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their stations, and engaging in a media campaign designed to spread malicious and untruthful information, solely to promote the broadcasters' economic self-interest.³ Of the commenters opposing MusicFIRST's Petition, only the National Association of Broadcasters ("NAB") – which is admittedly coordinating the campaign against the PRA – attempted a coherent defense of the broadcasters' actions.

NAB describes the claims in MusicFIRST's Petition as "specious," "groundless," "false[]," "vague," "unsubstantiated," "illusory," "speculative," "conclusory," "unsupported," and "spurious."⁴ Yet the comments received by the Commission to date substantiate all of the facts set forth in MusicFIRST's Petition. Indeed, in response to the Commission's call for comments, certain broadcasters openly admitted that they are refusing to play music by artists who are members of MusicFIRST and that they have refused to air MusicFIRST's advertisements in support of the PRA.⁵ Others recounted specific instances in which artists or syndicated radio hosts who have spoken out in favor of the PRA have been threatened or

³ See, e.g., Comments of Paul Porter, Industry Ears, MB Docket No. 09-143 (Sept. 8, 2009) (describing specific misleading spots and acts of intimidation); Comments of Institute for Policy Innovation, MB Docket No. 09-143 (Sept. 8, 2009) ("As a public policy think tank that has studied tax policy ... for over 22 years, it is clear to us that to call royalty payments a 'tax' is purposefully misleading."); Comments of American Federation of Musicians, MB Docket No. 09-143 (Sept. 8, 2009) (describing broadcasters' boycott of artists who are members of MusicFIRST or who have spoken out in favor of the PRA as "tantamount to an employer threatening an employee for unionizing, demanding higher wages or otherwise trying to protect his or her civil rights—and using public resources under their control to do it"). These comments are just the tip of the iceberg. Numerous artists have told MusicFIRST that they will not openly share their stories in this proceeding for fear of additional broadcaster retaliation.

⁴ See Comments of the National Association of Broadcasters, at 1, 2, 32, 35, 38, 40, 41, 43, MB Docket No. 09-143 (Sept. 8, 2009) ("NAB Comments").

⁵ See, e.g., Comments of George Chambers, Owner-Operator of KXIT Radio, MB Docket No. 09-143 (Aug. 18, 2009) (stating that he "removed all songs of artists that are part of musicFIRST and will not play their songs for now" and noting that he only recently "reversed [his] decision not to accept ads by musicFIRST regarding the PRA").

silenced.⁶ Yet despite these accounts confirming exactly the conduct described in MusicFIRST's Petition, NAB employs an abundance of adjectives instead of an abundance of caution, choosing to obfuscate and distort the request for relief MusicFIRST's Petition, rather than work with the Commission to ensure that none of NAB's members are engaged in practices that violate their public interest obligations.

NAB spends the vast bulk of its response attacking straw man arguments never made, and, indeed, expressly disavowed by MusicFIRST. The number of pages NAB devotes to the issue notwithstanding, MusicFIRST reiterates that it is not "seek[ing] to revive the Fairness Doctrine or otherwise dictate programming choices by broadcasters."⁷ Thus, NAB's repeated invocations of the specter of revival of the Fairness Doctrine are irrelevant. NAB refuses to engage MusicFIRST on the merits of MusicFIRST's arguments that broadcasters are violating their public interest obligations by intimidating artists, boycotting MusicFIRST ads on their stations, and engaging in a media campaign designed to spread malicious and untruthful information, solely to promote the broadcasters' economic self-interest. Instead, NAB's defense appears to be that broadcasters are entitled to warp and stifle public debate on the issue of the PRA because increasing broadcasters' bottom line is itself in the public interest.

This is not the forum in which to debate the merits of the PRA legislation. But it is the forum to petition the Commission to ensure that broadcasters are meeting their public interest obligations and that they are complying with the disclosure requirements necessary to assess whether broadcasters are meeting those obligations. The record thus far shows that broadcasters

⁶ See, e.g., Comments of Paul Porter, Industry Ears, MB Docket No. 09-143 (Sept. 8, 2009) (describing numerous instances in which hosts of syndicated broadcast programs were threatened or instructed not to air any material supportive of the PRA); Comments of Music Managers Forum-US, MB Docket No. 09-143 (Sept. 8, 2009) (describing act of intimidation against artist).

⁷ Petition at 2, 15.

are not complying with their public interest obligations and are stifling debate on a matter of public importance. Additionally, it is clear that at least some stations are not complying with the public and political file rules essential to police their behavior. Particularly in light of NAB's halfhearted arguments that these rules may not even apply to its furnishing of anti-PRA spots to broadcasters for free, the Commission should *at minimum*, clarify that broadcasters must comply with this Commission's disclosure requirements when airing material about the PRA.

