

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

In the Matter of)
)
Enhanced Disclosure) MB Docket 00-168
Requirements for Broadcast Licensee)
Public Interest Obligations)

**REPLY COMMENTS OF CBS CORPORATION, ABC TELEVISION STATIONS,
FOX TELEVISION STATIONS, INC., NBC OWNED TELEVISION STATIONS
AND TELEMUNDO STATIONS, AND UNIVISION TELEVISION GROUP, INC.**

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CBS Corporation (“CBS”), ABC Television Stations, Fox Television Stations, Inc., NBC Owned Television Stations and Telemundo Stations, and Univision Television Group, Inc. (“Network Station Owners”) hereby respectfully submit their reply comments concerning the Commission’s *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in the above docket, concerning the online availability of public file materials.

Although the Commission’s proposals may appear modest at first blush – and have been endorsed by non-broadcasters who will have no role in their implementation¹ –

¹ See, e.g., *Comments of Public Airwaves Public Interest Coalition*, MB Docket 00-168 (filed December 22, 2011); *Comments of Brennan Center for Justice at NYU Law School*, MB Docket 00-168 (filed December 22, 2011); *Comments of LUC Media Group, Inc.*, MB Docket 00-168 (filed December 22, 2011) (“*LUC Media Comments*”); *Comments of U.S. Conference of Catholic Bishops*, MB Docket 00-168 (filed December 22, 2011).

several will in fact impose significant new administrative burdens on television stations. As discussed below, those proposals should not be adopted.

INTRODUCTION AND SUMMARY

On July 11, 2011, President Obama issued an executive order asking independent federal regulatory agencies to join the administration's effort to eliminate regulations that unnecessarily burden business.² In commenting on the order, which was not technically binding on the independent agencies, the Office of Management and Budget stressed that the agencies had expressed their willingness to comply, noting particularly that the Federal Communications Commission was already taking steps to eliminate burdensome rules.³ In furtherance of that effort, the FCC recently requested comment on its preliminary plan for regulatory review, as well as on additional steps the Commission should take "to identify rules that should be changed, streamlined, consolidated, or removed."⁴

The Commission's commitment to a review of its existing rules to determine their continued necessity is to be applauded. However, it is equally critical that the FCC searchingly scrutinize new proposals that would add to the already formidable compliance obligations that encumber broadcasters. In so doing, the Commission should

² See, Lisa Rein, "Obama order calls for agencies to cut red tape," *The Washington Post*, July 14, 2011, p.B04; Jared A. Favole, "New Order to Nix Bad Regulations," *The Wall Street Journal*, July 11, 2011.

³ See, Jared A. Favole, "New Order to Nix Bad Regulations," *The Wall Street Journal*, July 11, 2011.

⁴ See, *Public Notice*, "Commission Seeks Comment on Preliminary Plan for Retrospective Analysis of Existing Rules," DA 11-2002, GC Docket No. 11-199 (released December 8, 2011).

consider not only the discrete burden of each individual new requirement, but the cumulative effect of an accretion of mandates that seems ever to increase, the agency's periodic homage to deregulatory goals notwithstanding.

Within just the last year, either the Commission or the Congress has imposed on broadcasters new and detailed obligations with respect to the loudness of commercials,⁵ captioning of television programming that appears online,⁶ and the narration of video portions of television programs for the visually impaired.⁷ The objectives of each of these mandates may be laudable, but their complexity is reflected by the multiple meetings that have already taken place between broadcasters and Commission staff concerning the details of compliance. All of these requirements are, of course, in addition to the panoply of existing regulations and pending Commission proposals that would impose new obligations on broadcasters with respect to "localism"⁸ and the categorization and reporting of their programming.⁹

⁵ See, *Report and Order*, MB Docket No. 11-93, *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, 2011 FCC LEXIS 5171 (released December 13, 2011).

⁶ See, *Notice of Proposed Rulemaking*, MB Docket No. 11-154, *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 13734 (2011).

⁷ See, *Report and Order*, MB Docket No. 11-43, *In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 11847 (2011).

⁸ See, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Docket No. 04-233, 23 FCC Rcd 1324 (2008).

