

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Standardizing Program Reporting Requirements ) MB Docket 11-189  
for Broadcast Licensees )

**JOINT COMMENTS  
OF THE  
NAMED STATE BROADCASTERS ASSOCIATIONS**

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## Summary

This proceeding carries with it the high risk that the Commission will find itself not just at the edge of a First Amendment cliff, but in a catastrophic plunge that intertwines the Commission and its staff for the indefinite future in the journalistic news judgments of television stations nationwide. Such risk-taking in this context is not new for the Commission. Indeed, this proceeding has the clear ring of “deja vu all over again.” As recently as late 2007, the Commission adopted a quantity of programming approach for measuring whether a television station has served the public interest, but in 2011 vacated its *2008 Report and Order* and with it the prior FCC Form 355. The Commission’s 2008 action was taken notwithstanding that the Commission, nearly thirty years prior, had (i) conducted an exhaustive review of the many of the same issues and properly rejected much of what the FCC reinstated in 2008, (ii) rejected, on a much more comprehensive record than existed for its *2008 Report and Order*, the kind of quantity of programming approach that the Commission is pursuing again, and (iii), in lieu thereof, adopted the “Quarterly Issues/Programs List” requirement.

The State Associations submit that the QPI Lists requirement, which has long been accepted as the best evidence of whether a station has been responsive to local community needs, issues and problems, should be retained. Furthermore, the Commission should reject the notion that the number of minutes a particular type of program may have aired on a station is a more appropriate measure of a broadcast station’s service in the public interest than the information provided in the QPI Lists. Those Lists are already “standardized” in terms of the type of information required to be included in them. The fact that it may be difficult for a person to “compare” the Lists of one station against the Lists of another station is simply not relevant. The QPI Lists were never intended to be used for station-to-station comparison purposes and such a

focus on comparisons would be inappropriate in any event. Rather, the Lists are intended to measure a station's own individual performance not vis-à-vis other stations but against the evolving needs, issues and problems of the station's community of license and surrounding service area as the station understands them. To substitute a chiefly quantity of programming measure for public service performance, which is the focus of Free Press' "Sample Form," would, in the State Associations' view, inappropriately, (i) elevate form (quantity of minutes) over substance (treatment of specific issues), (ii) place other undue burdens on stations, and (iii) intertwine the government for years to come in the journalistic news judgments of television broadcast stations throughout the country.

The State Associations submit that the Commission "got it right" in 1984/1986, that the FCC acted arbitrarily and capriciously by reversing policy direction in the *2008 Report and Order*, and that the Commission should not repeat that earlier mistake going forward. For those and the other reasons spelled out in these Joint Comments, the State Associations urge the Commission to terminate this proceeding without taking any action that may lead either (i) to the adoption of any form of quantitative program measure of a broadcast station's service in the public interest, or (ii) to the deletion or modification of the current requirement that commercial and noncommercial broadcast stations maintain QPI Lists in their public inspection files. To the extent that the Commission may discern certain best practices in the drafting of QPI Lists, that type of information would be welcomed.

In response to the *NOI* and the Form 355 proposals, the State Associations conducted an informal survey of commercial and noncommercial television stations licensed to communities in a number of states. The results of those surveys clearly demonstrate if the Commission were to require television stations to file the "Sample Form" or its equivalent (i) stations would be

endlessly confused as to what constitutes compliance; (ii) stations would be unduly burdened; and (iii) the reporting regime would have counterproductive effects.

By adopting a quantity of programming approach, which is the essence of the “Sample Form,” to measure station performance, the Commission will have introduced the same type of “raised eyebrow” regulatory dynamic that the D.C. Circuit Court in *Lutheran Church* found unlawfully pressured stations to hire based on race. According to the D.C. Circuit Court in *MD/DC/DE Broadcasters*, the FCC “has a long history of employing...’a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content...as means for communicating official pressures to the licensee’”. In *Lutheran Church*, the court concluded that “[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit.” Nor does any rational broadcast station licensee welcome having to expend its resources, and suffer any attendant application processing delay in having to justify before the Commission its programming choices whether in response to a petition to deny an application, a complaint, other objections filed by a third party.

A station licensee need not have been actually threatened by a complainant before such licensee appreciates the risk of being placed on the Commission’s radar screen. Such a threat will have been created by the Commission adopting a requirement that stations file the “Sample Form” or any other form that focuses on the number of minutes that certain types of programming were aired. A station’s response to that threat will naturally be to craft its program schedule and the content of its programs by favoring those types of programs that fit the categories the Commission has selected, so called “FCC Friendly Programming,” and where time constraints apply (as is usually the case) by not airing, or airing less, those types of programs that are not likely to earn the station the same regulatory “credit.” Hard minimum quotas are not

necessary for such pressure to exist. At least in a hard minimum quota environment, a station licensee knows what is good enough. Where there is regulatory pressure without a safe harbor, as here, the pressure will be less transparent but nonetheless insidious.

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association,

Vermont Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively the “State Associations”), by their attorneys in this matter, hereby file their Joint Comments in response to the Commission’s *Notice of Inquiry* (“*NOI*”) in this proceeding.<sup>1</sup> These Joint Comments are timely by virtue of the fact that they are being filed within the extended deadline recently authorized by the FCC’s Media Bureau.<sup>2</sup>

### **Preliminary Statement**

This proceeding carries with it the high risk that the Commission will find itself not just at the edge of a First Amendment cliff, but in a catastrophic plunge that intertwines the Commission and its staff for the indefinite future in the journalistic news judgments of television stations nationwide. Such risk-taking in this context is not new for the Commission. Indeed, this proceeding has the clear ring of “deja vu all over again.” As recently as late 2007, the Commission adopted a quantity of programming approach (released in 2008) for measuring whether a television station has served the public interest,<sup>3</sup> but in 2011 vacated its *2008 Report and Order* and with it the prior FCC Form 355.<sup>4</sup> The Commission’s 2008 action was taken notwithstanding that the Commission, nearly thirty years prior, had (i) conducted an exhaustive review of the many of the same issues and properly rejected much of what the FCC reinstated in 2008, (ii) rejected, on a much more comprehensive record than existed for its *2008 Report and Order*, the kind of quantity of programming approach that the Commission is pursuing again,

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<sup>1</sup> See *In the Matter of Standardizing Program Reporting Requirements for Broadcast Licensees*, Notice of Inquiry, MB Docket No. 11-189, FCC 11-169 (rel. Nov. 14, 2011) (“*NOI*”).

<sup>2</sup> See *In the Matter of Standardizing Program Reporting Requirements for Broadcast Licensees*, Order, MB Docket No. 11-189, DA 17-23 (rel. Jan. 6, 2012).

<sup>3</sup> See *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd 1274 (2008) (“*2008 Report and Order*”).