The concerns raised in MusicFIRST's Petition justify Commission action. As Commissioner Copps stated just last week, "We rely on our broadcast media for . . . public affairs programming essential to our civil dialogue, and for programming that . . . reflects the social and cultural diversity that comprises the great tapestry that is America. We have not been sufficiently attentive to this."⁸ MusicFIRST therefore reiterates its request that the Commission conduct a full investigation of the actions of broadcasters described in MusicFIRST's Petition, consider the results of the investigation in making license renewal determinations, issue declaratory relief, and take any other appropriate action to ensure such abuses cease. MusicFIRST again submits that the actions of broadcasters described in MusicFIRST's Petition support the calls for strengthening the license renewal process and shortening license terms in order to better ensure broadcasters' responsiveness to the public.

ARGUMENT

NAB's comments respond to a Petition for relief MusicFIRST never submitted. The very first sentence of NAB's response makes a complete caricature of MusicFIRST's position, stating that MusicFIRST "apparently wants the Commission to *prohibit* broadcasters from airing spots

⁸ See Testimony of FCC Commissioner Michael J. Copps, U.S. House Committee on Energy and Commerce Subcommittee on Communications, Technology, and the Internet, 4 (Sept. 17, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293510A1.pdf.

opposing the PRA; to *compel* them to air Petitioner’s spots supporting the PRA; and to play music by pro-PRA artists as a condition of holding a radio license.”⁹ Of course, none of that is true, so the time NAB devotes in its brief to assailing positions MusicFIRST has never taken is at best irrelevant.

First, MusicFIRST in no way wants the Commission to “prohibit broadcasters from airing spots opposing the PRA.”¹⁰ In its Petition, MusicFIRST made perfectly clear that it “respects the First Amendment rights of broadcasters to air their views in this debate.”¹¹ However, there are countervailing First Amendment interests also at work. The Supreme Court has repeatedly affirmed that “the Constitution protects the right to receive information and ideas” and that this right is “fundamental to our free society.”¹² Thus, MusicFIRST expects that when broadcasters air spots opposing the PRA, they will do so responsibly without distorting the truth and they will do so in compliance with all applicable rules regarding disclosure. As described in the attached Declarations, and more fully explored in Part II of these comments, it is clear that at least some broadcasters are not complying with these rules, and NAB’s attempt to excuse such practices suggests that they may be widespread. This has significant implications for how the Commission can measure whether a broadcast station is serving the public interest during license renewal proceedings.

Second, MusicFIRST does not want the Commission to “compel [broadcasters] to air [MusicFIRST’s] spots supporting the PRA.”¹³ MusicFIRST does not claim that broadcasters

⁹ NAB Comments at 2.

¹⁰ *Id.* (emphasis omitted).

¹¹ Petition at 2, 15.

¹² *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (collecting cases).

¹³ NAB Comments at 2 (emphasis omitted).

must be common carriers.¹⁴ Nor does it claim a “right of access to require broadcasters to air its advertisements concerning the PRA.”¹⁵ And clearly it is not asking the Commission to engage in “censorship.”¹⁶ However, MusicFIRST does ask the Commission to ensure that broadcasters are fulfilling their public interest obligations and not being “unreasonable or discriminatory in [their] selection of issues” presented to their listeners.¹⁷

Third, MusicFIRST is not asking that broadcast stations be required to “play music by pro-PRA artists as a condition of holding a radio license.”¹⁸ But it does ask that broadcasters cease engaging in a campaign of threats and intimidation against artists and others who have spoken out in favor of the PRA. Clearly such actions, as described by some commenters, are not in the public interest.¹⁹ The Commission has significant flexibility in deciding how to implement and determine whether a broadcaster’s obligations to serve the public interest have been satisfied.²⁰ The Supreme Court contemplated that one approach to deal with this issue would be to scrutinize a broadcaster’s activities during license renewal proceedings.²¹ The Commission should consider these principles in determining how best to proceed.

¹⁴ *See id.* at 11-12.

¹⁵ *Id.* at 13.

¹⁶ *Id.*

¹⁷ *In re License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993).

¹⁸ NAB Comments at 2.

¹⁹ *See, e.g.*, Comments of Paul Porter, Industry Ears, MB Docket No. 09-143 (Sept. 8, 2009) (describing numerous instances in which hosts of syndicated broadcast programs were threatened or instructed not to air any material supportive of the PRA); Comments of Music Managers Forum-US, MB Docket No. 09-143 (Sept. 4, 2009) (describing “act of intimidation” of an artist who spoke out in favor of the PRA by the general manager of WICB in Ithaca, New York).

²⁰ *See Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 122-23 (1973) (“DNC”).

²¹ *See DNC*, 412 U.S. at 110; *see also Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 n.2 (D.C. Cir. 1989) (“The Commission imposes a continuing obligation on licensees to operate ‘in the public interest’ via its power under 47 U.S.C. § 312(b) to issue cease-and-desist orders for failing to operate substantially as set forth in their licenses. The Supreme Court has made clear

As the foregoing demonstrates, NAB and other commenters have grossly mischaracterized MusicFIRST's position and the relief MusicFIRST has requested from the Commission.²² MusicFIRST seeks no more than to ensure that all broadcasters are complying with their obligations under the Communications Act to operate their stations in the public interest and that they are doing so in accordance with disclosure requirements meant to ensure that the Commission and the public can hold broadcasters accountable for their actions during license renewal proceedings. As the Supreme Court recently stated, “[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.”²³ Broadcasters are not free to ignore these obligations.

