Before the
Federal Communications Commission
Washington, DC 20554

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

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW, Sixth Floor
Washington, DC 20036
(202) 429-5430

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The National Association of Broadcasters ("NAB")[1] hereby submits these comments in response to the above-captioned *Notice of Inquiry* ("*NOI*").[2]

I. INTRODUCTION AND SUMMARY

NAB supports the Commission's effort to address questions concerning the future of television broadcasters' public-interest program reporting obligation through an inquiry proceeding. Discussion at this stage will allow the Commission to more fully assess the benefits and drawbacks of any particular approach to improving access to, and understanding of, the programming that television stations air to meet the needs and interests of their communities.

While NAB supports the Commission's interest in fostering greater dialogue among stations and their audiences, we are concerned that several concepts raised in the *NOI*, such as the proposal that licensees categorize their programming under specific content labels, will not further that goal. To the contrary, an approach that relies on "one size fits all" program content labels may unintentionally misrepresent or under-report what stations are doing to serve the public interest and distort the dialogue.

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[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Commission and other federal agencies, and the courts.

[2] *See Standardizing Program Reporting Requirements for Broadcast Licensees*, FCC 11-169, 2011 FCC Lexis 4629 (2011) ("*NOI*"); *see also id.*, Order, DA 12-23 (MB rel. Jan. 6, 2012) (extending Comment and Reply Comment deadlines to January 27 and February 9, 2012, respectively).

NAB also has practical and legal concerns with certain proposals in the *NOI*. Although they are somewhat less onerous than the requirements in the earlier Form 355, the proposals continue to call for what is essentially a social science exercise – "content coding" – which appears designed more to benefit research efforts than to help viewers or the Commission's staff assess an individual broadcaster's public interest record. Reporting based on strict content categories or codes is flawed in multiple respects:

- Content coding would be extremely time-consuming and subject to inconsistency and other errors. The work would be especially burdensome for a station's newsroom staffers, who likely would have to make the judgments necessary to decide which content category best aligns with a particular program or segment.

- Content coding is unnecessary to inform a station's viewers about its public interest programming and to prompt dialogue between licensees and their audiences. Simple, plain-English descriptions in words of the broadcaster's choosing are more likely to lead to substantive communications.

- Content coding is unnecessary to assist the Commission's staff process license renewal applications. A standardized coding scheme would serve no purpose in this context because the Commission may not compare stations' public interest records in ruling on individual renewals.

- Content coding would not actually produce data sets that either the Commission or "media researchers" (whether inside or outside the agency) could use in producing professionally rigorous content analyses or similar studies. Thousands of untrained coders working at separate stations across the nation will not be able to make uniform or consistent categorization choices over time, and therefore the effort could not generate valid and reliable data on which the Commission officially could rely.

Beyond the significant burdens that a content-categorization reporting mandate would place upon television stations, such a mandate also would raise serious statutory and constitutional questions, particularly considering the lack of corresponding public benefits. Even under the intermediate scrutiny level of First Amendment review, the proposal for content-based reporting in which stations categorize their programming using government-devised labels is very likely to fall short. Depending on the identified government goal to be achieved, such

reporting would not actually advance the goal, would be unnecessarily burdensome given the alternatives, or the objective itself would be found invalid.

For all these reasons – legal, practical and policy – the Commission must carefully consider its objectives and alternative means of fulfilling them before pursuing the proposal set forth in the *NOI*. NAB anticipates that commenters will present specific ideas that should be further explored in the course of this inquiry – alternatives that may more effectively serve the goal of facilitating meaningful dialogue between viewers and their local stations.

II. A STANDARDIZED DISCLOSURE FORM WITH UNIFORM CONTENT CATEGORIES IS NOT NECESSARY TO SERVE VALID POLICY OBJECTIVES

In this proceeding, the Commission seeks to improve the accessibility and usability of the information that stations already provide regarding their public interest programming.[3] It is not at all obvious that such a modest goal warrants abandoning the current reporting obligation in favor of far more onerous disclosure mandates. A standardized reporting form, even if it eschews content categorization requirements,[4] is not necessary to serve the Commission's legitimate policy objectives.

The stated impetus for considering replacement of broadcasters' quarterly issues/programs lists with a standardized programming form is a concern that the existing lists are less useful than they might otherwise be. The *NOI* identifies a perceived "lack of uniformity and consistency" among stations' issues/programs lists that "'make[s] it difficult to discern both how much and what types of public interest programming a broadcaster provided.'"[5] The *NOI* posits that a standardized disclosure form will facilitate viewers' access to information on how

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3 *NOI*, ¶ 1.

4 The terms "content coding" and "categorization" are used interchangeably herein.

5 *NOI*, ¶ 11 (internal citations omitted).

licensees serve the public interest and allow them to play a more active role in helping stations provide community-responsive programming.[6] Finally, the *NOI* seeks comment on a standardized form that would require broadcasters to categorize programming under very specific content code labels.

NAB recognizes that viewers have an interest in understanding licensees' service to their local communities and in assisting stations to provide programming that meets the communities' needs and interests. In this vein, we note that viewers today already have ready access to a substantial amount of information about broadcast programming. The programming itself is offered free over the air, of course, and numerous program guides – in electronic and paper form – provide detailed program listings. Moreover, broadcasters must keep extensive programming-related documentation in their public files, including their issues/programs lists.

The Commission intentionally designed the list style of public file reporting to provide broadcast audiences with the information that was most pertinent to the licensee's overall public interest performance.[7] By requiring that TV broadcasters disclose their "*most significant* treatment of community issues during the preceding three month period,"[8] the Commission provided an efficient reporting methodology intended to "elicit the kind of purposeful programming information relevant to our current regulatory concerns";[9] give "assurance that the station has met its issue-responsive programming responsibility during the past license term . . .

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6 *Id.*, ¶ 10.

7 *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations,* Report and Order, 98 FCC 2d 1076, 1109-10 ¶¶ 75-78 (1984) ("*TV Deregulation*").

8 47 C.F.R. § 73.3526(e)(11)(i) (emphasis added).

9 *TV Deregulation*, 98 FCC 2d at 1109 ¶ 75.

";[10] and serve as a source of information for potential petitioners who may challenge renewal applications.[11] The construct of the issues/programs list has served these roles for more than 25 years.

A. The Commission Must Be Clear As To Its Policy Objectives

As a legal matter, the Commission must be clear regarding the policy objectives it hopes to advance and how any revisions to the existing reporting mandate will serve these ends. Any government requirement that regulated entities submit reports must conform to fundamental principles of administrative law: Such obligations must serve a legitimate regulatory purpose established by statute,[12] and the agency must articulate the reasons for requiring such reports.[13]

The *NOI* identifies three goals that a new standardized programming report incorporating content categories might achieve. Such a form might: (1) "promot[e] a dialog between stations and the public they serve" by "mak[ing] it easier for members of the public to learn about how television stations serve their communit[y]";[14] (2) assist the agency "in determining whether the licensees are serving the public interest";[15] and (3) "assist the Commission and researchers to study and analyze how broadcasters respond to the needs and interests of their communities of license."[16] As discussed below, however, a standardized form with rigid programming

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10 *Id.*, ¶ 77.

11 *Id.*

12 *La. Public Serv. Com v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it.").