<sup>4</sup> See *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 00-168, FCC 11-162 (rel. Oct. 27, 2011) (“*2011 Order on Recon and FNPRM*”).

and (iii), in lieu thereof, adopted the “Quarterly Issues/Programs List” requirement (“QPI Lists” or “Lists”).<sup>5</sup>

The State Associations submit that the QPI Lists requirement, which has long been accepted as the best evidence of whether a station has been responsive to local community needs, issues and problems, should be retained. Furthermore, the Commission should reject the notion that the number of minutes a particular type of program may have aired on a station is a more appropriate measure of a broadcast station’s service in the public interest than the information provided in the QPI Lists. Those Lists are already “standardized” in terms of the type of information required to be included in them. The fact that it may be difficult for a person to “compare” the Lists of one station against the Lists of another station is simply not relevant. The QPI Lists were never intended to be used for station-to-station comparison purposes and such a focus on comparisons would be inappropriate in any event. Rather, the Lists are intended to measure a station’s own individual performance not vis-à-vis other stations but against the evolving needs, issues and problems of the station’s community of license and surrounding service area as the station understands them. To substitute a chiefly quantity of programming measure for public service performance, which is the focus of Free Press’ “Sample Form,” would, in the State Associations’ view, inappropriately, (i) elevate form (quantity of minutes) over substance (treatment of specific issues), (ii) place other undue burdens on stations, and (iii) intertwine the government for years to come in the journalistic news judgments of television broadcast stations throughout the country.

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<sup>5</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) (“*1984 Report & Order*”); *recon. denied*, Memorandum Opinion and Order, 104 FCC 2d 358 (1986) (collectively, the “*1984-1986 Decisions*”). See also 47 C.F.R. §§ 73.3526(e)(11) (“*QPI Lists Rule*”).

The State Associations submit that the Commission “got it right” in 1984/1986, that the FCC acted arbitrarily and capriciously by reversing policy direction in the *2008 Report and Order*, and that the Commission should not repeat that earlier mistake going forward. For those and the other reasons spelled out in these Joint Comments, the State Associations urge the Commission to terminate this proceeding without taking any action that may lead either (i) to the adoption of any form of quantitative program measure of a broadcast station’s service in the public interest, or (ii) to the deletion or modification of the current requirement that commercial and noncommercial broadcast stations maintain QPI Lists in their public inspection files. To the extent that the Commission may discern certain best practices in the drafting of QPI Lists, that type of information would be welcomed.

## **Background**

### **1984/1986 Rulemaking Proceeding**

Up until 1984, the Commission’s regulations included a delegation of authority rule that effectively threatened broadcast stations with full Commission (as opposed to Bureau staff) scrutiny and attendant processing delays if their renewal applications contained data “reflecting less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming.” (“Minimum Amount of Non-Entertainment Programming Rule”).<sup>6</sup> After conducting an exhaustive review of its commercial television policies relating to programming, ascertainment, commercialization and program log requirements,<sup>7</sup> the Commission did away with, *inter alia*, the Minimum Amount of Non-Entertainment Programming Rule, as well as a related rule that had the effect exposing a

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<sup>6</sup> See *Amendments to Delegations of Authority*, 59 FCC 2d 491, 493 (1976); see also, 47 C.F.R. § 0.283(a)(7)(i)(A), (ii)(A).

<sup>7</sup> See *1984-1986 Decisions*.

renewal applicant to full Commission scrutiny and processing delays if data contained in the station's renewal application reflected more than sixteen (16) minutes of commercials during an hour (the "Maximum Amount of Commercial Matter Rule").<sup>8</sup> As between the two rules, one effectively established a "floor" requiring stations to air no less than certain amounts of various types of program material; the other acted as a "ceiling" or "cap" on the amount of other types of program material that could be broadcast.

In 1984, the Commission rejected the quantity of programming approach for assessing station performance. As the basis for removing its Minimum Amount of Non-Entertainment Programming Rule, the Commission appropriately made the following findings and reached the following conclusions on an extensive record:

1. The "data reveals that licensees are presenting levels of informational, local and non-entertainment programming that are far in excess of our guidelines."<sup>9</sup>

2. The data "indicate that non-entertainment programming is an important part of broadcasters' financial viability and other aspects of their overall operations and, thus, there are reasons other than regulatory oversight to engage in this programming."<sup>10</sup>

3. "The overall performance data contained herein convince us that the current and future video marketplace will continue to supply this type of issue-oriented programming in response to a basic market demand."<sup>11</sup>

4. "[M]arketplace demand is determining the appropriate mix of each licensee's programming. For example, a licensee may find it competitively appropriate to

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<sup>8</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 F.C.C.2d 1076 (1984) (eliminated the FCC's non-entertainment guidelines, ascertainment guidelines, and program log requirements for television station licensees).

<sup>9</sup> *Id.* at ¶ 22.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (footnote omitted).

emphasize one type of programming within the guidelines rather than presenting programming in all categories. At the same time other stations in the market may elect to present other types of programming.”<sup>12</sup>

5. “[L]icensees should be given this flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand. Such an approach not only permits more efficient competition among stations, but poses no real risk to the availability of these types of programming on a market basis.”<sup>13</sup>

6. “[R]etaining the guidelines in light of our conclusions concerning marketplace incentives would be inconsistent with Congressional policies established in both the Regulatory Flexibility Act and the Paperwork Reduction Act.”<sup>14</sup>

7. The guidelines impose “significant” administrative costs on regulatees.<sup>15</sup>

8. “[T]he present regulatory structure raises First Amendment concerns” because “Congress intended private broadcasting to develop with the widest journalistic freedom consistent with its public interest obligation,” “the public interest standard necessarily invites reference to First Amendment principles,” and “the First Amendment concerns are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance.”<sup>16</sup>

9. “The Commission’s traditional policy objectives with respect to programming have never been fulfilled by the presentation of mere quantities of specific programming” and “the Courts have recognized that quantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee’s programming. Instead, a

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<sup>12</sup> *Id.* at ¶ 22.

<sup>13</sup> *Id.* at ¶ 23.

<sup>14</sup> *Id.* at ¶ 25, *citing* Regulatory Flexibility Act, PL 96-354 (1980), 5 U.S.C. § 601 *et seq.*; Paperwork Reduction Act of 1980, PL 96-511, 44 U.S.C. § 3501 *et seq.*

<sup>15</sup> *Id.* at ¶ 26.

