18ATC		Sancta Familia Academy, Inc.	Melbourne, FL	22BEH
Holy Family Communications	Leipsic, OH	22BSY		Sanford Fraternal Association	York, ME	18ARK
KC Club, Inc.	Bellefonte, PA	22BGP		Spirit & Truth, Inc.	Hatch, NM	22BJI
Kesan, Inc.	Summersville, WV	22AAU		Tyburn Academy	Fleming, NY	22ASI
Knights of Columbus, Inc.	Bath, ME	18ARF		Veritas Communications	Athens, MI	22AXJ
Knights of Columbus Home Association of Anderson, IN, Inc.	Chesterfield, IN	22AYD		(BOLD indicates a permit has been granted to the applicant already)		

* System failures by the FCC electronic filing system resulted in the submission of these applications, along with petitions for leave to file, on paper form after the closing of the electronic submission window. The FCC has not yet acted on the petitions for leave to file, and therefore no application file numbers are available. We therefore identify the applications by the FCC identification number assigned to each by the electronic submission system when the applications were prepared.