⁹ See, *Notice of Inquiry*, MB Docket No. 11-189, *Standardizing Program Reporting Requirements for Broadcast Licensees*, 2011 FCC LEXIS 4629 (released November 14, 2011); *Report and Order*, MM Docket No. 00-168, *Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd 1274 (2007)

This is the context, we respectfully submit, in which the Commission should consider its proposals to adopt new requirements as to the maintenance of broadcasters' public inspection files. These proposals are badly out of step with the spirit of President Obama's deregulatory mandate.

Given that the *Further Notice* contemplates that the FCC will host those portions of the file that broadcasters will be required to make available online, the Network Station Owners have no general objection to this aspect of the Commission's proposal. However, we submit that the Commission was correct when it found, in last visiting this subject just four years ago, that the posting requirement should not apply to political file materials. While the burden of making political file materials immediately available on the Internet may seem minimal to those framing the requirement, we submit it would be decidedly non-trivial to the station account executives on whom the task would fall, and who are already more than fully occupied during frenetic campaign periods with taking orders and revisions to orders, monitoring lowest unit rate and effective selling level, dealing with preemptions and make goods, and calculating, issuing and recording credits and rebates. Moreover, making political file information –including price information – easily accessible online to advertising agencies, other television stations and cable competitors would put broadcasters at a distinct negotiating disadvantage.

Requiring broadcasters to place a notation in the public file (and upload it to the Internet) every time a sponsor identification announcement is necessary would also be

(“Enhanced Disclosure Order”), vacated, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 00-168, FCC 11-162 (released October 27, 2011).

vastly more burdensome than it might immediately appear. Pursuant to contractual and other legal requirements, such announcements are routinely included in credits by the producers and distributors of television programs when goods or services have been provided without charge for use in connection with a television program on the understanding that the broadcast will include some audio or visual “mention,” usually fleeting, of the product or service in question. To require station personnel to make a notation in the public file of all of these garden-variety arrangements, which are fully disclosed in end credits, would entail a tremendous amount of paperwork for no general public benefit.

The Commission should adhere to its previous and correct decision declining to mandate that viewer correspondence be posted online, without adopting purposeless requirements that such correspondence be counted or categorized. Nor should the list of materials required to be placed in the public file be expanded to include local news-sharing agreements, an action that would imply FCC disapproval of such entirely legitimate arrangements without serving any legitimate regulatory objective.

Finally, while Network Station Owners have no objection to the Commission’s making most public file materials available on the Internet, we oppose the suggestion in the *Further Notice* that broadcasters may ultimately be required to submit these materials to the Commission in “machine-readable,” “searchable” or “native” formats such as Microsoft Word or Excel. In our view, the fact that having a searchable data base of a station’s public file materials may be convenient to academic researchers -- or to advocacy groups eager to litigate claims that broadcasters are not serving the public interest as they perceive it -- is not sufficient to justify saddling broadcasters with the

additional costs of converting documents from the form in which they exist to formats that would ideally serve the interests of such parties.

DISCUSSION

1. **The Commission Should Not Require Broadcasters to Post Their Political Files to the Internet.**
 - A. **A requirement to place the political file online would unduly burden broadcasters.**

Only four years ago, the Commission decided to exempt political file materials from a general requirement that licensees post their public inspection files on the Internet.¹⁰ Quoting from its earlier decision not to require broadcasters to honor telephone requests for copies of political file materials – as was required as to other components of the public file for stations having their main studios outside their communities – the Commission noted that the information kept in the political file was “in flux throughout each day of the campaign.”¹¹ The FCC found the same concern

¹⁰ The rule concerning Internet posting of the public file was adopted as part of the Commission’s *Enhanced Disclosure Order*, *supra*, 23 FCC Red 1274, which also promulgated extensive requirements for quarterly reporting by licensees on their programming. The *Enhanced Disclosure Order* was the subject of multiple petitions for FCC reconsideration, as well as a court challenge filed by broadcasters with the United States Court of Appeals for the D.C. Circuit. Accordingly, the requirement for placing a station’s public inspection file on the Internet never went into effect, and was ultimately vacated, together with other aspects of the *Enhanced Disclosure Order*, by the Commission order giving rise to the instant proceeding. *Order on Reconsideration and Further Notice of Proposed Rulemaking*, MB Docket No. 00-168, FCC 11-162, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations* (released October 27, 2011) (“*Further Notice*”).

