



October 19, 2011

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington DC 20554

Re: Notice of Ex Parte Communication in MM Docket No. 00-168

Dear Ms. Dortch:

On October 17, 2011, Jane E. Mago, Jerianne Timmerman and the undersigned of the National Association of Broadcasters (NAB), met with Erin McGrath of the Office of Commissioner Robert McDowell.

During the meeting, we discussed the Commission's plans to consider, at its October meeting, an *Order on Reconsideration* of the 2007 Enhanced Disclosure Report and *Order and a Further Notice of Proposed Rulemaking* ("FNPRM") proposing to replace television broadcast stations' public files with online public files.<sup>1</sup> We also discussed issues raised by certain proposals recently made in the record in this proceeding.<sup>2</sup>

We expressed some concerns about certain aspects of the online public file proposal, noting that the political file must be frequently updated, particularly during the flurry of activity close to an election day or other periods of intense campaigning. NAB believes that developing a system of uploading, organizing, and ensuring timely online access to the political file presents a significant challenge. Such a plan would have to be implemented in a manner that is robust and reliable, yet not unduly burdensome for

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<sup>1</sup> See *FCC Announces Tentative Agenda for October Meeting*, Press Release (Oct. 6, 2011).

<sup>2</sup> See Letter to Julius Genachowski, Chairman, Federal Communications Commission from Angela Campbell and Andrew Jay Schwartzman, counsel to the Benton Foundation, Campaign Legal Center, Common Cause, Free Press, Media Access Project, New America Foundation, and the Office of Communication, Inc. of the United Church of Christ (collectively the "Public Interest Public Airwaves Coalition" or "PIPAC") (filed Aug. 4, 2011 in MM Docket No. 00-168) ("PIPAC August Ex Parte") at 5.

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broadcast licensees. We noted that the Commission wisely chose to exclude stations' political files when it previously adopted an online public file requirement.<sup>3</sup>

NAB representatives also stated that, to the extent that the Commission is considering proposals to require the online public file to contain new information that is not currently in the file, such as sponsorship identification information or additional contracts,<sup>4</sup> it should ask balanced questions regarding both the potential benefits and burdens of such proposals, and should develop a complete record regarding whether there is a need for such additional information.

We also observed that some parties have proposed a reporting system under which broadcasters would identify and provide information about programs that meet certain criteria.<sup>5</sup> We understand that that the Commission is considering commencing a new proceeding to develop a reporting mechanism that would update the current system of quarterly issues/programs lists. NAB representatives stated that the Commission should be particularly cognizant of the potential burdens on licensees<sup>6</sup> and First Amendment issues<sup>7</sup> that could be raised by any new reporting system focused on FCC-specified categories of programming. We cited the complexity of the legal issues

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<sup>3</sup> See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 15 FCC Rcd 19816 (2008) at ¶¶19-20 (“Resources available to political candidates likely provide them with greater access to the station and distinguish them from members of the general public who will benefit from ready access to Internet posting of other parts of the public file. Political candidates and campaigns make heavy use of the file and require quick access to material, and if the volume of material is too great, the station may not be able to update the Internet file quickly enough . . . While Internet access would obviate the need for physical access to each station and free station personnel from having to assist candidates and their political committees, we conclude that the burden of placing this material on the Internet outweighs the benefits.”)

<sup>4</sup> PIPAC August Ex Parte at 5.

<sup>5</sup> *Id.* at 3-4.

<sup>6</sup> See, e.g., Comments of NAB on Proposed Information Collection Requirements, MM Docket No. 00-168, OMB Control No. 3060-0214 (May 12, 2008) (estimating, based on a one-week test by actual stations, that the FCC understated the information collection burdens associated with enhanced disclosure Form 355 by more than 1,000 per cent).

<sup>7</sup> See, e.g., *Lutheran Church - Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (any “content-based definition” of “diverse programming” gives “rise to enormous tension with the First Amendment”); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress “has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities,” and any FCC “requirement mandating particular program categories would raise very serious First Amendment questions”); *MD/DC/DE Broadcasters Assoc. v. FCC*, 236 F.3d 13 (2001) (“A regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others. The Commission in particular has a long history of employing a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content . . . .”); *Motion Picture Assoc. of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (FCC lacks authority to promulgate rules significantly implicating program content in absence of clear authorization from Congress).

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raised by such proposals, the significant fact-gathering required to craft a reporting mechanism that is not unduly burdensome for broadcast licensees, and the need to analyze what form of reporting would be likely to yield public interest benefits. In light of these issues, we stated that commencing such a proceeding with a Notice of Inquiry, rather than a Notice of Proposed Rulemaking, would generate a more robust and constructive record and would provide improved opportunities for developing a balanced proposal.

Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "ERL Dozier". The signature is fluid and cursive, with the first name "ERL" being more prominent and the last name "Dozier" written in a more standard cursive style.

Erin L. Dozier  
Senior Vice President and Deputy General Counsel  
Legal and Regulatory Affairs

cc: Erin McGrath