13 *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action."); *CBS Corp. v. FCC*, 663 F.3d 122, *40-41 (3d. Cir. 2011) (quoting *State Farm*).

14 *NOI*, ¶ 11; *see also NOI*, ¶ 1.

15 *NOI*, ¶ 11; *see also NOI*, ¶ 1.

16 *NOI*, ¶ 1. This "study and analy[sis]" reference appears to relate to future rulemaking efforts that may be based on data generated by a standardized reporting form. *See id.*, ¶ 11 (such form would help "assess[ ] the effectiveness of current Commission policies governing television broadcasting").

categories would not effectively serve these ends – and the third objective is not an appropriate one for the Commission to pursue through reporting mandates in any case.

1. Broadcast program reporting requirements should encourage dialogue between stations and the communities they serve

NAB strongly supports the Commission's goal of fostering dialogue between broadcast stations and the communities they serve. As of yet, however, there is no factual basis to support a conclusion that a standardized form with rigid content categories is an effective way in which to serve this important objective. The *NOI* cites no empirical evidence on this point but instead relies on the record compiled in 2000 and 2001 in the *Enhanced Disclosure Proceeding*.[17] As NAB previously pointed out, the Commission's conclusions in that proceeding were, in fact, *not* supported by empirical evidence.[18] In the earlier proceeding, the comments cited by the Commission to support its specific conclusion that a standardized form would assist the public in understanding how stations serve their communities[19] actually alleged that stations did not understand what the issues/programs list should contain; that physical access to the relevant documents was difficult; and that the information presented in the issues/programs list lacked consistency.[20]

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[17] *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, MM Docket No. 00-168 ("*Enhanced Disclosure Proceeding*").

[18] *See* Comments of the National Association of Broadcasters, MM Docket No. 00-168, at 10-12 (filed Dec. 18, 2000) ("NAB Comments"); Reply Comments of the National Association of Broadcasters, MM Docket No. 00-168, at 2-4 (filed Feb. 16, 2001) ("NAB Reply Comments"). The full version of these comments and reply comments are incorporated by reference herein.

[19] *Enhanced Disclosure Proceeding*, 23 FCC Rcd 1274, 1286-90 (2007) ("*Enhanced Disclosure R&O*").

[20] *Id.*; *see also* Comments of the Office of Communications, Inc. of the United Church of Christ, *et al.*, MM Docket No. 00-168, at 3, 16 (filed Dec. 18, 2000); Comments of People for Better TV, MM Docket No. 00-168, at 6 (filed Dec. 18. 2000). These comments did not provide evidence establishing that a standardized form would effectively promote dialogue between stations and their viewers.

As NAB and other commenters have previously demonstrated, a lack of uniformity in the issues/programs list is reasonable and to be expected.[21] The lists represent individual station performance across a wide variety of diverse markets. It is also simply incorrect to assume that only particular programs can serve community needs. Focusing exclusively on certain programming categories may well overlook programs that serve community needs in other ways.[22] Thus, the Commission cannot properly assume that a standardized form is inherently superior to issues/programs lists (or other similar reporting approaches) in facilitating dialogue between local stations and their viewers. Indeed, such a form might distort this conversation.

2. Input from informed viewers can support the Commission's evaluation of renewal applications

The Commission also suggests that a standardized form with rigid content categories would help the agency in determining whether a licensee is meeting its public interest obligations.[23] NAB recognizes that making information on a station's issue-responsive programming available to the public is important to the Commission's functions, particularly in light of the agency's license renewal process, which relies in part on public input about a station's performance.[24] But the Commission must proceed cautiously before it attempts to adopt a standardized, category-based disclosure form to achieve this objective.

The problems with this approach are apparent from the very language of the *NOI* itself. For instance, the *NOI* repeatedly suggests that the uniformity promoted by a standardized form

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[21] *See* NAB Comments at 10-12; Reply Comments of Tribune Broadcasting Company, MB Docket No. 00-168, at 2-3 (filed Feb. 16, 2001); Joint Reply Comments of the Named State Broadcasters Associations, MM Docket No. 00-168, at 5 (filed Feb. 16, 2001).

[22] For example, programming that serves the cultural or religious interests of a community might not be captured on a standardized form, but a broadcaster might reasonably conclude that such programming would serve its local audience.

[23] *NOI*, ¶ 11.

[24] *See Office of Com. of United Ch. of Christ v. FCC*, 707 F.2d 1413, 1441-42 (D.C. Cir. 1983) ("*UCC I*").

will allow comparisons to be drawn between the performance of individual stations with regard to programming that serves the needs and interests of the community.[25] The statutory standards for broadcast license renewals, however, do not involve comparisons among stations.[26] Comparative information therefore is not a valid basis for evaluating a renewal application. Consequently, the public's ability to participate in renewal proceedings would not be significantly enhanced by any comparative data that might result from use of a standardized form incorporating content categories.

In addition, the *NOI* makes the troubling suggestion that a "Comments" section in any new reporting form "could provide licensees with space to discuss *any mitigating factors* or other information relevant to the information provided in the form."[27] This statement begs the question of why opportunities for discussing any "mitigating factors" are needed, much less what those factors might be. The Commission has long since abandoned quantitative guidelines for non-entertainment programming.[28] Indeed, the *NOI* reaffirms that any new standardized form would not "require broadcasters to air any particular category of programming or mix of programming types" and that the Commission does not "contemplate imposing any such requirements."[29] If this is the case, why would stations need to offer "mitigating factors" in reporting on their public interest programming?

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[25] *NOI*, ¶ 5 (". . . uniform and consistent programming lists would allow the public more effectively to compare the efforts of various stations. . . ."); *id.*, n.18 ("[f]or those attempting to make use of the list and to compare the efforts of various stations, uniformity of reporting is desirable and, indeed, may be essential" (quoting *Enhanced Disclosure R&O*, ¶ 38)); *id.*, ¶ 11.

[26] 47 U.S.C. § 309(k).

[27] *NOI*, ¶ 40 (emphasis added).

[28] *See UCC I*, 707 F.2d at 1419.

[29] *NOI*, ¶ 23.

NAB is concerned that any standardized form that employs government-created content categories would effectively operate as another "not-so-subtle attempt to exert pressure on stations to air certain types of content."[30] Courts have recognized that the Commission has a history of "regulation by raised eyebrow."[31] In short, there are serious legal and policy concerns about instituting the type of standardized disclosure form at issue in the *NOI* for the purpose of Commission licensing and enforcement efforts – particularly where, as here, less burdensome and less legally problematic alternatives are available.

3. Using the program reporting obligation to attempt to produce reliable data for professional quality media research is not a valid policy objective

The Commission is somewhat oblique in framing its third discernible policy objective for mandating broadcaster use of a standardized, category-based program reporting form. The *NOI* makes multiple references to "research" and "media researchers," apparently in the belief that such a form would aid "the Commission and the public in assessing the effectiveness of current Commission policies governing television broadcasting."[32] Thus, it seems that the Commission expects the direct beneficiaries of a new category-based form to extend beyond local viewers in a

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30 *NOI*, Concurring Statement of Commissioner Robert M. McDowell (quoting *Enhanced Disclosure R&O*, 23 FCC Rcd at 1322 (Comm. McDowell dissenting in part)).