¹¹ *Enhanced Disclosure Order*, *supra*, 23 FCC Red. at 1282, quoting, *Report and Order*, MM Docket No. 97-138, *Review of the Commission's Rules Regarding the Main Studio*

applicable to a possible requirement that licensees make political file materials available online, observing that “if the volume of material is too great, the station may not be able to update the Internet file quickly enough.” In this regard, the Commission noted that its rules required that records be placed in the political file “immediately” absent unusual circumstances. This requirement, the Commission recognized, could require “multiple updates each day during peak periods of the election season.” Finding that the “[r]esources available to political candidates likely provide them with greater access to the station . . . [than] . . . members of the general public,” the Commission concluded that “the burden of placing this material on the Internet outweighs the benefits.”¹² Notably, the FCC’s calculus was not altered by the possibility that Internet access “would obviate the need for physical access to each station,” thereby “free[ing] station personnel from having to assist candidates and their political committees.”¹³

The *Further Notice* cites little reason for its departure from this analysis. The *Further Notice* observes that “the vast majority of television stations [now] handle political advertising transactions electronically,” but fails to explicate the relevance of this fact to the issue of burden.¹⁴ Nor is it at all clear what significance the Commission attaches in this context to its statement that the “purchase of advertising time and the receipt of equal time requests would continue to be handled by the station.”¹⁵ The

and Local Public Inspection Files of Broadcast Television and Radio Stations, 13 FCC Rcd 15691 (1998), *recon. granted in part*, 14 FCC Rcd 11113 (1999)..

¹² *Id.*

¹³ *Id.*

¹⁴ *Further Notice* at ¶ 23.

¹⁵ *Id.*

Further Notice also fails to elucidate why the Commission now finds persuasive the assertion of the Public Interest, Public Airwaves Coalition (“PIPAC”) that “placing political file information online will reduce the burden on broadcasters”¹⁶ by obviating the need for “multiple daily in-person requests to access . . . information,” when it so recently found this consideration of little significance.¹⁷

We respectfully submit that the Commission reached the correct conclusion as to the question of burden the first time. To assert that station account executives will be untroubled by the necessity of scanning and uploading voluminous paper to the Commission’s web site on a same-day basis is to betray a lack of familiarity with their work during election seasons. At the same time as the Commission’s proposal would have these personnel posting documents to the Internet, they are dealing with urgent demands for access from political time buyers, handling changes to orders and copy, reviewing stations logs to ensure candidates have received the station’s lowest unit rate for multiple classes of time, attending to preemptions and make goods (which must of course be recorded in the file), and arranging for rebates, credits, and the reinvestment of proceeds (which also require public file notations). During campaign periods, it is not uncommon for political sales personnel to work late into the evening to ensure that the day’s change orders, preemptions, make goods and credits due to lowest unit charge discrepancies are correctly reflected in the station’s *on-site* political file. The additional step of scanning and uploading political file entries, which will of necessity require the input of CDBS identification numbers and passwords – as well as calls to IT personnel

¹⁶ *Id.* at ¶ 22.

¹⁷ *Enhanced Disclosure Order, supra*, 23 FCC Red. at 1282.

and Commission staff for assistance when the inevitable difficulties with upload occur – will unquestionably be burdensome. The Commission’s mandate that the file be updated “immediately” – together with its expectation that political file information will be uploaded “in an organized manner” so that “the sheer number of filings” does not make it “difficult to navigate”¹⁸ – can only add to the stressfulness of the process for the people actually doing the job.

None of this is necessary to meet the legitimate needs of either candidates or the public. It is already the practice of many television stations to voluntarily provide candidate representatives with “dates and dollars” information – that is, the amount of money an opposing candidate has spent on the station during a particular period -- over the phone. This competitive information is usually sufficient for a political time buyer to make immediate purchasing decisions. Thus, while stations generally do not make the exact programs, dayparts and frequencies purchased by an opponent available in response to telephone inquiries, “dates and dollars” information allows political time buyers (who obviously have on hand the station’s pricing information) to make a very good estimate as to what the opposition has bought. The tasks for which more detailed information is necessary – for instance, auditing the fairness of rotations afforded to competing candidates and compliance with the lowest unit rate law – are tasks for the post-election period, and for which requiring a visit to the station by industry professionals does not seem unreasonable.¹⁹

¹⁸ *Further Notice* at ¶ 24.