I. Broadcasters Are Not Free To Ignore Their Public Interest Obligations.

NAB offers a curious definition of the “public interest” in its comments. In response to MusicFIRST's contention that it is not in the public interest to stifle or warp public debate on an issue of great importance to radio listeners, NAB argues that in fact it should be entitled to present listeners with *only* warped anti-PRA views because “broadcasters’ interest in opposing the PRA is closely intertwined with their public interest mission” since “transferring station

that the Commission's authority to require continued operation ‘in the public interest’ may be either explicit in the conditions of license issuance or implicit in the FCC's authority under 47 U.S.C. § 312(a)(2) to revoke a license for conditions that would justify denial of an initial license, coupled with the statutory requirement that the public interest be served in granting and renewing licenses, *id.* at §§ 307(a) and (d).”

²² See also NAB Comments at 10 (describing the “ultimate relief envisioned” by MusicFIRST as “requiring radio stations to air pro-PRA spots and/or cease airing anti-PRA spots, forcing stations to play the music of artists vocally supporting the PRA, or denying license renewals to stations involved in the PRA debate”). It is troubling that in responding to a Petition requesting that the Commission address potential distortions and falsehoods disseminated by radio broadcasters about the PRA, NAB would employ distortions and falsehoods to describe the relief requested by MusicFIRST.

²³ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)).

dollars to record labels and artists” would “subvert ... stations’ ability to serve local communities through free, over-the-air broadcasting.”²⁴ According to NAB’s logic, more money in the pockets of broadcasters means broadcasters will be better able to serve their communities and, therefore, broadcasters should be entitled to stifle or warp any public debate if doing so would increase their bottom line. The absurdity of such a position is clear. NAB’s argument would give broadcasters free reign to completely monopolize the airwaves for their own financial gain.²⁵ In NAB’s view of the world, presumably, broadcasters could ignore or distort the national debate on health care reform if doing so might prevent broadcasters’ costs from rising.²⁶

In support of its new definition of the public interest (*i.e.* anything that is in the financial interest of broadcasters must be in the public interest since broadcasters serve the public), NAB spends several pages of its brief attacking the merits of the PRA legislation.²⁷ MusicFIRST does not believe that this is the forum in which to debate this issue and therefore does not respond to NAB’s histrionics or apocalyptic vision of what passage of the PRA would mean for radio

²⁴ NAB Comments at 4.

²⁵ Indeed, one commenter reports that Radio One Founder Cathy Hughes has aired more than 5,000 anti-PRA spots on 53 stations in 16 markets worth more than \$3 million. *See* Comments of Paul Porter, Industry Ears, MB Docket No. 09-143 (Sept. 8, 2009).

²⁶ Emblematic of the type of behavior that would be permitted under NAB’s view of a broadcaster’s public interest obligations are the comments submitted by the Parents Television Council. The Council expressed concern that broadcasters might “refus[e] to air further educational information, whether paid or unpaid, about parental control devices since programmers have a built in conflict of interest in implementing the TV Ratings system and the V-chip technology that is dependent upon them.” Comment of Parents Television Council, MB Docket No. 09-143 (Sept. 8, 2009).

²⁷ NAB Comments at 4-8. Ironically, NAB elsewhere accuses MusicFIRST of “seek[ing] to recruit the Commission as a participant in its lobbying and public relations strategy in support of the PRA.” NAB Comments, Executive Summary at 1. As is clear from its comments, it is NAB, and not MusicFIRST, which is attempting to engage the Commission on the merits of the legislation.

broadcasters.²⁸ MusicFIRST's point is only that the public interest is best served by a robust debate about the merits of the issues. NAB cannot credibly claim that broadcasters are entitled to stifle or warp a matter of public debate on the basis that doing so is itself in the public interest.

Nor can NAB credibly claim that broadcasters are entitled to stifle and warp the debate on the PRA on the grounds that MusicFIRST has alternative fora for its message.²⁹ Clearly an "alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"³⁰ The PRA is about changing the way that terrestrial radio stations do business. Therefore, the audience that MusicFIRST is understandably trying to reach is terrestrial radio listeners. It cannot reach its intended audience if broadcasters block access to these listeners. Under NAB's logic, there would be no need for spots about the transition to DTV to be carried by television broadcast stations, for example, because the Commission could put out its message on the internet or Facebook or Twitter. Clearly, the Commission would not do this because it needs to reach television viewers, not Tweeters.

