

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

In the Matter of)
)
Standardizing Program) MB Docket No. 11-189
Reporting Requirements)
For Broadcast Licensees)

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

	<u>Page</u>
SUMMARY	i-v
INTRODUCTION.....	2
DISCUSSION.....	9
I. BY PRESSURING BROADCASTERS TO AIR GOVERNMENT-FAVORED CATEGORIES OF PROGRAMMING, ADOPTION OF THE STANDARDIZED DISCLOSURE FORM CONTEMPLATED BY THE <i>NOTICE</i> WOULD INTRUDE ON FIRST AMENDMENT FREEDOMS.	9
II. ADOPTION OF A STANDARDIZED FORM REQUIRING BROADCASTERS TO REPORT ON THE CATEGORIES OF ISSUE RESPONSIVE PROGRAMMING THEY HAD BROADCAST WOULD CONSTITUTE A SHARP AND UNEXPLAINED DEPARTURE FROM THE POLICIES ADOPTED BY THE COMMISSION IN <i>TELEVISION DEREGULATION</i>	16
III. THE COMMISSION'S ADOPTION OF A STANDARDIZED PROGRAM-REPORTING FORM COULD NOT PASS MUSTER UNDER THE PAPERWORK REDUCTION ACT.	19
IV. ADOPTION OF THE PROGRAM-REPORTING FORM CONTEMPLATED BY THE <i>NOTICE</i> WOULD UNDULY BURDEN BROADCASTERS.....	22
CONCLUSION.....	24

SUMMARY

There are few other industries with as long and distinguished a record of public service as broadcasting. Throughout their history, broadcasters have donated billions of dollars worth of air time for public service announcements by community and charitable organizations; spearheaded fundraising drives for worthy causes within their communities; devoted large amounts of air time to candidate debate and forums; and provided critical, life-saving information to their communities during times of emergency. It can hardly be questioned, as noted by the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (the "Advisory Committee"), that "most broadcasters feel a strong commitment to the public interest and their responsibilities as public trustees, and behave accordingly."

Nor can it be doubted that television stations present a tremendous amount of local news. The FCC-commissioned *Information Needs of Communities Report* notes that "[w]hile newspapers have been printing fewer pages, the average number of hours of news aired by local TV stations has increased by 35 percent in the last seven years." According to the *RTDNA/Hofstra University Annual Survey*, in 2009 the daily average of newscasts presented by television stations was *five hours*. And the Commission itself has found that television stations present an impressive amount of news and public affairs programming.

Given this record, it is hard to understand why the Commission now finds it necessary to propose the adoption of yet another government form to enable members of the public to determine whether their interests are being served. It is clear that the push for these burdensome new requirements comes from self-proclaimed "watchdog" groups unhappy, for various reason, with the content and quality of some broadcasters' newscasts. Notwithstanding the *Notice's*

disavowal of any such intent, there is no doubt the adoption of a “standardize disclosure form” would be driven by an intent to influence broadcasters’ editorial and journalistic decisions. The form can have no other purpose, since it seeks information far beyond what is necessary to determine whether broadcasters are serving the public interest as defined by Commission precedent.

Network Station Owners are very proud of their news coverage – both at the national network and local station level – and believe that the mix of national and local news that they offer during their many hours of daily newscasts – including a wide range of hard news, features, sports, and weather – provide a valuable and informative service to their viewers. Certainly, critics of various persuasions may believe in good faith that our stations, or other stations, could do a better job of covering this or that particular issue. But it is simply impermissible for the Commission to attempt to accomplish this by means of government regulation, whether it seeks to regulate content directly or influence it by means of a raised regulatory eyebrow.

As discussed below, the Commission’s adoption of a more prescriptive program-reporting standard would not only be at odds with the administration’s announced goal of lessening the regulatory burdens on business wherever possible, but would be legally unsustainable.

First, while the courts have upheld the Commission’s authority to broadly assess whether a licensee’s programming is serving community needs, it is well established that the First Amendment precludes its prescription of the broadcast of particular amounts of particular kinds of programming. Moreover, the courts have recognized that the pressure brought to bear on a government licensee by a regulator’s tendentious inquiries – questions that suggest, none too

subtly, what the regulator thinks the licensee *should* be doing – can be of the same constitutional dimension as a direct command.

The Commission’s adoption of the standardized disclosure form described in the *Notice* could also not withstand review under well-established principles of administrative law. For more than a quarter century, the FCC has found the Issues/Program List – an “exemplary” listing of a station’s most *significant* community-responsive programming – sufficient to allow assessment of a renewal applicant’s public-interest performance. Nothing has changed that would now warrant a more regulatory approach. Thus the basic obligations of broadcast licensees are the same as they were when the Issues/Program List was adopted. And far from there having been any decline in the amount of news and public affairs programming that was then broadcast by television stations, the quantity of such programming has significantly increased. In the absence of any objective rationale for departing from the factual findings and policy determinations made by the Commission in *Television Deregulation*, the adoption of a more exacting program-reporting requirement cannot be sustained.

Further, the standardized form proposed in the *Notice* could not pass muster under the Paperwork Reduction Act. Under the Act, before approving an “information collection” requirement proposed by an administrative agency, the Office of Management and Budget (“OMB”) must find that the information collection is “necessary for the proper performance of the agency’s functions.” As we will show, the detailed program reporting that would be required under the proposed standardized form is unnecessary to the Commission’s determination of whether license renewal should be granted under the governing substantive standard.