<sup>16</sup> *Id.* at ¶ 27 (footnotes omitted).

licensee's programming obligations has always been described in terms of providing programming that responds to the needs of the community. Thus, the existing quantitative structure significantly misrepresents the nature of a broadcaster's underlying programming obligation by incorrectly suggesting that the broadcasting of certain quantities of programming is enough to fulfill their traditional programming responsibilities."<sup>17</sup>

10. "[T]he only programming obligation of a licensee should be to provide programming responsive to issues of concern to its community of license",<sup>18</sup> and "[a] licensee, in the exercise of good faith judgment, will be able to address issues by whatever program mix it believes is appropriate in order to be responsive to the needs of its community," including the freedom to determine "what amounts of [non-entertainment] programming will be offered."<sup>19</sup>

11. [A]s the number of video outlets increases, a television station may, in response to economic incentives, begin to direct its programming towards a narrower audience" and "Unlike the existing guidelines, the new regulatory approach fosters this development by allowing the licensee to consider the programming of other television stations in its market in fulfilling its programming responsibilities."<sup>20</sup>

12. "[P]rogramming will remain a relevant issue in proceedings arising from petitions to deny." However, "arguments based solely on the failure to present amounts of non-entertainment programming will not be appropriate." "Petitioners raising programming issue[s] will have to demonstrate that an individual station is failing to address issues facing the community in its programming." The licensee's obligation is "to contribute to the overall information flow in its market," and "while this obligation is not negated by the existence of

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<sup>17</sup> *Id.* at ¶ 29 (footnotes omitted).

<sup>18</sup> *Id.* at ¶ 32.

<sup>19</sup> *Id.* at ¶ 33 (footnotes omitted).

<sup>20</sup> *Id.* at ¶ 34 (footnote omitted).

other issue-responsive programming in the market, it may be affected by the amounts and types of programming provided by other television broadcasters.”<sup>21</sup> Where a petitioner alleges “in a petition to deny that an individual station has failed to address the issues of particular relevance to a significant segment of the community,” the station “should be able to respond by pointing not only to its own programming that may have addressed such issue, but also to other television stations available in the community that could reasonably have been relied upon to address such issue.”<sup>22</sup> In assessing the reasonableness of a licensee’s programming decision, “the examination will focus on the licensee’s evaluation of the programming of other television stations and its own responsive programming in light of the needs of its community.”<sup>23</sup>

Based on these findings and conclusions, the Commission abolished its quantity of programming approach for measuring television station performance. In its place, the Commission adopted the requirement that commercial television stations place in their public files, on a quarterly basis, a list of community issues that the stations addressed in their overall programming, believing “that the issues/programs list technique is best equipped to elicit the kind of purposeful programming information relevant to our current regulatory concerns.”<sup>24</sup> Furthermore, such lists, “as when a programming issue is raised in a petition to deny ... will serve as a significant source of information for any initial investigation by a member of the public or by the Commission. If, in a particular case, a station’s issues/programs lists do not provide sufficient information to resolve a substantial of fact, the Commission may ask, as it has in the past, for more information from the licensee.”<sup>25</sup>

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<sup>21</sup> *Id.* at ¶ 37.

<sup>22</sup> *Id.* at ¶ 38 (footnote omitted).

<sup>23</sup> *Id.* at ¶ 39.

<sup>24</sup> *Id.* at ¶ 75.

<sup>25</sup> *Id.* at ¶ 77.

On reconsideration in 1986, the Commission denied various petitions for reconsideration explaining that “[o]ne strength of the issue-responsive programming approach is that it accommodates such wide differences in the program service of individual stations, thus according licensees maximum freedom to adjust to varying economic conditions, yet it retains a regulatory structure to ensure that essential service is provided in any given broadcast market.”<sup>26</sup> The Commission went on to state that “[I]n its opinion generally affirming the Commission’s radio deregulation decision, the Court of Appeals for the District of Columbia Circuit cited with approval this change to a more flexible policy, stating that ‘the Commission’s shift in policy is adequately explained and sufficiently supported by economic analysis and logical argument.’”<sup>27</sup>

### **2008 Report and Order**

In 2007, the Commission replaced the *QPI Lists Rule* with a requirement that the “Standardized Television Disclosure Form” (“FCC Form 355”) be completed and placed in each commercial television station’s public inspection file every quarter.<sup>28</sup> In doing so, the Commission returned to a long out-of-date quantity of programming approach to measure station performance without valid justification and in what appeared to be in complete disregard of virtually every finding and conclusion listed above that the Commission reached in its prior, exhaustive rulemaking proceeding. Under FCC Form 355, the Commission required every commercial television station, every day throughout the year, to keep track of each and every program and program segment that contained program material that related to any of these categories: national news, local news, local civic affairs, local electoral affairs, independently produced programming, local programming, public service announcements, paid public service

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<sup>26</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670, Memorandum Opinion and Order, 104 FCC 2d 358, at ¶ 7 (1986) (“1986 MO&O”).

<sup>27</sup> *Id.*

<sup>28</sup> *See generally*, 2008 Report and Order.

announcements, programming that meets the needs of underserved communities, religious programming, service for persons with disabilities, and current emergency information.<sup>29</sup> In addition, the form required stations to detail the efforts that they had undertaken to determine the programming needs of the community.<sup>30</sup>

In completely reversing course, the Commission's *2008 Report and Order* offered the following principal reasons as the basis for its about-face:

1. “[M]embers of the public had encountered [difficulties] in accessing programming information in the existing format” of the QPI Lists.<sup>31</sup>
2. Commenters “report that broadcasters are confused about what they should put in their public files and describe instances in which documents were missing and files outdated.”<sup>32</sup>
3. One commenter who reviewed the QPI Lists of several broadcast stations “found that some broadcasters listed everything and anything they considered to qualify while others listed only a few programs.”<sup>33</sup>
4. The same commenter “found that ‘[t]he lack of uniformity and consistency of the issues/programs lists make it difficult to discern both how much and what types of public interest programming a broadcaster provided,’ which makes any ‘overall assessment or comparison between broadcasters virtually impossible.’”<sup>34</sup>
5. Commenters “pointed to the benefits that a standardized form can bring, including enhanced access to information on the extent to which broadcasters are meeting their

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<sup>29</sup> *Id.* at ¶ 27.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Id.* at ¶ 32.

<sup>32</sup> *Id.* at ¶ 35.

<sup>33</sup> *Id.* (footnote omitted).

<sup>34</sup> *Id.*

public interest obligations, ease of use by the public and broadcasters alike, and the promotion of a dialog between stations and the public they serve.”<sup>35</sup>

6. “[M]any members of the public are not fully aware of the community-responsive programming that their local stations have aired.”<sup>36</sup>

Several parties petitioned for reconsideration of the Commission’s *2008 Report and Order* and others appealed the Commission’s action to the United States Court of Appeals for the D.C. Circuit. “Because of the multiple petitions for reconsideration,” the Commission never transmitted the information collection to OMB for its approval and therefore its *2008 Report and Order*, along with the FCC Form 355, never went into effect.<sup>37</sup>

#### **2011 Order on Reconsideration and Further Notice of Proposed Rulemaking**

In its *2011 Order on Recon and FNPRM*,<sup>38</sup> the Commission vacated its *2008 Report and Order*, including FCC Form 355 “in light of the reconsideration petitions” and “the comments and replies thereto,” and in order to “develop a new record upon which we can evaluate the public file and standardized form requirements.”<sup>39</sup> The Commission further concluded that “[d]ue to the complexity of the issues surrounding the replacement of the issues/programs lists with a standardized form, we intend to promptly issue a separate Notice of Inquiry in a new docket seeking comment on the standardized form.”<sup>40</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at ¶ 39.