To bolster its claim that broadcasters may rightfully stifle debate on the PRA, NAB points to "evidence" that MusicFIRST is nonetheless succeeding in disseminating its pro-PRA message despite being barred from terrestrial radio. This "evidence" consists of a showing that news references to the term "performance right" have increased in 2009 while references to the

²⁸ Likewise, MusicFIRST does not respond specifically to the comments of the Minority Media and Telecommunications Council or the American Women in Radio and Television, both of which simply oppose MusicFIRST's Petition because they oppose MusicFIRST's position on the PRA.

²⁹ *See id.* at 17-22.

³⁰ *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990); *see also, e.g., Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1225 (10th Cir. 2009) ("While providers could still conceivably contact the intended audience by indiscriminately broadcasting their speech to a larger audience, the speech was still impaired because the providers' preferred channel of communication was eliminated.").

term “performance tax” have risen only slightly.³¹ This is hardly surprising considering that the name of the legislation at issue is the “Performance Rights Act.” More importantly however, this “evidence” is completely irrelevant. MusicFIRST’s success in disseminating its message in alternative media has nothing at all to do with whether it is in the public interest for those who hold a radio license to deny MusicFIRST the opportunity to broadcast its message over this medium — the radio — to reach the target audience.

In further defense of its right to stifle and warp debate on the PRA, NAB repeatedly invokes broadcasters’ supposed Congressionally bestowed “widest journalistic freedom.” But this freedom is not without limits. NAB pointedly ignores that “Congress intended to permit private broadcasting to develop with the widest journalistic freedom *consistent with its public obligations*.”³² And the Supreme Court has stated that the Commission can and should intervene when “the interests of the public are found to outweigh the private journalistic interests of the broadcasters.”³³ “The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views *because of his private ends or beliefs*.”³⁴ Contrary to NAB’s claim that the Commission cannot consider the broadcasters’ actions at issue here in license renewal proceedings, the Supreme Court expressly held that “[l]icense renewal proceedings, in which the listening public can be heard, are a principal means of” regulating whether broadcasters are acting in “the interests of the public” or “private journalistic interests.”³⁵ Thus, *Columbia Broadcast Systems* – the central case upon which NAB relies – actually supports MusicFIRST’s position, not NAB’s. As this Commission has repeatedly

³¹ See NAB Comments at 17 and Attachment A.

³² *DNC*, 412 U.S. at 110 (emphasis added).

³³ *Id.*

³⁴ *DNC*, 412 U.S. at 111 (emphasis added) (quotation marks omitted).

³⁵ *Id.*; see also *Syracuse Peace Council*, 867 F.2d at 658 n.2.

reminded licensees, “[t]he licensee’s broad discretion over programming matters is, of course, limited by the broadcaster’s obligation to operate its station in the public interest. We have long held that the interest of the listening public is paramount to the private interests of the licensee.”³⁶

The Commission has warned licensees that it “will intervene in programming matters ... if [the licensee] is unreasonable or discriminatory in its selection of issues.”³⁷ As described in NAB’s Petition (and openly admitted by commenters), broadcasters are being blatantly discriminatory in their selection of issues by intimidating and boycotting artists and refusing to air any pro-PRA material.³⁸ This calls for investigation and action by the Commission.³⁹ It also calls for consideration by the Commission during license renewal proceedings.⁴⁰

³⁶ *In re Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, Memorandum Opinion and Order and Notice of Apparent Liability, 7 FCC Rcd 1503, 1507 (1992) (citing *KFKB Broad. Ass’n v. Federal Radio Comm’n*, 47 F.2d 670, 671 (1931)).

³⁷ *In re License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993).

³⁸ In defense of broadcasters, NAB cites a few examples of programming in which it claims that broadcasters have aired “both sides” of the PRA issue. See NAB Comments at 19 n.53. But all three of the radio broadcasts cited by NAB in footnote 53 of its comments occurred after MusicFIRST filed its Petition with the Commission, and the remainder of the examples consist of television coverage. As to the three stations that are supposedly covering “both sides” of the debate, one is a small gospel station, one is a news station, and the third is a university public radio station. None of the stations are owned by Radio One or Clear Channel, two of the station groups that have been actively placing spots against the PRA.

³⁹ NAB claims that it “seriously doubts the underlying premise of Petitioner’s argument that radio stations en masse are refusing to air its spots.” NAB Comments at 19. In support of this statement, it offers one anonymous example of an owner of a “mid-sized station group” and one declaration from the sales manager of WTOP-FM in Washington, DC, stating that he offered MusicFIRST the opportunity to advertise on his station. None of these alleged offers were received until after MusicFIRST filed its petition, which shows at most some positive impact from Commission scrutiny and offers further support for a Commission investigation. Moreover, as WTOP’s Mr. Goldstein’s declaration makes clear, MusicFIRST did not “turn down[.]” offers for advertising. Rather, MusicFIRST informed Mr. Goldstein that “MusicFIRST preferred to advertise when NAB is on the air.” NAB Comments, Attachment C, Goldstein Declaration ¶ 5. MusicFIRST had sought to reach radio listeners as part of a campaign in a number of cities

II. Broadcasters Are Not Free To Ignore Disclosure Rules Necessary to Ensure They Serve the Public Interest.

The Commission has recently begun consideration of “whether the current requirements for radio stations’ public inspection files are sufficient to ensure that the public has adequate access to information on how these stations are serving their communities.”⁴¹ NAB’s comments and MusicFIRST’s own independent investigation suggest that even the current rules are not being followed.