Apart from failing to show that adoption of the standardized disclosure form is necessary to the performance of the Commission’s regulatory functions, the *Notice* fails to document any

benefit that would flow from its adoption sufficient to outweigh the additional burden it would impose on broadcasters. Fostering “transparency,” for instance, cannot serve as a justification for requiring television stations to devote significant resources to the preparation of a report on the programming they have aired when that programming is available for viewing by any person within range of the station’s signal. There is nothing opaque about broadcasters’ product; anyone interested in what a broadcaster is providing need only turn on a television set and watch it. If unable to do so in real time, consumers can easily record as much programming as they want for viewing – or content analysis – later.

There should be no doubt that completing a standardized form along the lines described in the *Notice* would be significantly more burdensome than preparation of the Issues/Programs list. The latter allows broadcasters to use their own system to gather information as to the airing of illustrative reports, does not mandate that the information be reported in any particular format, and does not involve retyping information onto an online form. The former would necessitate a painstaking review of all relevant broadcasts presented during a so-called “composite week” (which could comprise as many as 14 days), categorizing responsive items, and entering the compiled information on the Commission’s web site. Moreover, some advocacy groups contemplate a form that would require the inclusion of information going considerably beyond the basics of what a station had aired and when. Should the Commission adopt these proposals, we believe the paperwork imposed on broadcasters would not be significantly less than would have resulted from Form 355, which the Commission now concedes was overly burdensome.

We return again to the fact that proponents of increased program-reporting by broadcasters have the capacity to view and/or record that programming for themselves and subject it to whatever content analysis they think useful. Advocacy groups may claim that they

do not have the resources necessary for this task. But if the professed commitment of administrative agencies to deregulatory goals is to mean anything, it must mean that regulators will not shift such costs to the industries they oversee for the benefit of particularistic interest groups, where no nexus with the substantive obligations of those businesses has been shown.

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CBS Corporation (“CBS”), ABC Owned 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 *Notice of Inquiry* (“*Notice*”) in the above docket.

Network Stations Owners agree with the comments filed by the National Association of Broadcasters (NAB) and the Radio Television Digital News Association (RTNDA) as to the lack of necessity for, and the undue burdensomeness of, the “standardized disclosure” form proposed in the *Notice*. We submit these reply comments both to give additional emphasis to a number of points and to respond to certain assertions made in comments supporting the Commission’s proposal.¹

¹ NBCUniversal is subject to separate program reporting obligations under the order approving the Comcast/NBCUniversal transaction, which are distinct from the proposals set forth in this docket and are unique to NBCUniversal. Those reporting obligations are not at issue here.

INTRODUCTION

There are few other industries with as long and distinguished a record of public service as broadcasting. Throughout their history, broadcasters have donated billions of dollars worth of air time for public service announcements by community and charitable organizations; spearheaded fundraising drives for worthy causes within their communities; devoted large amounts of air time to candidate debate and forums; and provided critical, life-saving information to their communities during times of emergency.² It can hardly be questioned, as noted by the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (the "Advisory Committee"), that "most broadcasters feel a strong commitment to the public interest and their responsibilities as public trustees, and behave accordingly."³

Nor can it be doubted that television stations present a tremendous amount of local news. The FCC-commissioned *Information Needs of Communities Report* notes that "[w]hile newspapers have been printing fewer pages, the average number of hours of

² Broadcasters' outstanding, real-world service to their communities is reflected in the extraordinary outpouring of testimonials from community leaders in the Commission's *Broadcast Localism* proceeding. See, e.g., Letter dated May 19, 2008, from Roy D. Boul, Mayor of Dubuque, Iowa, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in Docket 04-233 ("[T]he City of Dubuque considers our local television stations major partners in our efforts to keep our residents informed on local government and public safety issues"); Letter dated May 5, 2008, from Larry D. Williams, Superintendent of Schools, Sioux City, Iowa, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in Docket 04-233 (local television stations "instrumental in educating voters to critical issues"; "[no] need to insert a bureaucratic framework that would disturb our locally developed process that works well"); Letter dated April 28, 2008, from David J. Hossler to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in Docket 04-233 (past Rotary Club director writes that "local stations provide outstanding coverage of natural disasters or other emergencies in our area" and "assist in educating the voters"); Letter dated May 9, 2008, from Master Trooper D.E. Olinger to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in Docket 04-233 (according to State Trooper "local station doesn't need to be handcuffed with bureaucratic rules & changes"; has "personally on numerous occasions gone to the station and done safety programs on the early shows and many PSA's for holiday travelers or general concerns").

³ Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report on the Public Interest Obligations of Digital Television Broadcasters* (1998) ("Advisory Committee Report" or "Final Report"), Section III at 46.

news aired by local TV stations has increased by 35 percent in the last seven years.”⁴

According to the *RTDNA/Hofstra University Annual Survey*, in 2009 the daily average of newscasts presented by television stations was *five hours*.⁵ And the Commission itself has found that television stations present an impressive amount of news and public affairs programming.⁶

Given this record, it is hard to understand why the Commission now finds it necessary to propose the adoption of yet another government form to enable members of the public to determine whether their interests are being served. It is clear that the push for these burdensome new requirements comes from self-proclaimed “watchdog” groups unhappy, for various reason, with the content and quality of some broadcasters’ newscasts. Notwithstanding the *Notice*’s disavowal of any such intent,⁷ there is no doubt the adoption of a “standardize disclosure form” would be driven by an intent to influence broadcasters’ editorial and journalistic decisions. The form can have no other purpose, since it seeks information far beyond what is necessary to determine whether broadcasters are serving the public interest as defined by Commission precedent.