<sup>37</sup> *NOI* at ¶ 4.

<sup>38</sup> *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Order on Reconsideration and Further Notice of Proposed Rulemaking, MB Docket No. 00-168, FCC 11-162 (rel. Oct. 27, 2011) (“*2011 Order on Recon and FNPRM*”).

<sup>39</sup> *Id.* at ¶ 4.

<sup>40</sup> *Id.* at ¶ 6.

## **2011 Notice of Inquiry**

In its *NOI*, the Commission repeats its goal “to make it easier for members of the public to learn about how television stations serve their communities, and to make broadcasters more accountable to the public, by requiring stations to provide easily accessible programming information in a standardized format. This standardized disclosure will also assist the Commission and researchers to study and analyze how broadcasters respond to the needs and interests of their communities of license.”<sup>41</sup>

In describing the Commission’s 2007 action adopting FCC Form 355, the Commission stated it “found that uniform and consistent programming lists would allow the public more effectively to compare the efforts of those stations, and assess the programming aired,” and that “the online posting of such forms would give rise to more active dialogue between licensees and their audiences, which in turn would lead to more programs that are responsive to issues important to local communities.”<sup>42</sup> However, the Commission did agree that it wanted to use the *NOI* proceeding to “reexamine the balance the Commission struck in 2007 between public access to programming information and the burden providing such information imposes on broadcasters.”<sup>43</sup>

In the *NOI*, the FCC proposes essentially a “new” version of the former FCC Form 355 requiring that television stations collect and include on the form programming information in the following five “Reporting Categories”:

1. *Local News*: “programming that is locally produced and reports on issues about, or pertaining to, a licensee’s local community of license.”

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<sup>41</sup> *NOI* at ¶ 1.

<sup>42</sup> *Id.* at ¶ 5.

<sup>43</sup> *Id.* at ¶ 9.

2. *Local Civic/Government Affairs*: “broadcasts or interviews with or statements by elected or appointed officials and relevant policy experts on issues of importance to the community, government meetings, legislative sessions, conferences featuring elected officials, and substantive discussions of civic issues of interest to local communities or groups.”

3. *Local Electoral Affairs*: “candidate-centered discourse focusing on the local, state and United States Congressional races for offices to be elected by a constituency within the licensee’s broadcast area. Local electoral affairs programming includes broadcasts of candidate debates, interviews, or statements, as well as substantive discussions of ballot measures that will be put before the voters in a forthcoming election.”

4. *Closed Captioning and Video Description*: “how much video description is being done by a station, and what exceptions to closed captioning are being claimed for programming broadcast on the station.”

5. *Emergency Accessibility Complaints*: “what type of reporting requirements should there be regarding complaints filed against a station for not making emergency programming accessible to those with disabilities.”<sup>44</sup>

For each program that “fits” within the specified categories, the Commission asks whether it can and should require that broadcasters report additional information on a per segment (as opposed to a per program) basis. Specifically, the FCC is proposing that the following elements be reported for each program and/or segment:

6. Program/segment title or topic;
7. Date/time aired;

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<sup>44</sup> *NOI* at ¶¶ 22-33.

8. Whether the program/segment aired on the station’s primary or multicast channel;
9. Whether the program material was first-run programming or had been previously on the station or another station;
10. The approximate length of the segment excluding interstitials; and;
11. Whether the material reported, or any portion of it, is subject to the disclosure requirements of the Commission’s sponsorship identification rules, and if so, the sponsoring entity and whether the material reported, or any portion of it, is the product of a local marketing agreement, local news service, or shared service agreement, or any other contractual arrangement or agreement between the licensee and another broadcast station or daily newspaper located within the licensee’s designated market area.”<sup>45</sup>

## **Discussion**

### **I. The Commission’s Choice to Substitute a Quantitative Measure of Community Responsiveness for the Quarterly Issues/Program List Approach Would Be Arbitrary and Capricious**

Section 706(2) of the Administrative Procedure Act makes it unlawful for a federal agency to act in an “arbitrary and capricious” manner.<sup>46</sup> Before finalizing a decision, an agency first must consider all the relevant factors, give due consideration to the alternatives, and articulate a rationale basis for the agency’s decision.<sup>47</sup> An agency’s action will be found to be arbitrary and capricious if its decision is not based on the record taken as a whole, or merely states the facts and conclusions without providing a rational connection between them.<sup>48</sup>

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<sup>45</sup> *Id.* at ¶ 37.

<sup>46</sup> *See* Administrative Procedure Act, 5 U.S.C. § 706(2) (1994).

<sup>47</sup> *See, e.g.,* *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Fresno Mobile Radio Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999); *Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984).

<sup>48</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Furthermore, once an agency establishes a policy, an “irrational departure from that policy” will be deemed arbitrary and capricious.<sup>49</sup> Thus, where the Commission decides to depart from a long-established position, it must provide an adequate explanation to justify departing from precedent. “An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not just casually ignored.”<sup>50</sup> At bottom, the agency must provide an explanation that shows a “rational connection between the facts found and the choice made.”<sup>51</sup>

It is the view of the State Associations that the Commission’s *2008 Report and Order*, upon which this *NOI* is based, did not meet the legal standards articulated above . In that action, the Commission made a choice: it replaced a community needs-driven measure of station performance with a quantity of programming measure for station performance. The State Associations submit that the Commission’s 2008 choice was arbitrary and capricious and that the choice today to use a quantity of programming test would be equally arbitrary and capricious. A close examination of the facts relied upon by the Commission for its 2007 action and its justification for reversing direction and adopting a quantity of programming approach to measure station service demonstrates that the Commission’s choice was not supportable on the record or as a matter of law.

## **II. Claims for “Easy Access” to a Station’s Programming Information Do Not Support Adoption of a Quantity of Programming Reporting Requirement**

Throughout its *2008 Report and Order* and in its recent *NOI*, the Commission repeats that the public has lacked “easy access” to information about a station’s programming. That claim is completely without merit. First, any local person who is truly interested in what its local

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<sup>49</sup> *Immigration and Naturalization Servo v. Yang*, 519 U.S. 26, 32 (1996).

<sup>50</sup> *Comm. For Cmty. Access v.FCC* 737 F.2d 74,77 (D.C. Cir. 1984).

<sup>51</sup> *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

station is doing to serve the public interest need only watch the station's programming to make an informed judgment about the programming service of that particular station. In addition, any local person who is truly interested in learning more about what a station is doing to serve the community as well as to begin a dialogue with the station needs only to go to the station's main studio and examine the station's public file and/or speak with the station's management and staff. The same person can also decide to stay at home and check out the station's website for program scheduling, activities, *etc.*, as well as email station management or call the station and speak with the station's management and staff. Furthermore, apparently soon, anyone who is truly interested in examining a television station's public inspection file will be able to access it, including the QPI Lists, via the Internet at [www.fcc.gov](http://www.fcc.gov). Accordingly, today every local person, and others residing outside a station's service area, already have "easy access" to ample information about a station's programming service and the ability to engage an active dialogue with their local television stations. The State Associations very much support the fact that viewers regularly interact with their stations which has long been a goal of stations. Indeed, stations are committing millions of dollars on their websites and other platforms to intensify those interactions. In short, for the motivated viewer and anyone for that matter, the opportunity for station dialogue is but a click or phone call away!