¹⁹ In stressing the need for “immediacy” in the uploading of a station’s political file, the *Further Notice* observes that “a candidate has only seven days from the date of his opponent’s appearance to request equal opportunities.” *Further Notice* at ¶ 23. It is the experience of Network Station Owners that requests for “equal opportunities” – with

Network Station Owners would have no objection to a rule requiring that “dates and dollars” information be provided to candidate representatives over the phone during campaign periods. Such information should suffice to serve the immediate requirements of those with the greatest need for real time data about political purchases of advertising time. But it may be questioned whether any rule at all is necessary to accomplish that end. Certainly there has been no groundswell among political time buyers to the effect that they cannot get from television stations the information they need to make intelligent purchasing decisions without burdensome visits to station public files. Indeed, we are aware of no recent complaints made to the FCC by advertising agencies in this regard, and only one political agency bothered to file comments supporting the Commission’s proposal in this proceeding.²⁰

regard to both paid and unpaid candidate appearances – have grown increasingly rare. In purchasing time, federal candidates of course have resort to the “reasonable access” law, thus making requests to match what their opponent has purchased largely irrelevant. And in almost all instances, state and local candidates also make their inventory requests without reference to what has been sold to opponents in particular programs and dayparts. As to unpaid candidate appearances in station programming, the Commission’s expansive interpretation of the news exemptions to Section 315 of the Communications Act have mostly made “equal time” demands a thing of the past. In this connection, we note that since 2004 there have been only three reported Commission decisions concerning “equal opportunities” requests by political candidates, which respectively involved a presidential debate, an appearance of a gubernatorial candidate on “The Tonight Show with Jay Leno,” and an appearance made pursuant to a station gift of free time to various Republican candidates. *See, Emergency Complaint of Dennis J. Kucinich*, 23 FCC Rcd 482 (2008); *Complaint of Angelides For Governor Campaign*, 21 FCC Rcd 11919 (2006); *Complaint of Nicole Parra Against Pappas Telecasting Companies*, 19 FCC Rcd 21944 (2004). In none of these cases was there any indication that the complainant learned of his opponent’s appearance by inspecting the station’s political file. The Commission should not place additional burdens on broadcasters to aid candidates in the enforcement of a rule that has fallen into desuetude of its own weight.

²⁰ That shop, LUC Media Group, Inc. (“LUC Media”), was founded by lawyers who made something of a cottage-industry of bringing complaints against broadcasters for lowest unit charge violations in the early 1990s, prior to the FCC’s clarification of various

Of course, researchers and scholars – and indeed average citizens – also have a legitimate interest in political spending. But their need for the information is not immediate and can be satisfied by visiting the station either during or after the election campaign. If it is objected that this is an inconvenience that such persons cannot rightly be expected to bear, we would observe that research by its nature requires the expenditure of effort and that many primary sources indispensable to serious scholarship are not

aspects of that complex law. See, Amy Keller, *Roll Call*, May 30, 1996: The Insider, “Too busy to sue,” *Electronic Media*, February 12, 1996; Doug Halonen, “More stations face suit over political ads,” *Electronic Media*, September 16, 1991; *Report and Order*, MM Docket 91-168, *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, *Memorandum and Order on Reconsideration*, 7 FCC Rcd 4611 (1992). Notably, the reasons cited by LUC Media in support of a requirement that the political file be posted on the Internet – i.e., that the file contains information “relevant to determining whether candidates are getting favorable or unfavorable treatment in the placement and cost of spots” -- involve issues that will generally be too complex for resolution during a campaign and are best handled by a post-election audit. *LUC Media Comments* at 3; see discussion at page 10, *supra*. Moreover, despite LUC Media’s cynical assertion that broadcasters only object to a posting requirement “because they make money by denying public access to their political file,” the facts seem more in accord with its grudging acknowledgement that since the 1990s “some stations . . . have stopped trying to play games with their advertising inventory and pricing when it comes to candidate advertising.” To be sure, LUC Media states that “some still do try,” but a comprehensive Lexis search (see Exhibit A for search terms utilized) covering the period from January 1, 2004 to the present turns up only one instance in which LUC Media has had occasion to complain to the FCC about the political broadcast practices of *any* station. (That case involved an AM radio station that provided *no* political file materials to an LUC Media representative who visited the station, see *Letter to William M. Rodgers et al.*, 21 FCC Rcd 3451(2006).) Thus, for all of the aspersions it casts on broadcasters’ integrity and good faith, LUC Media provides no concrete justification for the adoption of new and burdensome paperwork requirements.

available online. We respectfully submit that, absent compelling public necessity, it is not the province of this Commission to promote academic research at the cost of unduly burdening the conduct of ordinary business by its regulated industries.