⁴ *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), p.77, available at www.fcc.gov/infoneedsreport (“*INC Report*”).

⁵ *News Release*, Radio and Television Digital News Association, April 14, 2010, available at <http://www.rtdna.org/pages/posts/rtdnahofstra-survey-finds-tv-doing-more-with-less-optimism-on-staffing920.php>

⁶ *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 at ¶ 8(1984) (“*Television Deregulation*”), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part*, *Action for Children’s Television v. FCC*, 821 F. 2d 741 (D.C. Cir. 1987).

⁷ *See, Notice* at ¶ 23 (denying that “the standardized reporting categories impose *de facto* quantitative programming requirements or pressure stations to ensure carriage of some amount of programming that falls within government-preferred categories”).

In its *Report on Broadcast Localism and Notice of Proposed Rulemaking*,⁸ the Commission acknowledged that the record in that proceeding reflected the devotion of “significant amounts of time and resources” to airing locally-oriented programming, but nevertheless pointed to contentions that broadcasters’ efforts “fall far short” of the ideal. The Commission’s discussion of broadcasters’ coverage of political issues and elections was along much the same lines. While saying that “[m]any broadcasters take very seriously their responsibility to inform their viewers and listeners about political issues,” it lamented that “not all stations do as much as they can and should.”⁹

The *INC Report*, cited multiple times in the *Notice*, is of the same tenor. It recognizes that “the best of the local TV stations are still producing high-quality broadcast journalism of tremendous value to the community,” saying that “[i]t is hard to overstate the importance and value of these broadcasts.”¹⁰ The report also takes note of the widely-recognized fact that “[d]uring emergencies, the local TV station is often considered to be as vital a part of the local community as the police and fire departments.”¹¹ At the same time, citing a study by the Norman Lear Center at the USC Annenberg School for Communication & Journalism, the *INC Report* complains that broadcasters do not devote more coverage to “local civic issues . . . like transportation, community health, the environment, education, taxes, activism, and fundraisers,”¹² and

⁸ *Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Docket 04-233, 23 FCC Rcd 1324, 1325 (2008) (“*Broadcast Localism*”).

⁹ *Id.* at 1353.

¹⁰ *INC Report*, *supra*, at 79.

¹¹ *Id.*

¹² *Id.* at 84.

laments that broadcasters devoted on average more time to accidents than local elections.¹³

In a society that enjoys an unprecedented profusion of media catering to every interest and taste, we think it is not misplaced to ask why “all” television stations must do “more” to present such programming, when “many” stations are devoting “significant amounts of time and resources” to political coverage and other local issues. That question becomes all the more pointed when one considers the 24-hour local news channels now offered by many cable operators.¹⁴ The fact is that an abundance of news and comment concerning both local and national issues is available to any interested citizen.

Network Station Owners are very proud of their news coverage – both at the national network and local station level – and believe that the mix of national and local news that they offer during their many hours of daily newscasts – including a wide range of hard news, features, sports, and weather – provide a valuable and informative service to their viewers. Certainly, critics of various persuasions may believe in good faith that our stations, or other stations, could do a better job of covering this or that particular issue. But it is simply impermissible for the Commission to attempt to accomplish this by means of government regulation, whether it seeks to regulate content directly or influence it by means of a raised regulatory eyebrow.

As discussed below, the Commission’s adoption of a more prescriptive program-reporting standard would not only be at odds with the administration’s announced goal of

¹³ *Id.*

¹⁴ See, Special Report, “All Politics Is Local – Especially in News; Regional cable news channels putting more resources into digital platforms in run-up to 2012 elections,” *Broadcasting and Cable*, November 14, 2011, p.43.

lessening the regulatory burdens on business wherever possible,¹⁵ but would be legally unsustainable.

First, while the courts have upheld the Commission's authority to broadly assess whether a licensee's programming is serving community needs, it is well established that the First Amendment precludes its prescription of the broadcast of particular amounts of particular kinds of programming. Moreover, the courts have recognized that the pressure brought to bear on a government licensee by a regulator's tendentious inquiries – questions that suggest, none too subtly, what the regulator thinks the licensee *should* be doing – can be of the same constitutional dimension as a direct command.

The Commission's adoption of the standardized disclosure form described in the *Notice* could also not withstand review under well-established principles of administrative law. For more than a quarter century, the FCC has found the Issues/Program List – an “exemplary” listing of a station's most *significant* community-responsive programming¹⁶ – sufficient to allow assessment of a renewal applicant's public-interest performance. Nothing has changed that would now warrant a more regulatory approach. Thus the basic obligations of broadcast licensees are the same as they were when the Issues/Program List was adopted. And far from there having been any decline in the amount of news and public affairs programming that was then broadcast by television stations, the quantity of such programming has significantly increased. In the absence of any objective rationale for departing from the factual

¹⁵ See, Cass Sunstein, “Washington is Eliminating Red Tape,” *The Wall Street Journal*, August 23, 2011; Lisa Rein, “Obama order calls for agencies to cut red tape,” *The Washington Post*, July 14, 2001, p.BO4; Jared A. Favole, “New Order to Nix Bad Regulations,” *The Wall Street Journal*, July 11, 2011;

¹⁶ *Television Deregulation, supra*, at ¶ 71.

findings and policy determinations made by the Commission in *Television Deregulation*, the adoption of a more exacting program-reporting requirement cannot be sustained.