Notwithstanding the many ways in which local viewers' can learn about a local station's programming service, the Commission criticizes the "adequacy" of the QPI Lists. None of the criticisms have any merit. One criticism is that sometimes the QPI Lists are missing from a station's public inspection file. However, even if some other version of a program reporting form were required, such as the "Sample Form," that form could also go missing from a station's public file. In all cases, the absence of a required document from a station's public file is a

violation of the Commission’s public inspection file rule, violations of which the Commission has not hesitated to enforce.<sup>52</sup>

Another invalid criticism of the QPI Lists is that there is no “uniformity” between the Lists produced by one station as against the Lists produced by another station. If that criticism means that not all stations provide all of the information required to be set forth in the QPI Lists Rule, such failings would also be a violation of the rule that requires each station to list the programs that have provided the station’s most significant treatment of community issues during the preceding three months, as well as to identify each such program by title and description, and the time, date, duration of each program that dealt with a particular issue.<sup>53</sup> Nothing could be more clear. If the lists produced by one station do not contain all of the required elements of the rule, the station is in violation and, as with any rule violation, noncompliance can be sanctioned.

If the “lack of uniformity” criticism lodged against QPI Lists is meant that a person cannot readily determine from such Lists which station, among two or more television stations, is *better* serving the public interest, the State Associations submit that such a comparison is not an appropriate focus of the Commission, and thus it would be inappropriate for the Commission create a regulatory device to facilitate such inappropriate comparisons by requiring stations to compile and make publicly available such data. For the Commission to allow its processes to be used to make such inappropriate comparisons would stand on their head numerous long-standing factual and policy underpinnings of the Commission, including the following:

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<sup>52</sup> See, e.g., *Cumberland Communications Corporation*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 5553 (MB 2007) (public inspection file violation included missing issues/programs lists); *CC Licenses, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 12711 (MB 2007) ( same); *CC Licenses, LLC*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 12695 (MB 2007) (same); *Continental Broadcasting Corp. of Arizona*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 8444 (MB 2007) (same); *Capstar TX Limited Partnership*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 12715 (MB 2007) (same).

<sup>53</sup> See 47 C.F.R. § 73.3526(e)(11).

1. The Commission has never found a nationwide market failure in the broadcast of certain types of television programming. Furthermore, the record does not support such a conclusion.

2. Marketplace demand is determining the appropriate mix of each licensee's programming, including its non-entertainment programming.

3. There is no proven direct nexus between a quantity of programming measurement approach and licensee performance.

4. Quantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee's programming.

5. Community needs are required to be addressed through a station's overall programming. Furthermore, specific ascertained community problems, needs and issues can be addressed by a station in many different over-the-air ways.

6. By adopting a quantity of programming measurement approach that the Commission has reason to believe, as here, could be used by interested parties to file complaints, petitions to deny and other objections alleging that a station is not airing an adequate amount of a particular type of program, it can be said that the Commission intends that its processes be used to pressure stations to favor certain types of programming (those that fit within whatever categories the FCC has selected) over other types of programming regardless of the relevance of a particular type of programming to the specific and evolving needs of the community as determined by the station from time to time.

The current QPI Lists requirement provides a valid and adequate measure of a station's responsiveness to community issues. As the Commission had long held, those Lists serve as a beginning point in the assessment by viewers, the Commission and other interested parties

whether the station has been responsive to the community's needs through the station's overall programming service. Where a substantial and material question of fact has been raised the Commission has the regulatory tools available to it to inquire further as well as to take any necessary regulatory actions.<sup>54</sup>

### **III. Implementation of the Quantity of Programming “Sample Form” Would Cause Unending Confusion, be Unduly Burdensome and have a Counterproductive Effect on the Commission’s Goal of Fostering a Robust Responsive Programming Service**

In response to the *NOI*, the State Associations conducted an informal survey of commercial and noncommercial television stations licensed to communities in a number of states. The results of those surveys clearly demonstrate if the Commission were to require television stations to file the “Sample Form” or its equivalent (i) stations would be endlessly confused as to what constitutes compliance; (ii) stations would be unduly burdened; and (iii) the reporting regime would have counterproductive effects.

#### **1. Endless Confusion**

There will be endless questions of interpretation in trying to differentiate between “Programs” and “Program Segments”. Responses to the State Associations’ survey raised the question: what does the Commission intend when it distinguishes between a “program” and a “program segment?” Is the difference a function of time or does it turn on content, or breaks in the program or all of above? The lack of clarity inherent in making these types of distinctions will inevitably cause endless confusion and second-guessing and ultimately eat up valuable resources that should be devoted to interacting with the public and addressing community needs, issues and problems through a station’s overall programming service. Those same concerns

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<sup>54</sup> See, e.g., *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d 1076, 1087 (1984).

grow exponentially when one considers the other areas of vagueness associated with a “Sample Form” approach.

The survey also revealed enormous confusion in trying to understand the scope and differences between the discrete categories of programs listed in the “Sample Form.” In that form, the term “local” is used as a qualifier for “Local News,” “Local Civic/Governmental Affairs” and “Local Electoral Affairs.” If the term is intended to mean local in the geographic sense, what is local? The station’s community of license? Adjoining communities? The county in which the station is located? Anywhere a person can pick up the signal over-the-air? Anywhere a person can view the station directly off-air or via a translator, or through cable? Furthermore, why is not “national” news creditable under a quantitative approach? If it is creditable to the extent that a particular news item may touch or be relevant to local viewers, how will a station be able to distinguish between national news that should be included and national news that should not be included?

If by “local,” the Commission intends to give credit only to programs that are produced within the station’s community or license or surrounding service area, why shouldn’t a program that is produced outside the station’s service area, but which directly addresses a truly “local” community issue or problem also be creditable? Furthermore, what constitutes “production?” If one aspect of the program is “produced” locally and another aspect is “produced” outside the area which would be deemed to be “local,” how is that program treated for credit purposes? For such a hybrid production, should a proportionality formula be used? If so, on what basis? By the number of hours devoted by persons working within, versus outside, the “local” area? And how likely is it for a local station to possess the kind of information needed to make the judgment call?

The survey also had the effect of disclosing enormous confusion in trying to “fit” programs and program segments into the program categories. Specifically, under a “Sample Form” regime, stations will be confronted with at least these two types of problems. The first problem for a station will be trying to decide whether a particular program or program segment legitimately “fits” into any of the listed categories. The second problem will be trying to decide what to do if a program or program segment legitimately “fits” in more than one of the form’s categories.