We also note the role of the press as surrogates for the public in providing information about campaign spending. Like political advertising agencies, news organizations have the resources to make a certain amount of leg work eminently practical. Reporters, we submit, are better positioned to visit a station's public file in the course of reporting the news – which is their primary professional function – than are television sales executives to perform additional clerical tasks unrelated to their main job, which is to sell advertising and service the needs of their clients.

In its evaluation of proposals that would impose new duties on broadcasters, the Commission's inquiry should not be whether the new regulations might provide some benefit to somebody, but whether the public interest so compellingly requires the proposed rules as to outweigh any additional burden on licensees. With respect to the placement of political file information on the Internet, we believe the answer to this question is clearly in the negative.

B. A requirement to place the political file online would make sensitive price information easily available to advertising agencies and competing stations, thus putting broadcasters at a negotiating disadvantage and facilitating parallelism in pricing.

In addition to the unwarranted burden it would impose on sales personnel, requiring that the entire political file be placed online would have another highly negative effect – it would make sensitive price information available to a television station's customers and competitors at the click of a mouse. This proprietary information would

be available to commercial as well as political advertisers, to other local stations, and to competing advertising media such as cable operators, newspapers and web sites.

Additionally, the online posting of such sensitive pricing information would raise potential antitrust issues. One must ask: If government authorities would look askance, as they surely would, at sales executives from competing television stations gathering in a conference room to share this information, why would the government require that the same information be made so easily accessible online?

The political file will, of course, contain information on the station's lowest rates for particular programs and rotations. But since the Commission's rules also provide that stations may offer candidates a non-preemptible class of time at a discount from their effective selling levels – that is, the going rate for a particular spot at the time of purchase – information in the file as to the prices paid by candidates for non-preemptible time will provide considerable information as to the rates a station will accept for a commercial in a given daypart at a particular time. And since preemption and make-good information must also be kept in the political file, a time buyer will likewise be able to garner valuable data concerning the rates at which a spot is likely to clear. While licensees are required by Commission rule to provide good-faith estimates of the probability of clearance at various rates to legally-qualified candidates, they are not required to be so accommodating of other advertisers.

Thus, in addition to making information regarding political sales more easily available to candidate representatives, as the Commission intends, the proposed rule would afford a significant intelligence advantage to one side in private commercial negotiations. Armed with political file information, the shrewd time buyer's ability to

drive the hardest possible bargain would be greatly enhanced by data allowing him to estimate the station's bottom line. One poker player would, in effect, have had at least a partial glance at the other's hand.

Television stations would also have competitors' rates at their fingertips. Such information might be used to undersell the competition, but might also serve as a signal to a station that it was pricing its inventory too cheaply. Readily available political file information would give television stations a convenient and completely legal way to act with "conscious parallelism" to put a floor under rates during election seasons. The Commission's proposal would thus seem at odds with the commonsense view that the sharing of price information among rival sellers is unhealthy for competition.

The Commission's proposed rule would also advantage certain industry segments at the expense of others. Cable systems, which have the technological ability to target particular geographic areas more narrowly than television stations – and thus may be particularly attractive to candidates seeking to reach swing voters – are making an aggressive push for a greater share of the political ad market.²¹ But although cable systems, like television stations, must keep information as to candidate purchases in their public inspection files, they are not included in the Commission's proposed requirement that this information be made available online. System executives seeking to persuade political time buyers to move more of their dollars from broadcast to cable will thus have

²¹ See, e.g., "Cable Campaigns For Candidate Cash; Local stations expect to retain lion's share of spending," *Broadcasting and Cable*, October 3, 2011; Holly Sanders Ware, "Cable sees ad-growth potential in midterms," *New York Post*, June 28, 2010; David Lieberman, "Fight is on for campaign TV ad dollars," *USA Today*, August 6, 2007.

extensive information about their competitors' pricing, while their counterparts at television stations will not have similar data.

Of course, stations' public files are just that – public – and all of this information could be obtained by determined commercial clients and competitors by making a visit to a station's studio. But it is one thing to travel to a station's office across town during a hectic business day – a trip that would have to be frequently repeated to keep current with rapidly changing market conditions – and quite another to have the desired information instantly available without leaving one's desk. The former scenario places practical limits on the use of the political file for purposes not intended by the rule; the latter almost guarantees that consulting this information for business reasons unrelated to any election campaign will soon become routine.