Further, the standardized form proposed in the *Notice* could not pass muster under the Paperwork Reduction Act.¹⁷ Under the Act, before approving an “information collection” requirement proposed by an administrative agency, the Office of Management and Budget (“OMB”) must find that the information collection is “necessary for the proper performance of the agency’s functions.” As we will show, the detailed program reporting that would be required under the proposed standardized form is unnecessary to the Commission’s determination of whether license renewal should be granted under the governing substantive standard.

Apart from failing to show that adoption of the standardized disclosure form is necessary to the performance of the Commission’s regulatory functions, the *Notice* fails to document any benefit that would flow from its adoption sufficient to outweigh the additional burden it would impose on broadcasters. Fostering “transparency,” for instance, cannot serve as a justification for requiring television stations to devote significant resources to the preparation of a report on the programming they have aired, when that programming is available for viewing by any person within range of the station’s signal. There is nothing opaque about broadcasters’ product; anyone interested in what a broadcaster is providing need only turn on a television set and watch it. If unable to do so in real time, consumers can easily record as much programming as they want for viewing – or content analysis – later.

It is therefore difficult to resist the conclusion that a principal purpose of the standardized disclosure form would be to facilitate the task of advocacy groups wishing

¹⁷ 44 USC § 3501, *et seq.*

to litigate claims that broadcasters are not serving the public interest as they perceive it. But neither the Paperwork Reduction Act nor the professed deregulatory goals of the FCC¹⁸ can be reconciled with a requirement that broadcasters do increased paperwork in order to make administrative litigation against them more convenient. The same is true for subsidizing research – whether by academics or industry critics – concerning subjects beyond broadcasters’ compliance with the Communications Act.

In this connection, there should be no doubt that completing a standardized form along the lines described in the *Notice* would be significantly more burdensome than preparation of the Issues/Programs list. The latter allows broadcasters to use their own system to gather information as to the airing of illustrative reports, does not mandate that the information be reported in any particular format, and does not involve retyping information onto an online form. The former would necessitate a painstaking review of all relevant broadcasts presented during a so-called “composite week” (which could comprise as many as 14 days), categorizing responsive items, and entering the compiled information on the Commission’s web site. Moreover, as discussed below, some advocacy groups contemplate a form that would require the inclusion of information going considerably beyond the basics of what a station had aired and when. Should the Commission adopt these proposals, we believe the paperwork imposed on broadcasters would not be significantly less than would have resulted from Form 355, which the Commission now concedes was overly burdensome.

We discuss these matters in greater detail below.

¹⁸ 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).

DISCUSSION

I. BY PRESSURING BROADCASTERS TO AIR GOVERNMENT-FAVORED CATEGORIES OF PROGRAMMING, ADOPTION OF THE STANDARDIZED DISCLOSURE FORM CONTEMPLATED BY THE NOTICE WOULD INTRUDE ON FIRST AMENDMENT FREEDOMS.

As early as its 1949 *Report on Editorializing*, the Commission was at pains to emphasize that “[i]t is the licensee ... who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting.”¹⁹ The FCC showed similar concern for the editorial discretion of licensees when it declined, in 1977, to adopt program percentage standards for determining what constituted “substantial service” in the context of a comparative renewal proceeding. Because all licensees would feel compelled to meet such standards, the Commission found, their adoption would “represent a restriction on licensees’ programming discretion.” Saying that it was “not convinced that that government should impose on broadcasters a national standard of performance,” the Commission concluded that quantitative program standards were “a simplistic, superficial approach to a complex problem.”²⁰

The Commission expressed similar distaste for quantitative program standards in *Television Deregulation*, where it found the replacement of numerical guidelines with a more flexible standard to be “more consistent with underlying First Amendment values.”²¹ The only programming obligation of a licensee, the Commission stated,

¹⁹ *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1247 (1949).

²⁰ *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 66 FCC 2d 419, 428-29 (1977).

²¹ *Television Deregulation*, *supra*, at ¶ 28.

should be “to provide programming responsive to issues of concern to its community of license,” emphasizing that a licensee should be able to address issues “by whatever program mix it believes is appropriate.”²²

In so stating, the Commission accurately anticipated the view of the United States Supreme Court. Thus, in *Turner Broadcasting System v. FCC*,²³ the Court acknowledged that broadcast programming “is subject to certain limited content restraints imposed by statute and FCC regulation,” giving as an example the Commission's authority under the Children's Television Act to consider the “extent to which [a] license renewal applicant has ‘served the educational and informational needs of children.’”²⁴ But the Court cautioned against “exaggerat[ing] the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming.” Noting that the Commission “is barred by the First Amendment and [§326 of the Communications Act] from interfering with the free exercise of journalistic judgment,” the Court concluded:

In particular, the FCC's oversight responsibilities *do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations*; for although “the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.”²⁵

²² *Id.* at ¶¶ 32-33.

²³ 512 U.S. 622 (1994).

²⁴ *Id.* at 649 & n.7. Two years after the Court's decision in *Turner*, the Commission adopted a three-hour per week license renewal “processing guideline” to implement the Children's Television Act. The constitutionality of its action has never been tested.

²⁵ *Id.* at 650 (quoting *Network Programming Inquiry, Report and Statement of Policy*, 25 Fed. Reg. 7293 (1960)) (emphasis added).