NAB is the chief lobbyist for the broadcasting industry and should therefore be intimately familiar with the disclosure rules governing its “advocacy” efforts.⁴² As described in MusicFIRST’s Petition, these efforts include making available to broadcasters several anti-PRA spots on NAB’s website at <http://www.noperformancetax.org/resources.asp>. Although NAB provides broadcasters with a public disclosure form on its website that it apparently “instructs” broadcasters to use when airing NAB’s anti-PRA spots,⁴³ it appears that at least some stations are not following NAB’s instructions. MusicFIRST investigated the public and political files of two area radio stations, WMZQ-FM and WITH-FM, both of which have aired spots against the

during the time that town hall meetings on the PRA were taking place. No radio stations accepted these ads.

⁴⁰ See Statement of Commissioner Michael J. Copps, Concurring in Part, Dissenting in Part, *In re Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1402 (2007) (stating that the FCC used to enforce a station’s public interest obligations by “requiring a thorough review of a licensee’s performance every three years before renewing the license” and opining that the “FCC needs to reinvigorate the license-renewal process”).

⁴¹ *In re Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, 22 FCC Rcd 10344, 10390 (2007).

⁴² See <http://www.nab.org> (“The National Association of Broadcasters is the premier advocacy association for America’s broadcasters. NAB advances radio and television interests in legislative, regulatory and public affairs.”).

⁴³ Comments of Radio Training Network, Inc., MB Docket No. 09-143 (Sept. 8, 2009).

PRA.⁴⁴ MusicFIRST found no record whatsoever of these broadcasts, and the stations' records revealed nothing at all about their PRA programming.⁴⁵ As another commenter stated, the disclosure rules are critical because "members of the public deserve to know who is paying (and being paid) to persuade them."⁴⁶

It is troubling that although NAB, the industry's chief lobbyist, repeatedly characterizes its spots and other advocacy in favor of the PRA as "political" speech and "lobbying efforts,"⁴⁷ it also argues that the very rules designed to ensure that broadcasters disclose the source of political advertising and on-air lobbying efforts do not necessarily apply to broadcasters. As shown below, these rules do apply, and NAB's weak attempt to excuse noncompliance suggests that such practices may be widespread. Thus, at minimum the Commission should clarify that broadcasters must comply with the public and political file rules in airing material about the PRA.

Under the Bipartisan Campaign Reform Act ("BCRA"), all radio licensees are required to "maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that ... communicates a message relating to any political matter of national importance, including ... a national legislative issue of public importance." 47 U.S.C. § 315(e). NAB halfheartedly suggests that broadcasters need not comply with BCRA's record-keeping requirements if they air NAB's spots free of charge, since BCRA "on its face, applies only to the 'purchase' of broadcast time."⁴⁸ But as its dictionary definition makes clear, "purchase" does not

⁴⁴ See Declaration of Monique Goubault (Attachment 2) and Victoria Sheckler (Attachment 3). These are the only two stations MusicFIRST investigated.

⁴⁵ See Declaration of Brookes Brown (Attachment 1).

⁴⁶ Comments of Free Press, MB Docket No. 09-143 (Sept. 8, 2009).

⁴⁷ NAB Comments at 25-35.

⁴⁸ *Id.* at 37.

necessarily require the payment of money.⁴⁹ And the Commission has long held that providing material for free as an inducement to air the material is essentially equivalent to paying for air time.⁵⁰ Allowing broadcasters to escape their reporting requirements in this way would be completely contrary to the purpose of BCRA's recordkeeping requirements. Indeed, in examining their constitutionality, the Supreme Court noted that these "recordkeeping requirements seem likely to help the FCC determine whether broadcasters are carrying out their obligations to afford reasonable opportunity *for the discussion of conflicting views* on issues of public importance."⁵¹ If broadcasters are evading the recordkeeping requirements by stating they are not actually "purchasing" NAB's spots, the Commission's ability to evaluate broadcasters' compliance with their public interest obligations during license renewal proceedings is completely undermined. The Commission should clarify that BCRA is meant to cover this situation.

Moreover, the anti-PRA NAB sports aired by broadcasters are indisputably "furnished" to them by NAB and therefore fall within the disclosure obligations imposed by 47 C.F.R. § 73.1212(e). The fact that the station records MusicFIRST has investigated to date do not contain the records required by 47 C.F.R. § 73.1212(e) is troubling to say the least.⁵² Yet NAB

⁴⁹ See <http://www.merriam-webster.com/dictionary/purchase> ("to obtain by paying money *or its equivalent*; to obtain by labor, danger, or sacrifice").