31 *MD/DC/DE Broadcasters Ass'ns v. FCC*, 236 F.3d 13, 19 (D.C. Cir 2001) (quoting *Community-Service Broadcasting of Mid-America, Inc. v FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)) (The FCC in particular has a long history of employing a "variety of *sub silencio* pressures and 'raised eyebrow' regulation of program content.").

32 *NOI*, ¶ 11; see also *id.*, ¶ 1 ("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."); *id.*, ¶ 6 ("Public interest advocates also filed petitions for reconsideration, arguing that the standardized form should be designed to facilitate the downloading and aggregation of data for researchers."); *id.*, ¶ 17 ("PIPAC attaches a statement from a coalition of academics with expertise in media sampling that says that a constructed week, if implemented properly, has methodological validity for academic research and would provide a snapshot of programming for the public."); *id.*, ¶ 21 ("What level of reporting granularity is necessary to provide meaningful information to the public and the research community?"). In other passages, the *NOI* indicates that certain commenters are urging the agency to craft new reporting obligations for private research purposes. *See id.*, ¶¶ 6, 17 and 41.

broadcaster's community to encompass academic and other media researchers – or at least to encompass their research.

NAB has no quarrel with the professional pursuits of media researchers. But, we are concerned that the Commission is seeking to impose new regulatory requirements on broadcasters in order to transfer the considerable costs and burdens of analyzing media content from professional researchers to local stations.[33] Even assuming that some researchers' work product eventually could be used by the Commission for regulatory purposes rather than by the researchers themselves for private purposes, the agency has no authority to require that broadcasters serve as research assistants for social scientists and other professional media researchers.

As of today, the Commission's policy focus for broadcast reporting requirements has always been – appropriately – on the *direct* relationship between stations and the audiences they serve. For example, the Commission's old, formal ascertainment policy documented direct communications between a licensee and citizens within the station's community, while the newer issues/programs list approach more informally fosters dialogue between stations and viewers.[34] The D.C. Circuit has confirmed that some level of program reporting obligations are appropriate for facilitating that interaction between broadcast licensees and their communities and thereby serve the related right of the public to participate in broadcast license renewal cases.[35] No court

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[33] This is not to say that the Commission has no interest in media research or lacks the power to conduct it. The agency has commissioned such media research, from its own employees or through federal contracts, on multiple occasions in recent years – and has expended considerable sums in doing so, in part because such projects must satisfy "quality, objectivity, utility and integrity" standards in order for the Commission to rely upon them. *See* Attachment A at 1-2.

[34] *See UCC I*, 707 F.2 1413 (upholding the Commission's elimination of the old ascertainment policy and related renewal processing guidelines).

[35] *UCC I*, 707 F.2d at 1441-42.

has ever suggested, however, that the Commission may impose significant regulation (particularly content-based regulation) for pure research purposes.

The Commission's focus should remain on that direct relationship between stations and their viewers and not expand inappropriately into the subsidization of media research. The reality is that media researchers, like other television viewers, have free access to broadcast TV content, to various TV program guides, and to public file records concerning that content. Researchers may conduct studies concerning over-the-air programming and publish their findings, either freely or for proprietary uses. It is outside the FCC's legal or policy purview, however, to impose complex and burdensome program reporting mandates on broadcasters in an attempt to provide media researchers with statistically valid data sets for content analyses or similar studies.[36]

B. Uniform and Rigid Content Categories Will Not Achieve The Commission's Valid Policy Objectives

The touchstone for consideration of new or modified program reporting mandates must be whether the new rules would actually serve the Commission's two valid objectives here: fostering communication between licensees and viewers and thereby encouraging input that will help the agency in reviewing license renewal applications.[37] A standardized form imposing a single content-labeling method would meet neither of these valid policy goals. No rigidly categorized content reporting method could capture all the relevant information concerning a broadcaster's service to its community. To the contrary, an approach relying on "one size fits all" program content labels may actually misrepresent what stations are doing to serve the public

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[36] The effort required to create statistically valid and reliable data sets for use in high-quality research studies is considerable, as the Commission's own experience illustrates. *See* Attachment A at 1-2.

[37] *See UCC I*, 707 F.2d at 1441-42.

interest by oversimplifying or under-reporting the substance of the programming. The content categories discussed in the *NOI* consist of two- or three-word labels which on their face would provide less information, for either dialogue or renewal review purposes, than do short descriptions set out in plain English. Moreover, should the Commission attempt to use station programming records for wide-ranging research efforts, the content-categorization schemes discussed in the *NOI* would not produce valid and reliable results because of inherent flaws at the initial data collection and "coding" stages of the process.

1. A government-mandated content coding requirement could not ensure uniformity and consistency or produce statistically valid and reliable data upon which the Commission could rely

By imposing strict content-labeling requirements on broadcast stations and expecting them to produce professional quality research data, the Commission will force stations' staff to function as *de facto* content coders. Content coding that produces valid and reliable data, however, is difficult to do well and involves the exercise of significant judgment on the part of the coders. A cursory review of academic literature, including that cited by the Public Interest, Public Airwaves Coalition ("PIPAC"), reveals why a mechanism that must rely upon an ever-changing cast of untrained laypeople as content coders over extended periods of time could not produce the "uniformity" or "consistency" of which the *NOI* speaks.[38] Nor could the generated data meet the professional quality standards that Commission research must achieve if the

[38] *See, e.g.*, Fico, Lacy & Riffe, *A Content Analysis Guide for Media Economics Scholars*, 21 J. Media Econ. 1144-130 (2008) ("*Content Analysis Guide*"); RIFFE, LACY & FICO, ANALYZING MEDIA MESSAGES: USING QUANTITATIVE CONTENT ANALYSIS IN RESEARCH, 2d (Mahwah, NJ: Lawrence Erlbaum Asso., 2005) ("ANALYZING MEDIA MESSAGES"); KRIPPENDORF & BOCK, THE CONTENT ANALYSIS READER (Thousand Oaks, CA: Sage Publications, 2009) ("CONTENT ANALYSIS READER"). PIPAC endorses the authors of the *Content Analysis Guide* as "three of the leading experts in the field." *See* PIPAC Letter to Chairman Julius Genachowski, MB Docket No. 10-25, App. A at n.2 (filed Aug. 4, 2011). For a more detailed overview of the challenges involved in conducting valid and reliable content analyses, see Attachment A.

agency is to rely upon it for official reporting or decision-making, whether that research is conducted by the agency's own analysts or outside researchers.[39]

To satisfy rigorous quality demands, each coder would have to use the same methodologies, work from the same set of operating assumptions, and employ a series of other procedural safeguards.[40] It is simply unreasonable to expect that station personnel across thousands of individual stations could work to these kinds of exacting standards. This is particularly the case over the long run, where changes in station ownership, management, and personnel over time will introduce additional variability into the content-coding process.[41]

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[39] This data quality problem would be an obstacle for any analysis that incorporated it. Since 2001, Congress has mandated that all federal agencies "ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information)" used in making reports to lawmakers or for other purposes. *See* Consolidated Appropriations Act of 2001, Pub. L. No. 106-554 § 515, 114 Stat. 2763, 2763A154 (2000) (legislation informally dubbed the "Data Quality Act").

[40] *See* Attachment A at 2-5.