Of course, the *Notice* vigorously maintains that “standardized reporting categories [do not] impose *de facto* quantitative programming requirements or pressure stations to ensure carriage of some amount of programming that falls within government-preferred categories.”²⁶ Indeed, the Commission expressly states that it “do[es] [not] . . . contemplate imposing any such requirements.”

First, we note that in its still-pending *Broadcast Localism* rulemaking proceeding, the Commission has in fact proposed that program-percentage “guidelines” for use in license renewal proceeding be reinstated.²⁷ Although the composition of the FCC has changed since that proposal was made more than four years ago, the membership that issued the instant *Notice* has made no move to dismiss it, despite the recommendation of the *INC Report* that it do so.²⁸ With the *Localism* proceeding still open, and capable of being reactivated at any time by this or a subsequent Commission, the possibility that such quantitative guidelines will be joined to a standardized disclosure form cannot be dismissed.

Moreover, the assertion that no regulatory pressure inheres in requiring broadcasters to report all of the programming they have aired in particular categories during a sample period simply denies reality. As a former FCC Commissioner has observed:

[A] clear and present First Amendment danger [is] posed by the concept of breaking out categories of programming on broadcasters' FCC forms. Having the government pick one kind of program substance over another, and then ask[ing] broadcasters to list what they have done in that particular area at the time of license renewal, necessarily involves the Commission in direct content regulation. . . . The coercion to air certain kinds of programming that the

²⁶ *Notice* at ¶ 23.

²⁷ *Broadcast Localism*, *supra*, 23 FCC Rcd at 1324.

²⁸ *INC Report* at 29, 347.

Commission has deemed to be in the “public interest” is not the sort of “general affirmative dut[y]” that courts have sanctioned under the First Amendment.²⁹

Few broadcasters, confronted with a Commission form asking them to list all of their programming related to “local civic/government affairs” (defined to include “broadcasts of interviews with or statements by elected or appointed officials”) or “local electoral affairs (defined to include “candidate-centered discourse focusing on the local, state and United States Congressional races”) will not feel pressure to skew their editorial judgments in a conforming direction. And any indication by the Commission of an amount of a particular kind of programming which is “recommended,” or which would satisfy a “processing guideline,” is sure to be taken as a command by any prudent broadcaster, as is the three-hour “processing guideline” for children’s educational and informational programming.

The courts have long recognized the constitutional implications of regulation by “raised eyebrow.” For example, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*,³⁰ the United States Court of Appeals for the D.C. Circuit held unconstitutional under the First and Fifth Amendments a provision of the Communications Act which required non-commercial, educational television and radio stations that received federal funding to retain an audio tape of any program in which an issue of “public importance” was discussed. The Court stated:

Noncommercial licensees, like their commercial counterparts, are subject to regulation and license renewal

²⁹ Notice of Proposed Rulemaking, MM Docket 00-168, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816, 19840 (Separate Statement of Commissioner Furchtgott-Roth, concurring in part and dissenting in part).

³⁰ 93 F.2d 1102 (D.C. Cir. 1978) (en banc).

proceedings by the FCC. This renders them subject as well to a variety of *sub silentio* pressures and “raised eyebrow” regulation of program content. While recent administrations provide ample examples of open forms of such pressure, . . . more subtle forms of pressure are also well known. The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry, and the setting of a license for a hearing on “misrepresentations” all serve as means for communicating official pressures to the licensee.³¹

More recently, in *Lutheran Church-Missouri Synod v. FCC*, the United States Court of Appeals for the D.C. Circuit held the FCC’s equal employment opportunity regulations unconstitutional because they “indisputably pressure -- even if they do not explicitly direct or require -- stations to make race-based hiring decisions.”³²

As we have discussed above, the issues as to which the Commission’s proposal seeks to “empower” advocacy groups do not concern the failure of broadcast licensees to present informational programming relevant to their communities – which failure would be evident from the Issues/Program List – but rather involve matter of news judgment and the selection of editorial content. For example, in discussing the “granular[ity]” of program reporting that should be required of licensees, the *Notice* quotes the assertion of the Public Interest Public Airwaves Coalition (“PIPAC”) that a program-segment level of specificity is required since “some stories reported on the local news are more national in character, and would not fit in the local news reporting category, as it does not pertain to

³¹ *Id.* at 1116 (footnotes and citations omitted).

³² 154 F.3d 487, 491, *petition for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998). *See also Writers Guild of America, West v. FCC*, 423 F. Supp. 1064, 1098, 1105, 1117 (C.D. Cal. 1976) (finding that informal "jawboning" by agency officials is judicially reviewable), *vacated and remanded on jurisdictional grounds sub nom. Writers Guild of America v. ABC*, 609 F.2d 355 (9th Cir. 1979) (agreeing that "the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA"), *cert. denied*, 449 U.S. 824 (1980).

the local community of license.”³³ In the first place, the predominant “character” of a news report will often be less than strikingly obvious: how, for example, would a licensee categorize a story concerning a federal loan guarantee to a local business, the affect on a local community of the mobilization of a national guard unit because of military action abroad, or the campaign promises of a presidential candidate to fund highway construction to reduce regional traffic congestion? More fundamentally, will the Commission now entertain complaints that local newscasts contain too many national stories?