The wholesale disclosure of timely proprietary information is unnecessary to satisfy either the immediate practical needs of candidate representatives or the public's important (but less immediate) interest in having the fullest information possible about a vital part of the political process. The disclosure of "dates and dollars" information over the phone -- together with the access to full public file information that will remain available to ad agencies, journalists and members of the public at the station -- should certainly be sufficient for these purposes. The Commission should exempt political file materials from any general rule requiring that stations' public files be posted on the Internet.

2. **Requiring Television Stations to File Notations Regarding Sponsor Identification Announcements in Their Public Files Would Greatly Burden Broadcasters for No Significant Public Benefit.**

The practice of paid sponsorship for the inclusion of certain on-air material in broadcast programs dates back to the dawn of radio, as does government regulation requiring that such sponsorship be identified on-air.²² End credits in television programs reflecting these longstanding practices are exceedingly common.

A hotel allows a scene in a dramatic series to be shot on its premises with the understanding that the program will include an establishing shot of the hotel's façade; an airline provides transportation for the cast and crew of a reality show in exchange for the inclusion of a shot of its plane taking off; a computer manufacturer that provides equipment to be featured on the set of a show with a high-tech theme asks for and is granted a brief shot of one of its laptops with the company's logo visible. Each of these video "mentions" will require sponsor identification – a so-called "317 announcement." Even where there is no explicit understanding that there will be an identification of the product or service in the program – and a sponsor-identification announcement would therefore be unnecessary as to a "reasonably related" use of the product in the broadcast – an end credit for the supplier will often be included as a courtesy or out of an excess of legal caution.

The Commission now proposes that these commonplace transactions be noted in the public file, saying that it "do[es] not propose to limit disclosure to certain types of programming, but to include all sponsorships that require a special on-air disclosure."²³

²² See, *Applicability of Sponsorship Identification Rules*, 40 Fed Reg. No. 175 (1975).

²³ *Further Notice* at ¶ 34.

This would be vastly burdensome for television stations. The kinds of disclosures discussed above are – quite naturally– generally handled by the *producers* of both network and first-run syndicated programming that constitute the bulk of non-news television station programming. They are the ones who are aware of the product placements that their shows contain, and stations quite properly rely on their program suppliers to include the necessary disclosures in the programs they provide. A public file requirement would necessitate having a station employee fast-forward to the end of virtually every non-local program aired by the station in order to view the sponsor identification announcements that appear there, note them down, and fill out a form for placement in the file. Or, in the alternative, stations would seek to pass the burden on to networks and syndicators, which are not entities subject to direct Commission regulation.

The task would be complicated by the fact, noted above, that not all end credits that appear to be sponsor identification announcements reflect the kind of *quid pro quo* that the statute is intended to reach. The FCC has made clear, for example, that Section 317 does not require sponsorship identification of products supplied for free for use in a broadcast “where there is neither payment in consideration for broadcast exposure of the service or property, nor an agreement for identification of such service or property beyond its mere use on the program.”²⁴ In examples used to illustrate this principle, the Commission has indicated that no 317 announcement would be required where a refrigerator was furnished for free for inclusion on a set, a Coca-Cola dispenser was provided without consideration for use in a drugstore scene, or a car was loaned to a production without cost for filming of an automobile chase. Yet courtesy credits in such

²⁴ *Applicability of Sponsorship Identification Rules*, 40 Fed Reg. No. 175 (1975) (Illustration C et seq.).

situations are often provided – either because such a credit has been specifically requested by the provider of the product or because the broadcaster or producer has chosen to be over-inclusive with regard to 317 announcements in order to avoid consultation with lawyers or possible later second-guessing. A precise listing of credits actually mandated by Section 317 would thus require an extensive legal review of all credits included for each program to determine what should and what should not be listed.

What purpose would any of this serve? Product placements in theatrical movies are so numerous that the Commission’s rules specifically *exempt* their broadcast from the sponsor identification²⁵ requirement because the required disclosures would be so extensive. Are moviegoers unaware of “by whom they are being persuaded”? And if so, how dire is the consequence?