⁵⁰ See, e.g., *In re Violation by Gaylord Broadcasting Co. Of Sponsorship Identification Rule*, 73.1212(d), 67 F.C.C. 2d 25 (1977).

April 20, 1977

⁵¹ *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 240 (2003) (internal quotations marks and citation omitted; emphasis added).

⁵² Under 47 C.F.R. § 73.1212(e), broadcasters must maintain for a period of two years "a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation" for any entity "paying for or furnishing" broadcast material that is "political matter or matter involving the discussion of a controversial issue of public importance." No such lists were found in the records of the stations MusicFIRST investigated. See Declaration of Brookes Brown (Attachment 1).

argues that broadcasters need not comply with 47 C.F.R. § 73.1212(e) so long as material was not officially “furnished” to them, and that broadcasters can also escape the provision’s reach so long as they make a “good faith judgment” that pro-PRA material is not really about a “controversial issue of public importance.”⁵³ NAB appears to believe that if it simply makes available information on its website and broadcasters choose to use that material and to characterize it as an “editorial, news story, announcement, or a station-produced spot featuring station personnel,” then NAB has not “furnished” material within the meaning of the regulation and broadcasters are off the hook.⁵⁴ But that is completely contrary to decades of Commission policy. “Where an individual or group produces a program and provides it free of charge to a licensee the Commission has stated that it is obvious that the material furnished by the [program’s producer], at considerable cost to it and no cost to the stations, was made available by the association with the expectation or hope that it would be presented by the stations to which it was supplied . . . i.e., as an inducement to the stations to present this particular material” and such material is therefore subject to the requirements of 47 C.F.R. § 73.1212.⁵⁵ NAB cannot and should not suggest that broadcasters can avoid their recordkeeping obligations by parsing the word “furnished.”

A broadcaster, “through use of a radio license, ‘has elected to occupy a forum that is not only distinctly public in character, but one of a limited number of such public forums,’ and ‘subjects itself to public interest obligations.’ These public interest obligations include the responsibility to comply with [the Commission’s] rules and incurring the consequences of not

⁵³ NAB Comments at 37-38.

⁵⁴ *Id.* at 37.

⁵⁵ *In re Violation by Gaylord Broadcasting Co. Of Sponsorship Identification Rule, 73.1212(d)*, 67 F.C.C. 2d 25, 26 (1977) (alterations in original; internal quotation marks omitted).

doing so.”⁵⁶ By ignoring the public file requirement and/or labeling their opposition to the PRA as “public service announcements,” broadcasters are completely undermining the purpose of the Commission’s requirements, which are “to provide the public with timely information at regular intervals throughout the license period.”⁵⁷ MusicFIRST thus requests that the Commission investigate the actions of broadcasters who are not complying with their public and political file requirements and that it clarify that a station must comply with 47 U.S.C. § 315 and 47 C.F.R. § 73.1212 with respect to the material it airs on the PRA. Otherwise, the Commission and the public will be at a significant disadvantage during license renewal proceedings when assessing whether broadcasters are fulfilling their public interest obligations.

III. Broadcasters Are Not Free To Engage in Distortion or Intimidation.

In response to the incidents detailed in MusicFIRST’s Petition involving deceptive advertising and artist intimidation, NAB replies that an investigation of such incidents would require the Commission to become the “national arbiter of the truth” and would “entangle the Commission in reviewing stations’ day-to-day programming.”⁵⁸ Once again, NAB has chosen to mischaracterize rather than confront the issues presented by MusicFIRST’s Petition. MusicFIRST does not seek some new role for the Commission in screening political advertisements or reviewing stations’ playlists. Rather, MusicFIRST asks that the Commission investigate the actions of broadcasters alleged in its Petition and that it remind broadcasters that the public interest is not served by deceptive political advertising or by intimidation.

⁵⁶ *In re Greenwood Acres Baptist Church Licensee of AM Broadcast Station KASO Located in Minden, Louisiana*, Memorandum Opinion and Order, 22 FCC Rcd 1442, 1449 (2007) (quoting *Faith Center, Inc.*, Memorandum Opinion and Order, 82 F.C.C. 2d 1, 13 (1980)).

⁵⁷ Letter from W. Kenneth Ferree, Chief, Media Bureau, to Capstar TX Limited Partnership c/o Dorann Bunkin, Esq., 18 FCC Rcd 20,195, 20,196 (2003).

⁵⁸ NAB Comments at 25-31.