Along the same lines, PIPAC’s comments cite findings that “only a small amount of time on local news is devoted to coverage of electoral campaigns, that a large proportion of that coverage is of the ‘horserace’ variety, and that only a very small amount of time is spent covering local elections.”³⁴ Is the amount of coverage devoted to local races in a presidential year now to be considered a subject on which a station’s news director must take into account the views of certain activist groups? Will stations be faced with FCC complaints that their election coverage consisted too heavily of “horserace” rather than “issue” stories?³⁵ For the Commission to entertain such complaints, we submit, would involve a degree of government involvement with program content and journalistic judgment far beyond what the First Amendment will tolerate. But if the Commission could not – and, it is to be hoped, would not – delve so deeply into

³³ Notice at ¶ 21.

³⁴ PIPAC Comments at 14.

³⁵ There should be no doubt that these are precisely the type of issues on which activist groups would have the FCC pass judgment. See, *Chicago Media Action and Milwaukee Public Interest Media Coalition*, 22 FCC Rcd 10877 (2007) (denying petitions to deny license renewals of stations alleged to have presented coverage of local elections that was both insufficient and not concerned with “issues or other facts which would actually assist in voting”).

station editorial judgments, what would be the point of requiring licensees to report in detail on all of their program segments concerning “local electoral affairs”?

The *Notice* suggests that an “enhanced” and standardized disclosure form will “promot[e] . . . dialog between stations and the public they serve.”³⁶ It is our experience that community representatives can and do have dialog with local television stations for the asking, but an open and non-adversarial exchange will not be enhanced by the piling of more and more paperwork on broadcasters that they consider costly and useless. What such overregulation will promote is only the wary circling of potential opponents that precedes litigation. The Commission should not adopt rules that will foster such an atmosphere.³⁷

³⁶ *Notice* at ¶ 11.

³⁷ As to the general efficacy of paper reports for promoting meaningful dialog with viewers – whether the one now proposed or the less burdensome Issues/Programs List – the observations of the *INC Report* should not go unnoted:

Broadcasters waste time filling out government paperwork, maintaining “issues/programs lists,” that are often uninformative, and which few people read. This laborious system is largely useless to consumers, taxpayers and public interest groups, and does little to help make the local market for news work better. Efforts to strengthen the system—such as the “enhanced disclosure” rules and “localism” proceeding—would have been overly bureaucratic and unnecessarily burdensome to broadcasters.

INC Report at 347. It is regrettable that the *INC Report* did not extend this insight to the type of reporting form here in issue, but it is no less applicable for that fact. The obvious and readily available alternative is for interested parties to record and study a station’s broadcasts and *then* convey any concerns they have to the station’s management. That would have the added benefit of removing from the discussion disputes concerning the categorization process required by the proposed form.

II. **ADOPTION OF A STANDARDIZED FORM REQUIRING BROADCASTERS TO REPORT ON THE CATEGORIES OF ISSUE RESPONSIVE PROGRAMMING THEY HAD BROADCAST WOULD CONSTITUTE A SHARP AND UNEXPLAINED DEPARTURE FROM THE POLICIES ADOPTED BY THE COMMISSION IN TELEVISION DEREGULATION.**

The Commission's proposal in this proceeding to adopt a standardized form requiring broadcasters to report on the categories of issue responsive programming they have broadcast is fundamentally at odds with steps the agency took in the mid-1980s to significantly deregulate television broadcasting. Because of the stark contrasts between the Commission's *Television Deregulation* order and the direction of the instant Notice, the reasons underlying the Commission's 1984 decision bear emphasis.

In eliminating its quantitative license renewal guidelines in 1984, the Commission relied on two "fundamental considerations." First, the Commission found, based on studies of station performance, that broadcasters were providing public interest programming in quantities greater than those prescribed by the regulations, and concluded that "licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines."³⁸ Second, the Commission noted disadvantages "inherent" in the existing regulatory scheme for a variety of reasons, including that it infringed on the editorial discretion of broadcasters, conflicted with the Commission's traditional effort "to avoid this type of [quantitative] regulatory approach," and imposed burdensome compliance costs.³⁹ In the latter regard,

³⁸ *Television Deregulation, supra*, at ¶ 8.

³⁹ *Id.* at ¶ 29.

the Commission also repealed its requirement that television licensees retain detailed logs concerning the sources and categories of all programs they broadcast, citing a 1978 GAO report calling the regulation “the largest government burden on business” in terms of total hours expended.⁴⁰

The Commission also eliminated formal ascertainment requirements in its 1984 deregulation order, explaining that “[c]ommercial necessity dictates that the broadcaster must remain aware of the issues of the community or run the risk of losing its audience.” Finding that market forces would provide “adequate incentives for licensees to remain familiar with their communities,” the Commission concluded that “the need for our ascertainment regulation has declined and will continue to decline, and that the [requirement] should [be] eliminate[d].”⁴¹

In place of its quantitative processing guidelines, and its logging and ascertainment rules, the Commission adopted a requirement that each commercial television licensee place in its public file, on a quarterly basis, a report detailing the most significant programming regarding issues of community concern which it had broadcast during the previous three months. The report was to include the time, date and duration of each program, as well as a brief narrative description of its contents. The Commission found that such an issues/program report would be a better source of information regarding a licensee’s public interest programming than an exhaustive log, which it found unnecessary “to document the current program obligation which is directed to issues of [community] concern ... rather than to categories or amounts of programs.”⁴²

⁴⁰ *Id.* at ¶ 69.

⁴¹ *Id.* at ¶ 49.

⁴² *Id.* at ¶ 75.