We would venture that most adults assume that when a Coke bottle appears on the big screen, it may well be adding an element of profit, as well as verisimilitude, to the production. Those who are truly interested in the question regarding a particular product they observe in a television program can simply wait until the end of the program they are already watching and look to the credits for the desired information. This type of swift, efficient disclosure has been deemed sufficient to serve the public’s interest in this information for almost a century, and neither Congress nor the FCC has ever seen a need to require that the information be placed in the public file, much less that it be posted as part of a government database. There is no basis for concluding that suddenly this longstanding procedure is inadequate. After all, how many viewers are going to log on to

²⁵ 47 CFR § 73.1212 (h).

their computers, navigate the FCC's web site, and search a government database to find out if the United Airlines plane they just saw conveying a dramatic hero to his next adventure was expressly bargained for, when they could obtain the same information by simply waiting for the credits?

"Pay-for-play" arrangements that affect the editorial content of informational or news programming are obviously a more troubling matter, and warrant full disclosure to viewers when they occur. But the press has hardly been remiss in bringing allegations of such practices to the attention of the public,²⁶ and the Commission has been vigorous in pursuing perceived violations of disclosure requirements.²⁷ A public file requirement will not assist the average viewer in discerning when content that appears to reflect a station's editorial judgment has actually been aired at least in part due to value received. And a viewer skeptical enough to think to check the station's public file for this information is in any event unlikely to be unduly influenced by what he has just seen.

It seems clear, then, that increasing broadcasters' paperwork by requiring that 317 disclosures be noted in their public files will not benefit ordinary viewers. That being the

²⁶ See, e.g., Paul Farhi, "FCC seeks news transparency," *The Washington Post*, January 4, 2012, p.CO1; Paul Farhi, "Is it news, or is it product placement," *The Washington Post*, December 7, 2011, p.AO1; Amy Gahrn, "FCC report: Regulations out of sync with online news media changes," CNN.com, June 10, 2011; James Rainey, "Bad news, these pitches," *Los Angeles Times*, September 15, 2010, p.D1.

²⁷ See, *In re Fox Television Stations, Inc.*, 26 FCC Rcd 9485 (2011); *In re Sonshine Family TV, Inc.*, 24 FCC Rcd 14830 (2009); *In re Comcast Corporation*, 22 FCC Rcd 17474 (2007). Our citation of these cases is intended to illustrate the vigor of the Commission's enforcement program in this area, not to indicate agreement with the legal conclusions reached by the agency in these proceedings.

case, there is insufficient basis for a new regulation that would be highly burdensome to broadcasters.

3. **The Further Notice Correctly Concludes that Viewer Mail Should Not be Made Available Online.**

Reconsidering the rule originally adopted by the Commission in 2007 requiring that viewer e-mails (as opposed to letters) be posted to the Internet, the *Further Notice* concludes that this should not be done, agreeing with the concerns expressed by broadcasters about burden and viewer privacy. This conclusion is clearly correct and the Commission should adhere to it. It should also refrain from adopting any of the new proposals regarding viewer mail referred to in the *Further Notice*.

It is questionable what purpose the existing requirement to keep viewer mail in the public file serves. Individuals and groups are capable of evaluating for themselves the quality of a station's programming and public service without reading what others have had to say. But certainly the existing requirement should not be expanded.

What, for instance, would be the point of requiring a station employee to count the number of communications received from the public for the purpose of recording the grand total in the public file? While the number would in itself be meaningless, compelling stations to compile a "brief summary" of the letters received would be even worse, because it would be very burdensome. And with all due deference to the brave new world of social media, the suggestion that stations be required to "retain" in the file comments left on sites such as Facebook borders on the absurd. Merely editing out inappropriate postings could well be a full time job.

If anything, the viewer mail requirement should be eliminated entirely. It should not be enlarged.

4. **A New Online Public File Requirement to Post All Local News Sharing Agreements Is An Unnecessary Additional Obligation on Broadcasters That Would Serve No Legitimate Regulatory Purpose.**

Noting that some licensees have begun entering into cooperative newsgathering arrangements, the *Further Notice* seeks comment on a proposal to add a new public file obligation to post all such sharing agreements.²⁸ There is no justification for such an expansion of the public file rule.