[41] *See* Attachment A at 5-6. Several examples in in this docket illustrate the real-world inconsistency problems that would arise if new FCC rules required individual station staff to code program segments. For example, in the wake of the *NOI*, the Radio and Television Digital News Association ("RTDNA") conducted a survey that asked its professional journalist membership to use PIPAC's suggested content categories to code a hypothetical story about an incumbent city council member's actions in a council meeting during election season. RTDNA Comments, MB Docket No. 11-189, at 12-13 (filed Jan. 27, 2012) ("RTDNA Comments"). In answering this question, 36.7% of RTDNA respondents chose "local civic affairs" and 9.2% selected "local electoral affairs," leaving 54.1% to opt for the general default category of "local news." *Id*. Similarly, the more than 50 respondents to a survey of broadcasters in numerous markets conducted after release of the *NOI* ("Broadcaster Survey") had trouble agreeing how to code a simple hypothetical story about a "new mayor's economic incentives." Out of this group of broadcasters, there was another significant split in coding choices: 62.8% chose "local civic/government affairs," 33.3% selected "local news," and 4.1% opted for "local electoral affairs." *See* Joint Comments of the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters and the Virginia Association of Broadcasters in MB Docket No. 11-189 (filed Jan. 27, 2012). In neither case did the untrained coders collectively reach the "customary" 80% level of agreement deemed an "acceptable level of reliability." Krippendorf, *Testing the Reliability of Content Analysis Data*, CONTENT ANALYSIS READER, at 354 (only where study seeks merely to reach "tentative conclusions" would a level of intercoder reliability of 66.7% suffice). Among their weaknesses, these coding exercises suggest that when confronted with confusing or difficult categorization choices, many stations may simply opt for the general "local news" category as the safest choice, regardless of its accuracy.

2. A government-mandated content coding requirement could not adequately represent all a station does to serve the interests and needs of its community

Beyond the practical impossibility of controlling coding variability nationwide, the basic premise that a government-created content coding or categorization scheme will simplify either the reporting process or comprehension of the reported information is conceptually unsound. In proposing to revive a category-based reporting form, the *NOI* does reflect the Commission's effort to learn from the past: This time, in order to simplify a concededly burdensome task, the number of content categories would be limited and each program or program segment would be tagged with only one content code.[42] Yet the Commission also recognizes that the proposed content categories necessarily overlap.[43]

This flaw is fatal from the standpoint of accuracy and completeness. No content coding approach that arguably would be easy to use could, at the same time, give appropriate weight to all potential public-interest topics. Such a scheme would necessarily under-report programming addressing local community needs and interests. Consider, for example, a news story about an incumbent city council member's actions in a council meeting during election season; such stories are both commonplace and important to local communities.[44] Under the proposal advocated by PIPAC, such a story could be coded as "local civic/government affairs" content or as "local electoral affairs." It plainly is both, however, as well as being "local news."[45] Were a

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[42] *See NOI*, ¶ 26; *compare Enhanced Disclosure R&O*, 23 FCC Rcd at 1291-92 ¶ 43-44.

[43] *Id*.

[44] For example, WRC-TV in Washington, D.C., broadcast a story about then-D.C. City Council Member and mayoral candidate Vincent Gray testifying before the city council regarding allegations of political corruption in Gray's campaign to unseat then Mayor Adrian Fenty. *See* Tom Sherwood, *Gray Confidante Denies Allegations of Corruption*, NBC WASHINGTON (May 13, 2011), http://www.nbcwashington.com/news/politics/Gray-Confidante-Denies-Allegations-of-Corruption-121811654.html.

[45] *See supra* note 41 (discussing significant variation in classification choices by licensees

station to opt for coding this material as only local civic/government affairs, the report would be inaccurate in at least two respects. First, it would under-report the full import of the story for the station's viewers. Second, it would lead to an undercounting of the actual minutes the station devoted to local electoral affairs.

Furthermore, shoe-horning a program or program segment into only one content category would not actually simplify the reporting task. To the contrary, that approach comes with substantial costs. Deciding whether to place programming into one of a limited number of government-favored programming categories, or a single (and implicitly disfavored) catch-all category, requires difficult judgment calls. Given those challenges and the potential significance of the choice for the station's record at renewal time, a licensee could not risk delegating the coding work to a low-level staffer. Stations with newsrooms likely would assign a professional journalist to the task, thereby diverting resources that could otherwise be used in actually gathering and reporting local news.[46]

The Commission also posits that a one-category-code-only approach to reporting will allow stations to quantify the total airtime "devoted to public interest programming" during the reporting period.[47] To the degree that such a quantification may bear on a station's record of service to its community, the easier and more straightforward alternative would be simply to ask broadcasters to report it. In fact, the rules governing the existing issues/programs lists already require that stations report the duration of each example of a station's "most significant treatment

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participating in RTDNA's survey and the Broadcaster Survey).

[46] *See* RTDNA Comments at 9-11 (arguing that the proposal will "rob newsrooms of limited resources and detract from newsgathering, community interaction, and in-depth reporting"); *see also* Letter from Scott Blumenthal, LIN Media, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 11-189, 2 (filed Jan. 27, 2012) ("LIN Letter"). Yet even two professional broadcast journalists may disagree as to the "right" content code for a particular story – a problem exacerbated by the fact that they have not been trained as coders in the academic sense. *See* Attachment A at 6.

[47] *Id*.

of community issues" during the quarter, along with the airdate, airtime, and a short description of the reported programming.[48] The current rules thus call for the key information that viewers and the Commission need for assessing a station's record of service to its community. More modest and less burdensome changes to the current reporting requirements than those contemplated in the *NOI* could be adopted to improve the accessibility and understandability of this information.

3. A government-mandated content coding requirement will disserve the public interest by discouraging program variety and specialization over time

As discussed above, the Commission's proposal to adopt a standardized disclosure form with specified content categories is predicated on a perceived lack of "uniformity" and "consistency" in the issues/programs lists. This desire for uniformity and consistency apparently stems from the notion that the government should require each station to serve the needs and interests of all actual and potential viewers within the licensee's community – or, in short, that every station must strive to be all things to all people. This idea has long been discredited and should not be resurrected now.[49]

NAB previously has explained that this idea also will disserve the public in the long run by leading to the homogenization of programming across stations.[50] The Commission reached the same conclusion decades ago, when the media marketplace was much less vibrant than it is today.[51] The competition then faced by broadcasters – posed mostly by a growing number of

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48 *See* 47 C.F.R. § 73.3526(e)(11)(i).

49 *See, e.g., Lutheran Church-Missouri Synod v. FCC,* 141 F.3d 344, 355-56 (1998) (it is "understandable why the Commission would seek station to station differences," but a "goal of making a single station all things to all people makes no sense").

50 *See* NAB Comments at 10-13; NAB Reply Comments at 5-7.

51 *See Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, Report and Order, 66 FCC 2d 419, 428-29 ¶ 20 (1977) ("*Elimination of*

broadcast stations – naturally encouraged licensees (especially radio) away from general-audience programming to more targeted fare; the emergence of multiple cable networks with their own targeted focus later began to have much the same competitive impact on TV broadcasters.