The Commission requires that broadcasters “take very seriously their responsibility to inform their viewers and listeners about political issues.”⁵⁹ When a broadcaster presents deceptive advertising or editorializing about political issues, it is violating this responsibility. As detailed in MusicFIRST’s Petition, broadcasters are doing just this. Although NAB spends several pages of its response closely parsing the various dictionary definitions of “tax,” and calculating (all the way to a tenth of a percentage point) the ownership interests of various record companies in order to show the supposed “truth” of its PRA coverage,⁶⁰ it fails to confront the essential problem — warping the presentation of a public debate is not in the public interest. While it is true that the Commission is generally not in the business of policing deceptive advertising (leaving this task to the Federal Trade Commission), the Institute for Policy Innovation has pointed out “the uniqueness of this issue in that the broadcasters have a unique and specific pecuniary interest in a specific legislative issue.”⁶¹ Thus, this situation calls for “unique treatment by the FCC.”⁶² It is regrettable that NAB persists in defending its misleading spots rather than acknowledging broadcasters’ public interest obligations.

Likewise, NAB gives only a passing nod to some of the most serious allegations of MusicFIRST’s Petition — that broadcasters are engaging in a boycott of artists who have spoken out in favor of the PRA, refusing to play their music on the air and intimidating or harassing them.⁶³ NAB suggests that it would be too much trouble for the Commission to investigate such

⁵⁹ *In re Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1353 (2008).

⁶⁰ NAB Comments at 28-30.

⁶¹ Comments of Institute for Policy Innovation, MB Docket No. 09-143 (Sept. 8, 2009).

⁶² *Id.*

⁶³ NAB apparently believes that such blatantly anticompetitive actions are shielded by the *Noerr-Pennington* doctrine. See NAB Comments at 32-35. But that doctrine is completely inapposite. The *Noerr-Pennington* doctrine is meant to protect the rights of an industry to collectively petition its government. NAB cannot possibly claim that encouraging broadcasters to act in

allegations as it could involve the Commission in questions such as “whether a station reduced its airplay of songs by certain artists, [or] whether a station has aired the music of an artist supportive of the PRA a sufficient number of times.”⁶⁴ That is absurd. Where a broadcast station openly admits (as some have)⁶⁵ that it is boycotting the music of pro-PRA artists, administrative inconvenience to the Commission is not a viable response from NAB.⁶⁶ To be clear, MusicFIRST does not ask that a radio station be required “to play music by pro-PRA artists as a condition of holding a radio license.”⁶⁷ It does ask that a radio station be prohibited from intimidating artists for speaking in favor of the PRA.

As the Commission recognized, “substantial First Amendment interests are involved in the examination of speech of any kind.”⁶⁸ Contrary to NAB’s view, however, these First Amendment interests do not belong only to broadcasters. The public has a First Amendment “right to receive information and ideas.”⁶⁹ And artists have a First Amendment right to speak out on a political issue and to associate themselves with others in their advocacy efforts. The broadcasters’ boycott of artists on the basis of their “political belief and association” with the

concert to refuse MusicFIRST’s advertisements and to boycott artists who support the PRA qualifies as “petitioning one’s government.” Again, MusicFIRST does not suggest that broadcasters do not have the right to “influence the passage of enforcement of laws.” *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1965). But they must exercise this right without engaging in anticompetitive conduct such as boycotts.

⁶⁴ NAB Comments at 27 n.72.

⁶⁵ See, e.g., Comments of George Chambers, Owner-Operator of KXIT Radio, MB Docket No. 09-143 (Aug. 18, 2009) (stating that he “removed all songs of artists that are part of musicFIRST and will not play their songs for now”); see also Petition at 2.

⁶⁶ Nor is it enough to point, as NAB does, to the fact that one leading proponent of the PRA (Will.i.am of the Black Eyed Peas) “continues to enjoy vast amounts of free radio airplay.” NAB Comments at 42. Although certain high-profile artists may not (yet) have become the target of a broadcaster boycott due to the popularity of their music, less high-profile artists justifiably fear speaking out in favor of the PRA since the cost could be losing a chance for airtime.

⁶⁷ NAB Comments at 2.

⁶⁸ Notice at 1.

⁶⁹ *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (collecting cases).

MusicFIRST coalition strikes at the “core of those activities protected by the First Amendment.”⁷⁰ While broadcasters’ First Amendment rights to play the programming they want should be protected, broadcasters should not be permitted to use the airwaves under their control to suppress the speech of others outside of the airwaves. As one commenter described it, the actions of broadcasters in threatening and boycotting artists for exercising their First Amendment right to speak out in favor of the PRA is “tantamount to an employer threatening an employee for unionizing, demanding higher wages, or otherwise trying to protect his or her civil rights—and using public resources under their control to do it.”⁷¹ The Commission should issue a declaratory ruling that such actions are not consistent with a licensee’s public interest obligations.

CONCLUSION

For the foregoing reasons, the Commission should investigate the actions of broadcasters described in MusicFIRST’s petition and declare them contrary to the public interest. The Commission should also take this conduct into account in assessing license renewal applications, and consider other relief as may be appropriate.

⁷⁰ *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

⁷¹ Comments of American Federation of Musicians, MB Docket No. 09-143 (Sept. 8, 2009).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Feder', is written over a horizontal line.