It is certainly the case that in recent years numerous news organizations have entered local news sharing agreements under which they have pooled camera crews to cover routine events, such as public officials' news conferences. Instead of each station's sending its own crew, a single crew provides footage of these events to all, thereby freeing resources to be used to cover other aspects of the same story or pursue other enterprise reporting. Similarly, stations have shared the massive cost of helicopter rental to provide a common source of aerial footage, which is used – like footage from other pooled events – as determined in each station's editorial judgment.

Immediately after referring to these cooperative newsgathering arrangements, the *Further Notice* states in a footnote that sharing agreements “can affect at [sic] the Commission's attribution rules, which define what interests are counted for purposes of applying the Commission's broadcast ownership rules.”²⁹ Although there are sharing arrangements that can have a bearing on the attribution of ownership – such as time

²⁸ *Further Notice* at ¶ 35.

²⁹ *Id.* at n.105.

brokerage and joint sales agreements³⁰ – the Commission’s rules already require that those agreements be included in the public file.³¹ While Network Station Owners have no objection to posting these agreements online, there is no legitimate basis for expanding the current rule to cover local newsgathering agreements. Such arrangements are lawful, have no bearing on attribution of ownership, and free station resources for original reporting rather than duplicative coverage of the same event. Contrary to PIPAC’s claim, they do not affect control of a station.³²

Requiring that news sharing agreements be included in a station’s public inspection file would thus serve no proper regulatory objective of the FCC³³ and should not be adopted by the Commission.

5. Broadcasters Should Not be Required to Alter the Form of Public File Documents Uploaded to the Internet.

Recognizing that implementing the recommendations of the Commission’s *Information Needs of Communities Report*³⁴ concerning public file materials – specifically, that they be made available in “standardized, machine readable and

³⁰ See, 47 CFR § 73.3555 (j) (2), (k).

³¹ *Further Notice* at ¶ 35 and n. 107.

³² There is, accordingly, no occasion for the raised Commission eyebrow that would be implicit in its adoption of PIPAC’s proposal that such agreements be posted online so that community groups and the FCC may “learn” of them. See, *Further Notice* at ¶ 35.

³³ Significantly, the Paper Work Reduction Act, 44 USC § 3501, *et seq.*, mandates that the Office of Management and Budget, prior to approving an information collection requirement proposed by an administrative agency, determine whether the information collection is "necessary for the proper performance of the agency’s functions," and must "consider whether the burden of the collection of information is justified by its practical utility." 44 USC § 3507.

³⁴ "The Information Needs of Communities: The Changing Media Landscape in a Broadband Age," by Steven Waldman and the Working Group on Information Needs of Communities (June 2011), available at www.fcc.gov/infoneedsreport.

structured formats” – would involve the expenditure of time and money, the *Further Notice* declines to propose that broadcasters be required to alter the existing form of documents before posting them online “at this time.”³⁵ However, the Commission’s acknowledgement that this is its “ultimate goal” is seriously disturbing.

As noted, the Commission concedes that the requirements it envisions would impose significant costs on broadcasters. Yet it asks whether it should nonetheless impose them, given its belief that this could “increase usability and facilitate text searches.”³⁶

We return to what is by now a familiar theme: The purposes for which government may properly impose costs and burdens on regulated industries. We do not believe that facilitating the efforts of researchers and scholars – let alone the industry’s critics – are among those proper purposes. Whatever documents broadcasters are required to place in the public file or post on the Internet, their only obligation should pertain to the document “as is.”

CONCLUSION

In order for the federal government to consider a regulation “economically significant,” it must impose in excess of \$100 million in costs on the American economy.³⁷ By that standard, the proposals of the *Further Notice* discussed in these Reply Comments may seem like small beer.

³⁵ *Further Notice* at ¶ 37.

³⁶ *Id.*

³⁷ Executive Order 12866, Section 3 (f) (1), 58 Fed. Reg. No. 190 (1993).

But if there is to be progress toward the goal of eliminating regulations that unnecessarily burden business, government agencies must not only consider the costs and benefits of the most significant rules, but whether ones imposing more modest, but still real, costs serve any real public purpose.

Although the proposals we have opposed in this filing have been enthusiastically endorsed by certain groups with very particular interests, we respectfully submit they cannot meet this test. Therefore, they should not be adopted.

Respectfully submitted,

CBS CORPORATION

A handwritten signature in blue ink that reads "Howard F. Jaeckel". The signature is written over a horizontal line.

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January 17, 2012

EXHIBIT A

110PRS

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