In a series of decisions extending from 1977 to 1984, the Commission concluded that its old ascertainment rules, with its category-oriented "guidelines" for broadcast content, were actually pushing licensees to respond more to the government's favored topics than to the actual needs and interests of local audiences.[52] The Commission therefore adopted the issues/programs list requirement to afford television licensees "increased freedom and flexibility in meeting the continuously changing needs of their communities."[53] Recognizing that "diverse programming is desirable," the Commission accepted the fact that issues/programs lists would not be uniform across all stations and likely would contain an "assortment" of information.[54]

Comparative Hearings"); *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 977 ¶ 24 (1981) ("*Radio Deregulation*"); *TV Deregulation*, 98 FCC 2d at 1076 ¶¶ 2-3.

[52] *See Radio Deregulation*, 84 FCC 2d at 1023, App. D ¶ 4 ("Universally applied rules or guidelines cannot take into account differences among communities" and are often "unresponsive to the wants or needs of the public in individual markets."); *id.* at 1059, App. E ¶ 78 ("[G]uidelines that pertain to all licensees create incentives for all licensees to act the same way, even if they are operating in very different market environments. Licensees become responsive first and foremost to the guideline, only secondarily to the public. Hence guidelines may not provide programming in the public interest."); *Elimination of Comparative Hearings*, 66 FCC 2d at 428-29 (The government should not "impose on broadcasters a national standard of performance in place of independent programming decisions attuned to the particular needs of the communities served."); *Radio Deregulation*, 84 FCC 2d

[53] *TV Deregulation*, 98 FCC 2d at 1077 ¶ 3; *see also id*. at 1087-88 ¶ 23 (new reporting obligation provides stations "flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand").

[54] *See Radio Deregulation*, 84 FCC 2d at 1088, App F ¶ 54. Differentiation is continuing, as pressure from the Internet and cable television is pushing ABC, NBC, and CBS nightly newscasts to "shak[e] up conventions that stretch back 50 years, seeking to distinguish themselves…." and "[i]n the mornings, too, the networks are highlighting their differences." *See* Brian Stelter, *Big Three Newscasts Are Changing the State of Play*, N.Y. TIMES, Jan. 8, 2012, http://www.nytimes.com/2012/01/09/business/media/at-abc-cbs-and-nbc-news-accentuating-the-differences.html?_r=1&emc=eta1. The President of NBC News, Steve Capus, said, "What is going to rule the day, in this age, is unique content." *Id*. "[Viewers] pick what matters most to them, and we are

A new content reporting scheme that relies on a standardized form and government-created, uniform content categories may well have the unintended consequence of flattening out the differentiation among broadcast stations, which has been a significant benefit of the modern, fragmented media marketplace. The Commission has recognized that the benefits associated with market fragmentation and frequently calls for more broadcast service to "niche" audiences of various types.[55] One of the most viable means of providing such programming is through a station or program stream that largely focuses on a particular niche – so that viewers interested in that particular content know where, among hundreds of channel options, to find it. The Commission accordingly should refrain from adopting detailed and indirectly proscriptive reporting mandates, which could inadvertently discourage stations from airing the types of programming that the Commission actually wants to promote.[56]

C. Reporting On The Basis Of Program Segments Will Compound The Potential For Confusion, Mistakes, Or Misimpressions

The *NOI* also seeks comment on whether it should require reporting on "programming segments" and whether the benefits of this more granular reporting would outweigh the burdens

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trying to be adaptive and respond to those sweeping changes," said Ben Sherwood, president of ABC News. *Id.*

[55] *See, e.g., Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10358 ¶ 37 (2007) ("[D]iversity of programming services may result from multicasting and provide programming to unserved and underserved segments of the population. We strongly encourage digital audio broadcasters to use their additional channels for local civic and public affairs programming and programming that serves minorities, underserved populations, and non-English speaking communities."); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 549 ¶ 16 (2009) ("Hundreds of local stations are using their digital channels to provide multicast programming, including news, weather, sports, religious material, music videos, and coverage of local musicians and concerts, as well as foreign language programming.").

[56] NAB further observes that the burdensome recordkeeping tasks necessitated by a standardized, category-based disclosure form would effectively penalize stations that air the highest amounts of news and public affairs programs by increasing their compliance burdens. This perverse result should be avoided.

on broadcasters.[57] Plainly such an approach would exacerbate the reporting burdens on broadcasters, and it would not provide significant, offsetting benefits.

In essence, stations would be required to slice apart multi-segment programming such as newscasts, news magazines, or talk shows into separate sections and content-code each segment individually. This practice would greatly increase the reporting burdens on licensees. At a minimum, each station would have to review every minute of every news broadcast, news magazine, public affairs program, and talk show in order to categorize each individual story and/or segment. As several broadcasters explain, it is not uncommon for a typical half-hour newscast to cover 15 or more separate stories.[58] If it took more than just a minute for a station's designated content coder to review each program segment and fill out a highly detailed report that might include even more data than the segment's title, content code, airdate, and duration,[59] the time devoted to the reporting mandate could easily equal or surpass the length of the entire program. Multiply that burden over early morning, noon, late afternoon, early evening and late-evening newscasts, and it becomes evident that the time needed for reporting by stations heavily invested in news and other public/civic affairs programming would swell to several hours a day

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57 *NOI*, ¶ 21.

58 *See* LIN Letter at 3; *see also* RTDNA Comments at 21 (citing survey results that "88.7% of stations air ten or more stories in a typical half-hour newscast"). Licensees who participated in the Broadcaster Survey indicated that their stations air an average of 20.2 segments per half-hour broadcast. One noted that it could broadcast an average of 2300 news segments weekly, even without including 21 weekly hours of network news. Tribune Company reported a range of eight to 15 segments per newscast.

59 PIPAC's proposed form would also require, *inter alia*, that a station indicate whether the program segment was closed captioned, whether it contained any material subject to sponsorship identification requirements, and whether it included any material produced in connection with shared services agreements or other various types of cooperative news-gathering and -sharing arrangements. PIPAC *Ex Parte* at 3, 5.

during or soon after the designated reporting period.[60] And this time burden will translate into substantial financial costs for stations as well.[61]

Further, given the difficulties inherent in content coding, stations may have to pull newsroom personnel away from their newsgathering and on-air reporting tasks to handle the reporting paperwork.[62] This would necessarily take away from the time such persons spend on gathering information and crafting news reports, including the kind of in-depth pieces that the *INC Report* suggests broadcasters should do more often.[63] For example, many of the station managers who responded to the Broadcaster Survey specifically commented that the additional burden would detract from newsgathering activities. One general manager in a market smaller than the top 75 Nielsen Designated Market Areas ("DMAs") reported that "[i]f we spent this

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[60] Licensees who responded to the Broadcaster Survey estimated that such reporting would take on average more than 40 hours per quarter to prepare the required report. A representative of Sunflower Broadcasting, Inc., attests that assembling and filing the programming disclosures proposed by PIPAC would require at least 86 hours per composite week, plus training and filing time, given the large amounts of local news and public affairs programming produced and aired by its Wichita stations. Declaration of Laverne E. Goering, Att. B, ¶¶ 3-5 ("Goering Declaration").