One may reasonably conclude that anything of importance that happens in a station’s service area is worthy of news coverage. However, the Commission uses the term “issues” when defining “local news.” Does the Commission intend the term “issue” to be limited to important matters in controversy about which there more than one point of view? Or will “local news” also include any wide range of events such as floods, fires, crime, accidents, athletic events, school news and cultural events? The answer to that question will have a substantial influence on editorial judgments of stations as they pick and choose what matters are to be included for credit in their “local news.”

A related question involves the Commission’s intent in considering using separate categories for “local news,” “local civic affairs” and “local electoral affairs. The “local news” category could logically include matters covering “local civic affairs” and “local electoral affairs.” Does the Commission intend that “local civic affairs” and “local electoral affairs” be treated as subsets of “local news” that should be separated from “local news?” If so, that will surely complicate the lives of station news persons as they try to subtract from their “local news” the minutes that dealt with “local civic affairs” or “local electoral affairs.” To avoid that process,

a station may become inclined to develop distinct “local civic affairs” and “local electoral affairs” programs. Perhaps, that is the Commission’s programming editorial objective!

As between the categories “local civic affairs” and “local electoral affairs,” there is a further “subset issue.” If a candidate running for political office is interviewed and he/she talks about an issue of public importance, into which of these two categories should the segment be placed. One can argue that “local electoral affairs” is usually a subset of “local civic affairs.” If that is true, must the segment be placed in the “local electoral affairs” category? Is there a distinction between a candidate running for public office and the winner of an election for public office? If the election has not been held, the interview should be classified under “local electoral affairs” but if he or she is interviewed after the person takes office, the interview should be classified under “local civic affairs?” If a station reports that community leaders have changed their mind about a particular local matter but the station does not interview them, is such coverage “local news” or “local civic/governmental affairs?” As to the latter, how in depth must a segment be to qualify as a “substantive discussion of a civic issue?” If the topic is ongoing, the station may have aired more in-depth segments on other dates pertaining to the issue, but the story that was aired on the particular day of the composite week was simply, albeit an important, update. Will that one segment still count?

If the Commission were to adopt the “Sample Form” approach, other related questions arise . The “Sample Form” asks whether the broadcast of the particular story was the “initial” airing or a “repeat?” If the story is dealt with on more than one newscast, would it be entered each time as a separate entry on the form? Would the first airing be designated an “initial” airing and the rest “repeat?” What if the story included part of the story from before, but it has been added to for the next newscast? What that be an “initial” broadcast since it has some new

content? Does a station have to taken into consideration whether it aired first on the station's news partner, another station? If so, would the station have to check through their news stories too? Would the person entering the information have to compare the stories to see if the repeat is basically the same or has been updated? What if it is providing the same information but the airing is worded differently?

These questions represent only some of the multitude of questions posed by the use of a "Sample Form" approach. No matter how the Commission answers these and other related questions, the Commission's action in adopting a "Sample Form" quantitative approach will, in the view of the State Associations, improperly and unlawfully, inject the federal government, broadly and intrusively, into the news judgments and editorial decisions of broadcast stations throughout the country.

## 2. Undue Burdens

If stations were required to complete the Sample Form each quarter, whether based on one or two composite weeks, many of them would have to purchase and install new equipment, including server grade storage hardware,<sup>55</sup> as well as new software in order to code/track, classify, store, access, upload, etc. the required data onto the form. While some stations responding to the survey indicated that they could probably accommodate the new burdens caused by with the Commission's proposals by significantly increasing the duties and hours of existing employees, many more stations stated that they would have to consider hiring full-time or part-time employees. Based on the surveys received, the incremental cost in dollars range from \$8,000 per year by increasing the workload on existing employees (estimated 80 hours of additional work per quarter) to as high as \$65,000 dollars a year for a station that believes it

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<sup>55</sup> One station surveyed estimated that upgrading the station's scanners and storage servers alone could cost the station between \$4,000 and \$8,000.

would have no choice but to hire an additional employee. A number of stations responding to the survey indicated that to the extent that the Commission were to increase the number of categories of programming that would have to be tracked, etc., labor costs would increase proportionately.

There was broad consensus in the surveys that a new “data-chase” would also steal valuable time away from staff that is already overcommitted, particularly persons with news and public affairs responsibilities. These are the very same people who are involved in developing the programming that is intended to be responsive to the community’s needs. If their time must be newly allocated to husbanding data for a new reporting form, that is valuable time lost to producing the very programming that the Commission is seeking to foster.

### 3. Counterproductive Effects

The State Associations’ survey of television stations produced these responses, among others, that confirm the counterproductive effect of requiring stations to submit program reporting forms like the “Sample Form”:

- The form would “[i]nfluence stories covered to ‘look good’ in the reporting of categories.”
- “If we are being judged by how much we air in certain categories, we will be more likely to do stories that make us look good on the form.”
- “The current Quarterly Issues/Programs List regime is fully adequate. Reporting forms are inherently vague, unduly burdensome, counterproductive (the more FCC-friendly informational programming a station airs the more burdensome it will be for the station to retain/aggregate/categorize/upload....”

- “The primary effect [of requiring the form] will be to degrade the effectiveness of station’s ability to cover news over a wide area and in depth.”
- “The burden [of having to produce the form] would fall on an always taxed newsroom to provide the information. In this day and age with no additional staff, it might mean less local coverage because without overtime or additional staff there is just so much that can be accomplished each day.”
- The “Sample Form” reporting requirement “would decrease the amount of content we could actually create because we would spend more time completing the form.”
- The “additional reporting requirements would create a significant burden to stations trying to provide as much local content as possible.”
- “Stations who do a ton of local news will be unfairly burdened by this report while a station that skates by with the minimum...could likely knock this report out in a few hours....”
- “The proposed Commission rules will be an additional burden on small market stations. Many will have to reallocate money from providing value local content to handling administrative paper work if the proposed rules are adopted.”
- “If serving the community interest is really important to the FCC, our time and our company’s money can be put to better use.”
- Under a “Sample Form” regime, “it seems in our best interests to try to do stories that will make us come out well on the form. It appears to us that the FCC is attempting to influence news content....”

#### IV. A Quantity of Programming Measurement Approach Violates the First Amendment Rights of Television Station Licensees

By adopting a quantity of programming approach, which is the essence of the “Sample Form,” to measure station performance, the Commission will have introduced the same type of “raised eyebrow” regulatory dynamic that the United States Court of Appeals for the District of Columbia Circuit in *Lutheran Church* found unlawfully pressured stations to hire based on race.<sup>56</sup> According to D.C. Circuit Court in *MD/DC/DE Broadcasters*, the FCC “has a long history of employing...’a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content...as means for communicating official pressures to the licensee”<sup>57</sup>. In *Lutheran Church*, the Court concluded that “[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit.”<sup>58</sup> Nor does any rational broadcast station licensee welcome having to expend its resources, and suffer any attendant application processing delay in having to justify before the Commission its programming choices whether in response to a petition to deny an application, a complaint, other objections filed by a third party.