Samuel L. Feder

Jessica Ring Amunson

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Suite 900

Washington, DC 20001

(202) 639-6000

Attachment 1

Declaration of Brookes Brown

DECLARATION OF BROOKES BROWN

1. My name is Brookes Brown. From May 26th to August 28th, 2009 I worked as a Law Clerk at Jenner & Block LLP.
2. On August 21, 2009, I visited the offices of WMZQ-FM and WITH-FM. These offices are located at 1801 Rockville Pike, Rockville MD, 20852. At these offices, I asked to view the public and political files of both of these radio stations.
3. Upon request, I was escorted to a computer that contained what I was informed were all of the relevant public and political records. The records were divided by radio station. Within the records for each radio station files were subdivided by general topic. Listed topics included Authorizations, Applications, Citizens' Agreements, Contour Maps, Ownership Reports, EEO filings, The Public & Broadcasting, Public Comments, FCC Investigations, Quarterly Reports, Local Public Notices, Time Brokerage, Joint Sales, and several categories specific to television broadcasting. The files were not marked by date.
4. I asked if there was a category of records relating to national legislative issues of public importance. The woman who assisted me informed me that she was unaware of any such category of records.
5. I examined the records of both radio stations to determine if any of the files listed related to issues of national public importance generally or the Performance Rights Act specifically.
6. After determining that files listed as Applications, Authorizations, Citizens' Agreements, EEO filings, Ownership Reports, and Contour Maps, as well as those relating to television broadcasting (in regards to which both radio stations had no files), and The Public and Broadcasting, did not contain relevant information, I focused on the categories of Political Records, Quarterly Reports, and Local Public Notices. WMZQ had no local public notices. The station's political records related only to Senator McCain, President Obama, and Terry McAuliffe. They also listed two "Issue Advertising" spots. The first spot related to "Let Freedom Ring." It had a start date of September 8th, 2008 and an end date of September 21, 2008. The second spot was purchased by the American Federation of Teachers. The start date for that spot was February 5, 2008 with an end date of February 11, 2008. I examined the Quarterly Reports for WMZQ for the period from January 1, 2009 to June 30, 2009, the latest date available in the records. The Quarterly Report for January 1 to March 31, 2009 included topics in politics/government, employment, population/culture, health, education, economics/business, public safety, environment, and transportation. The Quarterly Report for April 1 to June 30, 2009 included topics in population/culture, health, economics/business, public safety, politics/government, employment, transportation, education, environment, and housing/homelessness. None of the information listed in these records related to the Performance Rights Act or royalty rates.
7. WIHT had no local public notices. The station's political records related only to President Obama and Senator McCain. The Quarterly Reports were very similar to those of WMZQ. The general categories covered were the same, with minor distinctions in the topics.

For example, in the April 1 to June 30, 2009 Report under Population/Culture, WITH included as a topic the gay pride celebration, and under Health, WITH included as a topic the National Kidney Foundation and the foundation's local event. In the January 1 to March 31, 2009 report WITH included additional sections on medications and children, and on flu vaccine dangers. None of the topics listed related to the Performance Rights Act or royalty rates.

8. In conclusion, I found nothing in the public or political files of either station related to the Performance Rights Act or royalty rates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of August, 2009.

A handwritten signature in cursive script that reads "Brookes Brown". The signature is written in black ink and is positioned above the printed name.

Brookes Brown

Attachment 2

Declaration of Monique Goubault

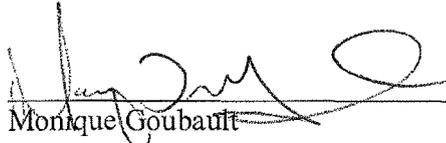
DECLARATION OF MONIQUE GOUBAULT

1. My name is Monique Goubault. I am an employee of the Recording Industry Association of America. I was asked by the musicFIRST coalition to let the coalition know if I heard any anti-performance rights spots on radio.

2. On August 13, 2009, I was listening to station WITH-FM, 99.5, and heard them play a spot against the performance rights initiative. It was substantially similar to or the same as one of the National Association of Broadcasters ("NAB") sponsored spots that are available at <http://www.noperformancetax.org/resources.asp>. I believe I had heard WITH-FM, 99.5 play similar spots earlier this year, but cannot recall the specific dates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of September, 2009.


Monique Goubault

Attachment 3

Declaration of Victoria Sheckler

DECLARATION OF VICTORIA SHECKLER

1. My name is Victoria Sheckler. I am an employee of the Recording Industry Association of America. I was asked by the musicFIRST coalition to let the coalition know if I heard any anti-performance rights spots on radio.
2. On July 30, 2009 at approximately 8:50 am, and again on July 31, 2009, I was listening to station WMZQ-FM, and heard them play a spot against the performance rights initiative. It was substantially similar to or the same as one of the National Association of Broadcasters ("NAB") sponsored spots that are available at <http://www.noperformancetax.org/resources.asp>.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23 day of September, 2009.



Victoria Sheckler