[61] With some broadcasters airing upwards of 50 hours of local news per week, many stations would find the cost of compliance with the proposed segment reporting obligation a significant financial burden. For example, Tribune Company relayed to NAB individual station estimates of the cost, on an annual basis, to review and report on a segment-by-segment basis for two composite weeks per quarter. These stations air between 37 and 55 hours of local programming weekly. The stations' estimated costs for complying with the segment reporting obligation range from $17,600 to $45,000 annually, and the estimated number of personnel hours required to review and report on segments range from 630 to 1,587 hours annually. The burdens would be heavy regardless of market size. In Chicago, Tribune's WGN-TV estimated that segment-by-segment coding of its 49.5 hours of weekly news and public affairs programming would require 150 hours of staff time per quarter – and that the annual workload would require the hiring of additional staff. In one of Tribune's smaller markets, WXMI-TV, Grand Rapids, MI, calculated that similar coding of its 37 hours of weekly news would require 148 hours of staff labor.

[62] Nearly 95% of TV station respondents to RTDNA's survey on the use of the proposed form reported that responsibility for recordkeeping and reporting would fall on the station's news professionals, meaning that the reporting requirement would result in "less time to devote to interacting with the community, gathering news, and crafting high-quality, in-depth reporting." RTDNA Comments at 9-10; *see also* LIN Letter at 2.

[63] *See* STEVEN WALDMAN, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 79-80, 84-88 (July 2011) ("INC REPORT") (noting the shrinking of TV newsroom staffs and the importance of in-depth investigative reporting and local coverage).

amount of time on additional reporting requirements to categorize the news we were doing[,] it would eliminate more than a day of reporting we could be doing on issues that matter to our constituents."[64] Another respondent in a similarly sized DMA stated that proposed new burdens "would take away from local news gathering time. Currently news edititoral personal [sic] compile most of the data."[65]

If a station decides that it cannot skimp on any of these tasks, the alternative would be to hire a new part-time staffer with enough of a journalism background to make coding judgments or to train an existing non-newsroom employee sufficiently to trust him or her with the coding work. A respondent to the Broadcaster Survey from a top 50 DMA stated that the proposed recordkeeping and reporting requirements "will create cumbersome layers of detailed work for the daily production of news scripts and logs" and that the tasks "will divert important resources used for daily news gathering, investigation and research."[66] Another survey respondent, this one in a market below DMA No. 175, reported that its community "will get less, not more, local service from us if this is enacted. We will need to eliminate content production and community outreach to fund this administrative activity."[67] This significant drain on station resources plainly would be at cross-purposes with the Commission's desired outcome.

III. THE GOAL FOR ANY STANDARDIZED REPORTING REQUIREMENTS SHOULD BE A STREAMLINED PROCESS THAT PROMOTES EASE OF USE BY BOTH TELEVISION LICENSEES AND THE VIEWERS THEY SERVE

Because adoption of a standardized programming form incorporating government-crafted content categories will not promote effectively the policy goals articulated in the *NOI*, the

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64 Broadcaster Survey.

65 *Id.*

66 *Id.*

67 *Id.*

Commission should avoid the pitfalls identified above by declining to adopt rigid content categorization requirements. Any revamp of the existing issue/program reporting rules should seek to establish a simple, streamlined process that promotes the ease of use by both stations and their viewers. This effort to update the reporting requirements for online uses could well benefit by the Commission coordinating with the working group(s) NAB has proposed in the context of the *Online Public File* proceeding.[68]

A. "Composite Week" Sampling Techniques Will Not Reliably Disclose The Most Noteworthy Public Interest Programming That A Station Airs Each Quarter

The Commission seeks comment on whether incorporating some form of sampling technique as part of any new reporting requirement would provide sufficient information to the public without unduly burdening broadcasters.[69] The *NOI* focuses on the concept of a "composite week" and asks whether that approach would adequately capture performance for all categories of reported programming.[70] Yet the Commission also calls for comment on whether certain content is so significant that it must be documented in full, pointing to PIPAC's contention that all electoral affairs coverage throughout a quarter should be reported.[71]

The actual value of composite week sampling turns on what use the Commission expects to make of the data. If the agency is looking only for a snapshot in time of a station's "average" weekly performance, such sampling (if conducted accurately) could serve some purpose.[72] But

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68 Comments of the National Association of Broadcasters, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398)*, MM Docket Nos. 00-168, 00-44, 29-37 (filed Dec. 22, 2011) ("NAB Online Public File Comments").

69 *NOI*, ¶ 16.

70 *Id.*, ¶ 20.

71 *Id.*

72 NAB observes that a random full week could also serve this "snapshot" purpose. This approach may well be simpler and more straightforward for the Commission to implement and for stations to fulfill.

for more than 25 years, the Commission has sought programming data to glean the *key* highlights – the "most significant" examples – of a station's service to its community through the three-month reporting period, not simply to discern average weekly performance over the quarter. In essence, the existing rule embodies a type of quality-based sampling left to the discretion of the station. It also reflects the Commission's understanding that programs serving community interests and needs can vary greatly over time and between markets, and that not all of it is broadcast regularly throughout a quarter. Public interest programming responding to short-term needs (such as emergency reporting) or one-time community events obviously may not fall within the composite week approach to sampling.[73]

Information reported as the "most significant" examples of a station's public interest performance remains valuable and plainly relevant, both for viewers who seek to engage with their local broadcasters and for Commission personnel who process renewal applications. Accordingly, if the Commission continues to explore the composite week sampling approach, it should also seek to accommodate additional reporting about significant programming aired outside the sampling dates. Because a combination of these approaches would require TV broadcasters to engage in two different types of reporting, any composite week sampling period should be limited to seven days (*i.e.*, one composite week). Even the professional social-science

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See NOI, ¶ 16 (inquiring whether compiling full week would be less burdensome than composite week).

[73] For example, if a strict sampling approach had been in place in the second quarter of 2011, TV stations licensed to the Springfield/Joplin, MO market likely would have been forced to under-report – in the sense of quantity and quality – their service to the Joplin community during and after the May 22, 2011 tornado that devastated large sections of the town. A seven- or 14-day sampling period selected evenly throughout April, May, and June of 2011 would, at most, credit the stations with only about three or six days, respectively, of tornado-related coverage. It seems doubtful that most Joplin area residents would consider such a sampling a fair assessment of the stations' actual performance. A keyword search for "tornado" on the website for KYTV(TV) in Springfield yields 129 search results in 2011 2Q, a significant amount of coverage of the tornado and the impact on the local community in the storm's aftermath. *See* Search Results, KY3, http://www.ky3.com/ (click search box; then search "tornado" and create a custom data range from April 1, 2011 to June 30, 2011; then click "Search").

support cited by PIPAC recognizes that a one-week composite sample would be statistically valid.[74]

Whatever approach the Commission pursues, the agency should make plain that no particular content will be subject to a "report everything" mandate. The Commission therefore should reject PIPAC's proposal that stations be required to report all electoral affairs programming throughout the entire "lowest unit charge" period.[75] PIPAC's only support for this proposal is an assertion that such content is "important public interest programming and is critical to an informed citizenry."[76] While NAB certainly does not dispute the importance of electoral affairs programming, mandating that broadcasters report all of one type of content over prolonged periods would multiply the burdens on broadcasters[77] without appreciably advancing

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[74] *See* PIPAC Ex Parte, App. A at 2-3. The social science experts generally cited by PIPAC have reported that one week's worth of constructed week data is sufficient for fairly representing six entire months' worth of content. *See* Daniel Riffe, *et al*., *The Effectiveness of Random, Consecutive Day and Constructed Week Sampling, in Newspaper Content Analysis, in* THE CONTENT ANALYSIS READER, 57-58 (2009) (finding "that for a population of six months of [newspaper] editions, one constructed week was as efficient as four, and its estimates exceeded what would be expected based on probability theory."). Consequently, if the Commission were to require a 14-day sample of constructed week data every quarter, over a year's time stations would report four times as much data as PIPAC's cited experts deemed reliable. Moreover, such a mandate would not deliver any correspondingly sizeable benefit in the quality of the data reported. *See id*. at 57 ("Precision is increased slightly with two or three constructed weeks, but may not merit the increased resource commitment, which would be doubled or tripled.")