A station licensee need not have been actually threatened by a complainant before such licensee appreciates the risk of being placed on the Commission’s radar screen. Such a threat will have been created by the Commission adopting a requirement that stations file the “Sample Form” or any other form that focuses on the number of minutes that certain types of programming were aired. A station’s response to that threat will naturally be to craft its program schedule and the content of its programs by favoring those types of programs that fit the categories the Commission has selected, so called “FCC Friendly Programming,” and where time

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<sup>56</sup> *Lutheran Church – Missouri Synod v. F.C.C.*, 141 F.3d 344 (D.C. Cir. 1998).

<sup>57</sup> 236 F.3d 13, 19 (D.C. Cir. 2001) *reh’g denied*, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. *Minority Media and Telecom. Council v. MD/DC/DE Broadcasters Ass’n*, 534 U.S. 1113 (2002) (quoting *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)).

<sup>58</sup> *Lutheran Church* at 353- 54

constraints apply as they usually do by not airing, or airing less, of those types of programs that are not likely to earn the station the same regulatory “credit.” Hard minimum quotas are not necessary for such pressure to exist. At least in a hard minimum quota environment, a station licensee knows what is good enough. Where there is regulatory pressure without a safe harbor, as here, the pressure will be less transparent but nonetheless insidious.

While the Commission has the authority to regulate broadcasters in the public interest, the Communications Act specifically “prohibits the Commission from exercising the power of censorship.”<sup>59</sup> In order to impose a content-based regulation on speech, the Commission must have a compelling governmental interest and the regulation must be narrowly tailored to satisfy that compelling interest.<sup>60</sup>

Adoption of the “Sample Form” or its equivalent will necessarily involve the FCC in determining which types of programs to include on the form, which determination will be the product of the government’s own subjective set of program content values. What factors will the FCC use in its selection process? Why is one type of program more or less worthy of inclusion than another? If the Commission does not include “religious programming” under a creditable category in its reporting form, is not the Commission in effect discouraging the broadcast of such religious programming? If “religious programming” were included as a creditable category, is the FCC strongly implying that all stations should air at least some of that type of programming regardless of the local community’s needs and what other stations are doing in the same service area? And if the Commission intends to signal that it favors religious programming, would such pressure constitute inappropriate governmental involvement in the area of religious freedom? It should be clear from these questions that the “Sample Form”

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<sup>59</sup> *Nat'l Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (citing 47 U.S.C. § 326).

<sup>60</sup> *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991).

approach involves the Commission in favoring certain programming over other programming in direct conflict with the Supreme Court’s admonition that the FCC may not, consistent with the First Amendment, “impose” upon regulatees “its private notions of what the public ought to hear.”<sup>61</sup>

As mentioned, in order to impose a content-based regulation on speech, the Commission must have a compelling governmental interest and the regulation must be narrowly tailored to satisfy that interest.<sup>62</sup> If the Commission has a compelling interest in making sure that stations are adequately responsive to the problems, needs and issues of their communities of licensee, why are not QPI Lists a narrowly tailored regulation? The Commission is taking the position that it is justified in creating categories of governmentally favored programming in order to ensure that issues/programs reporting by stations “becomes more consistent or uniform.”<sup>63</sup> Tellingly, the Commission does not indicate exactly how the “Sample Form” approach is supposed to accomplish this goal or whether this goal can be achieved in a less intrusive manner. And given that the FCC has not provided *any* persuasive rationale for adopting a new reporting Form 355, the Commission’s proposals fail to even meet a rationale basis standard let alone strict scrutiny.

In addition to being an impermissible content-based regulation, the FCC’s proposals to have stations identify certain types of programming for potential governmental scrutiny also chills speech in violation of the First Amendment. When the FCC requires its regulatees to compile and publicly disclose data on certain types of programming, but not on other types of programming, the government has placed itself in the position of favoring certain programming

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<sup>61</sup> *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *FCC Network Programming Inquiry, Report and Statement of Policy*, 44 FCC 2303, 2308 (1960)).

<sup>62</sup> See *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 118 (1991).

<sup>63</sup> *NOI* at ¶ 12.

over, and to the exclusion of other programming. As a result, the government is essentially selecting what content is aired by broadcasters.<sup>64</sup>

As noted, these requirements will inevitably lead to *de facto* “quantitative minimums” for programming. Obviously, if the data is to be generated for public review and monitoring, this creates the likelihood that such data will be used as the basis for complaints, petitions or objections filed with the Commission against stations by members of the public. Each complaint, petition, or objection filed will place the Commission in the position of having to rule on the merits of a variety of programming-related claims such as, for example, whether a particular station is not carrying enough of a certain type of programming. Given the likelihood of that type of claim, and the Commission’s need to resolve it, it is inevitable that the Commission will have to resort to some quantitative measure of programming adequacy such as national or local “averages” or the programming “minimums” that the Commission eschewed so long ago for constitutional and other reasons. The threat of the government measuring broadcast stations against certain “averages” or “quantitative minimums” will pressure television

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<sup>64</sup> The NOI’s claim that the FCC does not plan to require broadcasters to provide set amounts of programming in each category selected does not remove the constitutional problems associated with the NOI’s proposals. Indeed, as Courts have noted, finding that a regulation chills speech turns not on whether the FCC actually penalizes a broadcaster for its programming choices, but rather on whether the broadcaster will censor itself “to avoid official pressure and regulation.” These pressures can take on “subtle forms.” *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 192 U.S. App. D.C., 1102, 1116 (D.C. Cir. 1978). “To the extent that a recording requirement” restricts a broadcaster’s programming discretion, “it will be effecting a new and significant diminution in the broadcasters’ First Amendment freedoms.” *Id.* at 1117.

“Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern.” *Id.* at 1118.

Consequently, there are grave constitutional free speech problems with the Commission’s proposals given that the threat of government action for not airing “enough” of a certain type of programming. While the Commission does not even address the First Amendment implications of its standardized form proposal, clearly the proposed regulation is not narrowly tailored to achieve a compelling end.

broadcasters to carry certain amounts of particular types of programming, to the exclusion of other types, to avoid or at least reduce the risk of governmental scrutiny.<sup>65</sup>

The Commission's standardized programming form proposal is clearly not narrowly tailored to meet a compelling need. The categorization of programs and quantitative minimums is not a regulation that is narrowly tailored to determine whether stations are responding to community issues and needs. The Commission has previously concluded that the types of programming carried, and the amount of such programming, are not factors that are necessarily determinative, or even necessarily indicative, of whether a station is airing enough programming responsive to community needs and issues. On the other hand, the currently required quarterly issues/programs lists do constitute targeted and probative "evidence" of whether a station is doing a satisfactory job responding to community needs and issues. The Commission long ago concluded, with the benefit of an extensive rule making record, that "the issues/programs list is a ... useful vehicle to record a licensee's effort" to provide issue-responsive programming.<sup>66</sup> That those lists are not as the FCC puts it "consistent or uniform" is evidence of the individuality of each station, not evidence of the inadequacy of the reporting scheme.