It is, of course, fundamental that “an agency changing its course . . . is obligated to supply a reasoned analysis for the change.”⁴³ In *Television Deregulation*, the Commission relied on an “exhaustive” record that included its own “independent study of the economic incentives for the delivery of video programming” and a “comprehensive study of the levels of informational and local programming on commercial television for the year 1980.”⁴⁴ In light of its conclusion, after meticulous examination, that the rules there in issue were burdensome and unnecessary, the Commission would face an extraordinary burden in justifying a decision to reinstate the very same type of regulation now. This is particularly so given the rise of the Internet, which has led to an exponential increase in the number of sources of information, and the quantity of information, about both national and local affairs available to every citizen. We respectfully submit that the *Notice* cites nothing in the record that could sustain a departure of this magnitude from longstanding Commission policy.

⁴³ *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983); see also *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”)

⁴⁴ *Television Deregulation*, *supra*, at ¶¶ 2, 4.

III. THE COMMISSION'S ADOPTION OF A STANDARDIZED PROGRAM-REPORTING FORM COULD NOT PASS MUSTER UNDER THE PAPERWORK REDUCTION ACT.

The Paperwork Reduction Act is intended to “minimize the paperwork burden” on individuals and entities “resulting from the collection of information” by the federal government, while ensuring “the greatest possible public benefit and maximiz[ing] the utility of information” collected.⁴⁵ An agency may not collect information unless it has first sought public comment in order to evaluate, *inter alia*, whether the proposed collection is necessary for the proper performance of the functions of the agency. The agency must also solicit and consider comments regarding the accuracy of its estimate of the burden caused by the proposed collection, and whether the information has practical utility.⁴⁶ Only after conducting this review may the agency forward the proposed rule for information collection to the Director of the OMB for approval or disapproval.⁴⁷

To obtain approval from the OMB for an information collection, the agency must:

demonstrate that it has taken every reasonable step to ensure that the proposed collection of information:

- (i) is the least burdensome necessary for the proper performance of the agency’s functions to comply with legal requirements and achieve program objectives;
- (ii) is not duplicative of information otherwise accessible to the agency;
- (iii) has practical utility.⁴⁸

⁴⁵ *Id.* at §3501(1) and (2).

⁴⁶ *Id.* at §3506(c)((A)(i) and (ii).

⁴⁷ See 44 U.S.C. §3507.

⁴⁸ *Controlling Paperwork Burdens on the Public*, 5 CFR 1320.5(d)(1)(i)-(iii). The regulations state that “practical utility means the actual, not merely the theoretical or potential, usefulness of

The OMB must then independently determine, based on the above criteria, 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.”⁴⁹

The information collection that the Commission proposes to make through the standard disclosure form cannot meet these requirements.

The Commission has previously acknowledged that its tentative conclusions regarding the need for a standardized disclosure form is “not premised on the existence of rule violations by licensees or the failings of a particular station.”⁵⁰ In the instant *Notice*, it claims that the adoption of standardized program-reporting requirements is justified by a need for “accessibility” and “uniformity” that the Issues/Program List is not meeting.⁵¹ The Commission also stresses that adoption of the form will allow the public better to assess “the extent to which broadcasters are meeting their public interest obligations.”⁵² In fact, these purported goals are not advanced by the form.

In order realistically to determine whether the standardized form described in the *Notice* will enhance the public’s ability to assess the public interest performance of broadcasters – and thereby facilitate participation in the license renewal process – one must consider the substantive standards that govern such proceedings. The

information to or for an agency.... In the case of recordkeeping requirements..., ‘practical utility’ means that actual uses can be demonstrated.” *Id.* at 1320.3(l).

⁴⁹ *Id.* at 1320.5(e).

⁵⁰ *See, Report and Order*, MM Docket 00-44, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensees*, 23 FCC Rcd 1274, 1288 (2008).

⁵¹ *Notice* at ¶¶ 11, 46.

⁵² *Id.* at ¶ 11.

Communication Act directs that the Commission “shall” grant a station’s application for license renewal if it finds that it “has served the public interest, convenience and necessity,” has not committed “serious violations” of the Communications Act or the Commission’s rules and regulations, and that there have been no other such violations that, “taken together, would constitute a pattern of abuse.”⁵³ Prior Commission rulings make clear that, in determining whether a licensee has met its obligation to serve the public interest, the question is not whether the amount of programming that it has presented on selected issues is satisfactory to any particular interest group, but whether the overall levels of the station’s issue-responsive programming are so “nominal as to have effectively defaulted on its obligations to contribute to the discussion of issues facing its community.”⁵⁴ In the context of considering challenges to renewals, the Commission has noted the broad discretion licensees possess to choose, in good faith, which issues are of concern to the community and to choose the types of programming to address those issues.⁵⁵ In *Television Deregulation*, the Commission specifically found that the public interest is served by leaving to licensees the discretion to emphasize specific types of community responsive programming or to provide a wide variety of such programming.⁵⁶

⁵³ See 47 U.S.C. § 309(k) (emphasis added).

⁵⁴ *License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia*, 5 FCC Rcd 3847, 3848 (1990) (“*Philadelphia TV Renewals*”), citing *Television Deregulation* at 1092-94.