[75] *See NOI*, ¶ 20 (citing PIPAC *Ex Parte* at 4). Such an exemption would require broadcasters to report all electoral affairs programming aired during a 45-day period before a primary election and a 60-day period before a general election.

[76] *Id*.

[77] If stations were required to report on all local electoral affairs programming as well, one broadcaster estimates that such a report would require at least 1,290 hours of staff time, just to analyze all segments of local news and public affairs programming regarding a single state's primary and general elections in a given year. Many additional hours would be required for analysis and description of other electoral programming, such as debates and election day coverage. Goering Declaration ¶¶ 6-7. Tribune stations report to NAB that between 315 and 1,058 and hours of programming would have to be reviewed and reported on to analyze a federal primary, state primary if on a different date, and general election in a single year. This would require between 630 and 1587 hours of employee time. As with the general proposal for segment-by-segment coding, this proposed "report everything" mandate would be burdensome for stations of any size. For example, in Chicago, IL, WGN-TV estimates that it would have to review and report on 1,058 hours of programming, which would require 1587 worker hours. In the

any objective within the Commission's jurisdiction.[78] Such "exemptions" from the composite week approach would add more complications by creating yet another variation in reporting schemes.

In light of these various shortcomings of the composite week sampling technique, the Commission should consider other approaches (or combination of approaches) that would more effectively enhance viewer understanding of the programming stations air to serve local communities.

B. The Commission Should Not Favor Locally Produced Programming Over Other Material That Serves The Needs And Interests Of The Community

The Commission seeks comment on whether to require broadcasters to classify programming addressing the needs and interests of their communities into three strictly defined categories, *i.e*., local news, local civic/governmental affairs, and local electoral affairs programming.[79] With regard to the proposed local news category, the Commission notes that the *Enhanced Disclosure R&O* required reporting with respect to national news, local news produced by the station, and local news produced by an entity other than the station, all of which included national and local programs that included significant treatment of community issues.[80] PIPAC now recommends limiting the definition of local news to "'[p]rogramming that is locally produced and reports on issues about, or pertaining to, a licensee's local community of

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smaller market of Indianapolis, WXIN-TV estimates that it would have to review and report on more than 471 hours of programming, requiring 942 hours of employee time annually.

[78] Some commenters in this docket and the related *Online Public File Proceeding* appear to believe that the Commission has substantial regulatory authority over campaign spending disclosures and other political campaign concerns. *See, e.g*., Letter from Libby Reinish, Free Press, to Marlene H. Dortch, Secretary, FCC, MM Docket No. 00-168, 1 (filed Jan. 17, 2012); Letter from Media & Democracy Coalition, to Marlene H. Dortch, Secretary, FCC, MM Docket No. 11-168 & 11-189, 1 (filed Jan. 17, 2012). These commenters are misguided.

[79] *NOI*, ¶¶ 27-29.

[80] *Id.*, ¶ 27 (citing *Enhanced Disclosure R&O*, 23 FCC Rcd at 1301-02).

license.'"[81] The Commission should reject this notion that programming must be "locally produced" and pertain to a licensee's "local community of license" in order to be relevant to a community's needs and interests.[82]

Distinctions drawn solely on the basis of whether broadcast programming was or was not produced locally have little or no relevance to the question of whether that content serves the community's needs and interests. The same is true with respect to the "local" nature of a particular issue, even if it could be defined in any rational way. The simple fact is that broadcast stations select programming that interests the public they serve; stations need to attract and retain viewers to compete for vital advertising revenue. If a station airs content that was produced elsewhere or that has a national, regional, or statewide focus, the programming airs because the station, in its editorial judgment, believes that such coverage interests its community. It would be ridiculous to suggest that reporting on developments in a state capital or the region as a whole does not serve community needs merely because the station relied upon a news service for the report. Similarly, broadcast journalists often "localize" regional, national, or even international news stories by emphasizing the impact such events have locally.[83] The Commission should not

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81 *Id.* (quoting PIPAC *Ex Parte* at n.23, *citing* Christopher Ali, "THE SECOND DAY STORY": RE-IMAGINING PUBLIC BROADCASTING THROUGH COMMUNITY, 15, n.2) (RIPE@2010 2010).

82 *See NOI*, ¶ 27; *see also id.*, ¶ 21 (referencing the "local community of license.").

83 Examples abound to illustrate this point. For example, KOTV-TV in Tulsa, Oklahoma aired a broadcast about the impact of President Obama's decision to not proceed with the Keystone XL oil pipeline on local community members seeking employment, an otherwise "national" news story. *See* Dan Bewley, *Pipeline Rejection Leaves Jennings Man, Others Looking For Work*, NewsOn6.com (Jan. 19, 2012), http://www.newson6.com/story/16559534/pipeline-rejection-puts-jennings-man-in-bind. WMUR-TV in Manchester, New Hampshire broadcast a story on the end of the war in Iraq, which discussed the return of New Hampshire National Guard members to the state after their service. *See With End of War in Iraq, Local Troops Return Home*, WMUR.com (Dec. 15, 2011), http://www.wmur.com/r/30007912/detail.html. As the U.S. recession continued in 2008, WRAL-TV in Raleigh, North Carolina reported on the economic downturn's impact on local non-profit organizations and the decline in charitable giving. *See Recession Jeopardizes Corporate Philanthropy*, WRAL.com (Dec. 4, 2008), http://www.wral.com/news/local/story/4080004/.

put itself in the position of potentially having to judge whether a particular report contains sufficient local content to qualify for its reporting purposes.

More to the point, the Commission should not seek to override a broadcaster's editorial judgments about what content addresses community needs and interests by creating a clear governmental preference for "locally produced" programming over all other material. The Commission has stated previously that programming "that addresses local concerns need not be produced or originated locally to qualify as 'issue-responsive' in connection with a licensee's program service obligations."[84] Indeed, the Commission has said the premise – that only locally produced programming can meet the local needs of communities – "lacks presumptive validity."[85] The D.C. Circuit has agreed with the agency on that point, rejecting the argument that the Communications Act requires licensees to provide locally produced programming.[86]

Any emphasis on the "local community of license" would be similarly flawed.[87] Adoption of such a focus would suggest that a station licensed to the District of Columbia could not regard coverage of news events in Northern Virginia or Maryland as serving the needs and interests of their viewers, many of whom reside in Virginia and Maryland. This result would be patently absurd.

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84 *Broadcast Localism,* Notice of Inquiry, 19 FCC Rcd 12425, 12431 ¶ 14 (July 1, 2004). *See also Radio Deregulation,* 84 FCC 2d at 999 (Concurring Statement of Commissioner Fogarty) (In discussing the maintenance of quarterly programs/issues lists, one Commissioner expressly noted that stations are "not preclude[d]" from airing non-locally produced programming "which address issues of importance to the community.").