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<sup>65</sup> See, e.g., *See Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1116. The *NOI* is also flatly inconsistent with the Commission's own prior conclusion that quantitative standards deny broadcasters discretion and do not assure quality programming. In fact, in the past, the Commission asserted that granting broadcasters greater discretion would further benefit the community by allowing broadcasters to change programming as the needs of their community change. See *Memorandum Opinion and Order, Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 104 FCC 2d 358 at ¶ 2 (1986). The standardized form process, which will pressure stations nationwide to at least maintain certain quantitative minimums, will not permit a television broadcaster, when deciding what programming types to air, to take into consideration the programming of other broadcasters in the same community. The pressure toward program category and quantitative homogenization frustrate broadcasters in their efforts to innovate and to provide varied programming, including issue-responsive programming. Thus, each local community will be denied the fullest opportunity for a true diversity of programming choices should the *NOI*'s proposals be adopted.

<sup>66</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 F.C.C.2d 1076, at ¶ 75 (1984).

In sum, the clearly coercive effect of government-selected program categories on television broadcasters raises obvious First Amendment difficulties.<sup>67</sup> Given the constitutional implications of defining preferred categories of programming and requiring broadcasters to report the amounts of programming aired in those categories, the State Associations strongly urge the Commission to not go forward with the *NOI*'s proposal to create a new standardized form. The Commission should retain its long-standing and current approach, which avoids intrusive governmental intervention and appropriately defers to a local station's methods of selecting and describing the programming of local importance the station covers in its community.<sup>68</sup> Unlike the proposals raised in the *NOI*, this approach respects the constitutionally-recognized editorial independence of broadcasters while still insuring that they carry programs addressing issues of concern to their local communities.

## **V. Adoption of the "Sample Form" Approach Would Violate the Paperwork Reduction Act**

In response to the Commission's request for a "Cost/Benefit" analysis associated with the proposed regulations,<sup>69</sup> the State Associations submit that the Commission's proposals to adopt a new standardized reporting form would also violate the Paperwork Reduction Act of 1995, (the "*PRA*"), which was enacted "to minimize the federal paperwork burden"<sup>70</sup> by eliminating regulatory burdens "which are found to be unnecessary and thus wasteful ...."<sup>71</sup> Congress

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<sup>67</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 tensions with the First Amendment"); *Office of Communication of 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 "Commission requirement mandating particular program categories would raise very serious First Amendment questions").

<sup>68</sup> Under current rules, television licensees must provide coverage of issues facing their communities and place lists of programming used in providing significant treatment of those issues (issues/programs lists) in their stations' public inspection files. See 47 C.F.R. § 73.3526(e)(11).

<sup>69</sup> *NOI* at ¶¶ 44-48.

<sup>70</sup> Public Law 104-13, 44 U.S.C. § 3501(1) (Supp. V 1981).

<sup>71</sup> S.Rep. No. 930, 96th Cong., 2d Sess. 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6241, 6243.

specifically applied this policy to the FCC's domain when it extended the broadcast license term for television stations.<sup>72</sup> Congress has, therefore, specifically imposed on the FCC a policy of "reduction in regulatory burden" through the *PRA*.<sup>73</sup> The *PRA* instructs the Commission to weigh carefully the need for an information collection against the burdens of the collection.<sup>74</sup> The FCC's *NOI* has failed to do so here.<sup>75</sup>

The Commission's proposals would significantly increase the burden on television local stations while providing no corresponding benefit to the viewing public. In essence, the FCC is attempting to change something that has been working well for decades by proposing new regulatory burdens on broadcasters with the hope that it will "assist the Commission and researchers to study and analyze how broadcasters respond to the needs and interests of their communities of license."<sup>76</sup> To accomplish this highly questionable goal, the FCC has chosen to impose on television broadcasters nationwide sweeping new information collection and reporting obligations. The FCC does not provided any rational, articulated basis for believing the pervasive and sweeping changes it is proposing to make to day-to-day broadcast operations will accomplish its goal or why the FCC cannot use the current QPI Lists to obtain the information it truly and lawfully needs to perform its duties.

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<sup>72</sup> See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1241, 95 Stat. 357, 736.

<sup>73</sup> *Black Citizens for a Fair Media v. F.C.C.*, 719 F.2d 407, 416-417 (D.C. Cir. 1983).

<sup>74</sup> 44 U.S.C. § 3501(1) and (2) ("The purposes of this subchapter are to – (1) minimize the paperwork burden . . . resulting from the collection of information by or for the Federal Government; (2) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government. . . ."); 5 C.F.R. § 1320.8(a)(1) (An agency's *PRA* review "shall include: (1) [a]n evaluation of the need for the collection of information. . . .").

<sup>75</sup> In order to comply with the OMB regulations promulgated under the *PRA*, the FCC must evaluate any information collection requirement in a very specific way. Among other things, this review must include: An evaluation of the need for the collection of information; a specific, objectively supported estimate of the burden; an evaluation of whether and to what extent the burden can be reduced; a test of the collection through a pilot program, if appropriate; a plan for the efficient and effective management and use of the information, including necessary resources. 5 C.F.R. § 1320.8(a)(1), (a4)-(a)(7).

<sup>76</sup> *NOI* at 1.

The *NOI's* states that the proposal to greatly *increase* information collection and reporting requirements using the proposed "Sample Form" is based on what the FCC perceives to be a lack of "uniformity" with the current QPI Lists and is antithetical to the fundamental purpose of the *PRA*. It is incumbent on the FCC to comprehensively review the overall burdens that would be placed on television stations (which in the aggregate, is significant both in terms of time and money) if the Commission were to require stations to prepare and file the new Form 355 or any substantially similar form. Instead of doing so, in the *NOI* the FCC tentatively concludes that simply because current QPI Lists are not "uniform," broadcasters should be required to devote vastly more resources towards compiling and providing information that has, at best, questionable countervailing public interest benefits. In what would be a reversal of nearly 30 years of consistent and successful FCC policy, the *NOI* proposes to replace the current workable quarterly issues-programs list to require each television station to instead compile and provide extraordinarily detailed information regarding programs and program segments aired, as well as information about how the licensee determined the programming needs of its community and designed responsive programming. Under these circumstances, the Commission simply cannot meet the standards for certification set forth in the *PRA*.

### **Conclusion**

It is clear from the foregoing analysis that the intended principle benefit of the quantity of programming measurement approach that is embodied in the Sample Form (access to data showing the number of hours and minutes that certain types of programming were broadcast over a station for the purpose of allowing quantitative comparisons to be made as between two or more stations) would be a regulation that the Commission may not lawfully create for anyone including itself. Considering this fact, and the endless confusion, undue burdens and