⁵⁵ See, e.g., *See, Chicago Media Action and Milwaukee Public Interest Media Coalition*, 22 FCC Rcd 10877 (2007) (“choice of what is or is not to be covered in the presentation of broadcast news is a matter to the licensee’s good faith discretion”); *Dr. Paul Klite*, 1998 FCC LEXIS 2089, 12 Comm. Reg. (P & F) 79 (1998) (“judgments regarding news programs are committed to a broadcaster’s good faith discretion. . . . while violence in television programming is a legitimate public concern, the alleged predominance of violence in these stations’ local news does not present a basis for Commission action”); *Philadelphia TV Renewals*, *supra*, 5 FCC Rcd at 3838.

⁵⁶ *Television Deregulation* at ¶ 22.

For this reason, the Commission’s requirement that licensees report in detail on their programming in categories chosen by the Commission does not advance any proper agency function. There is no legitimate purpose, for example, in requiring licensees to report on their coverage of “local electoral affairs”; there is no substantive mandate that stations air such programming, and having information about how much or how little a particular station has broadcast will do nothing to enhance meaningful participation in the renewal process. The same is true concerning another justification offered by the Commission for more detailed program reporting: that it will allow members of the public to “compare” the public interest performance of one station to others. But there is no legitimate regulatory basis for facilitating station-to-station comparisons, since the Communications Act expressly prohibits the Commission from “consider[ing] whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant” if the statutory standards for grant have been met.⁵⁷

Since the information that television stations would be required to compile by the standardized form proposed by the *Notice* is unnecessary to the performance of the FCC’s function, it cannot meet the standards for OMB approval set forth in the Paperwork Reduction Act.

IV. ADOPTION OF THE PROGRAM-REPORTING FORM CONTEMPLATED BY THE NOTICE WOULD UNDULY BURDEN BROADCASTERS.

It is clear that the program reporting contemplated by the *Notice* will be far more burdensome than compiling the Issues/Program List. The reasons are as follows:

⁵⁷ 47 USC § 309 (k) (4).

- The Issues/Program List allows each station to devise its own system for collecting the necessary information. For example, the executive producer of each of a station's newscasts can be instructed to send a quarterly memo listing a specified number of the most significant issue-responsive reports aired on his broadcast to the person responsible for compiling the Issues/Program List. Given the producer's familiarity with what has been aired, this task should not be overly time-consuming.
- By contrast, the standard form contemplated by the *Notice* would require *comprehensive* reporting on every program segment falling within the specified subject categories that aired on as many as fourteen days.⁵⁸ Therefore, either laborious after-the fact review of everything aired on non-entertainment programs during the selected days or extensive contemporaneous logging of all possibly relevant programs segments would be required. In this regard, we note that PIPAC proposes that the Commission announce the days comprising the composite week or weeks after-the-fact,⁵⁹ meaning that if a station chose to rely on contemporaneous record-keeping, everything would have to be logged.
- Station personnel would be required to make discretionary judgments regarding how to categorize program segments on the new form. This means that the task of reviewing or logging the station's non-entertainment programming would have to be done by an employee sufficiently senior to be entrusted with such judgments.
- Station personnel would have to enter the required information on the Commission's web site after the preparation of a hard-copy version. Thus additional hours would be consumed by the task of data entry into an already over-burdened and crash-prone electronic filing system.

In addition to these already formidable burdens, the *Notice* seeks comment on PIPAC's proposal that television stations be required to report whether the program segment in question aired on a primary or multicast channel; whether the material broadcast was first-run programming or aired previously; the approximate length of the segment excluding interstitial commercials; whether the material or any part of it was subject to the disclosure requirements of the Commission's sponsorship identification rules; and whether the program in question

⁵⁸ *Notice* at ¶ 17.

⁵⁹ PIPAC Comments at 6.

was 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, and if so the relevant agreement in the licensee's online public file.

PIPAC also urges that stations be required to separately identify all programs that are not captioned (including the date, time and length of the program, and the basis for any claimed exemption), as well as the particular captioning method used ("off-line, live, or 'electronic newsroom technique'") for programs that *are* captioned.⁶⁰

PIPAC blandly characterizes these proposed reporting mandates as "not burdensome."⁶¹ We think that those required to do the work will have a different view.

But whether the Commission adopts the truly oppressive PIPAC scheme (the burdens of which would not differ materially from those entailed by Form 355) or the merely unnecessary – and decidedly more onerous – proposals of the *Notice*, the quarterly task of documenting issue-responsive programming will have been made significantly more difficult and time-consuming for broadcasters. As we have shown, neither the *Notice* nor supportive commenters have made the case that the costs of saddling broadcasters with such requirements would be outweighed by countervailing benefits.

CONCLUSION

We return again to the fact that proponents of increased program-reporting by broadcasters have the capacity to view and/or record that programming for themselves and subject it to whatever content analysis they think useful. Advocacy groups may claim that they do not have the resources necessary for this task. But if the professed

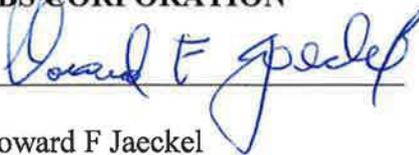
⁶⁰ PIPAC Comments at 19, 22-25.

⁶¹ PIPAC Comments at 19.

commitment of administrative agencies to deregulatory goals is to mean anything, it must mean that regulators will not shift such costs to the industries they oversee for the benefit of particularistic interest groups, where no nexus with the substantive obligations of those businesses has been shown.

Respectfully submitted,

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A handwritten signature in blue ink, appearing to read "Howard F. Jaeckel", is written over a horizontal line.

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