85 *See Applications of WPIX, Inc.*, Decision, 68 FCC 2d 381, 402-03 ¶ 61 (1978).

86 *See UCC I*, 707 F.2d at 1430, n.54 ("As long as the Commission requires licensees to provide programming – whatever its source – that is responsive to their communities, § 307(b) is satisfied.").

87 *NOI*, ¶ 27 (citing PIPAC *Ex Parte* at 3).

C. The Commission Should Not Burden Stations With Reporting New And Unnecessary Information

The Commission seeks comment on recommendations that, for each program or program segment that is reported, broadcasters be required to disclose a wide variety of additional information beyond what is needed to identify and briefly describe the programming itself. This includes whether the material aired on a primary or multicast channel; whether the material is first-run programming or previously aired; the approximate length of the segment excluding interstitial commercials; whether the material reported, or any portion of it, is subject to the disclosure requirements of the 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 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.[88] In addition to this list, the Commission asks whether broadcasters should be required to include yet more information in their quarterly programming reports: whether the reported programming is closed captioned, information about programs that contain video descriptions, and the number of emergency accessibility complaints that a station has received.[89]

The Commission should heed the lessons learned in earlier phases of the *Enhanced Disclosure Proceeding* and avoid the temptation to lard broadcasters' programming reporting obligation with every conceivable piece of information that some would like included in a station's report. If the record in that proceeding demonstrates anything, it is that every additional piece of information that the Commission mandates be included in a programming report adds to

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88 *NOI*, ¶ 37 (citing PIPAC *Ex Parte* at n.28).

89 *NOI*, ¶¶ 31-37.

the burden of preparing that report. NAB estimated that the old Form 355, if it had been implemented, would have resulted in a net increase of approximately 2.6 million burden hours per year for broadcast stations.[90] Much of that burden was associated with reporting the same information that has again been teed up for consideration in this new proceeding.[91]

Although the *NOI* states that the comparatively reduced obligations under discussion in this docket should cut the reporting burden on stations from 2.6 million hours to something less, there is no reason to believe that the sum total of the new or recycled reporting proposals will not still be significantly burdensome. This is particularly problematic, given that the additional information proposed by PIPAC does not directly relate to the Commission's fundamental policy objective in this proceeding, *i.e.*, improving viewers' access to, and understanding of, information concerning their local broadcasters' public interest programming and fostering dialogue between those viewers and stations regarding such programming.

This point is well illustrated by PIPAC's suggestion that stations should be required to state whether reported programming was sponsored and provide a list of the sponsors.[92] As NAB pointed out with regard to a similar proposal in the *Online Public File Proceeding*,[93] requiring the re-disclosure of sponsorship ID information in a programming report would be duplicative and, therefore, would make no sense.[94] Broadcasters already are required to disclose

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90 Comments of The National Association of Broadcasters on Proposed Information Collection Requirements, MM Docket No. 00-168, 3 (filed May 12, 2008) ("NAB PRA Comments").

91 *See id*. at 6-11.

92 *NOI*, ¶ 37.

93 *See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children's Television Programming Report (Form 398)*, MM Docket Nos. 00-168, 00-44, Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 11-162, ¶ 34 (rel. Oct. 27, 2011) ("*Online Public File FNPRM*").

94 NAB Online Public File Comments at 23-28. Moreover, because the Commission already is considering in that proceeding whether to require stations to include the information in their online public files, raising that potential obligation in this proceeding is unnecessarily repetitive.

each sponsor – exclusive of obvious commercial advertisers – during each sponsored program.[95] This long-standing requirement is a sensible method for providing interested viewers with information about sponsors of programming. Increasing these reporting burdens substantially would not deliver a commensurate level of public benefit.[96]

The Commission also should reject calls for documenting programming decisions that remain solely within a station's editorial discretion. For example, there is no need to obligate broadcasters to state, on a program-by-program basis, whether particular material has aired on the station's primary stream or a multicast stream.[97] Except for children's programming, TV broadcasters are free to determine which program stream may be most appropriate for any particular content. Similarly, there is no need to require broadcasters to state whether particular programming is "first run" or has aired before.[98] Whether a given program has aired previously has no bearing on whether that material serves the needs or interests of the community. In short, there is no justification for burdening stations with these extraneous reporting requirements.[99]

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95 47 C.F.R. § 73.1212; *see also* NAB Online Public File Comments at 23-28.

96 NAB Online Public File Comments at 23-28.

97 *Id.*, ¶ 37.

98 *Id.*

99 In addition, the Commission should reject calls to further complicate reporting obligations by requiring stations to indicate whether a station's public interest programming is the product of a local news service, shared service agreement ("SSA"), or other contractual agreements between the licensee and another broadcast station or daily newspaper in the same market. *NOI*, ¶ 37. As NAB has pointed out in the *Online Public File Proceeding*, where the same issue has been raised, it is premature for the Commission to decide whether broadcasters should be required to disclose SSAs or comparable contractual arrangements at all. NAB Online Public File Comments at 28-29. Similarly, there is no need to require broadcasters to report on the raw number of "emergency accessibility complaints" in their public files – the mere existence of which, the Commission recognizes, does not signify that a violation has occurred. *NOI*, ¶ 33.

IV. A FORM BASED ON STRICT CATEGORIZATION OF PROGRAM CONTENT IS FRAUGHT WITH STATUTORY AND CONSTITUTIONAL INFIRMITIES

Adopting new and detailed reporting requirements that includes government-crafted content coding would raise serious questions about the Commission's authority under the Communications Act and the First Amendment. Although the *NOI* is virtually silent on statutory authority and constitutional issues,[100] the Commission must confront them before pursuing any further the proposal set forth in the *NOI*.

A. The Commission's Statutory Authority To Target Particular Program Content Is Limited

Although Congress has given the Commission general power to require that broadcasters keep programming records,[101] that grant of authority is not limitless – particularly where, as here, the proposed new record-keeping mandate involves strict content categorization that will almost inevitably shape and influence broadcasters' program content.[102] In the years since the D.C. Circuit last looked at the broadcast public file rules, that court has cautioned the agency that it may "promulgate regulations that significantly implicate program content" only if the action is expressly authorized under the Act.[103]

The proposal for a standardized reporting form premised on government-created content categories exceeds the agency's express authority to regulate content. As the D.C. Circuit in *Motion Picture Association of America, Inc., et al. v. FCC* pointed out, "Congress has been

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100 The *NOI* fails to raise any constitutional questions and only briefly cites *Ofc. of Comm. Of United Ch. Of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985) ("*UCC II*") for the proposition that the Commission "has statutory authority to require whatever recordkeeping requirements it deems appropriate." *NOI*, n.77 (citing *UCC II*, 779 F.2d at 707). The lone reference to constitutional issues appears in Commissioner Robert McDowell's separate statement.

101 47 U.S.C. § 303(j).

102 *See supra* Section II.B.3; *see also infra* Section IV.B.

103 *Motion Picture Association of America, Inc., et al. v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002) ("*MPAA*").

scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content."[104] The Commission, however, can point to no such "scrupulously clear" delegation of authority to support the burdensome and content-oriented reporting requirements under consideration here. Although section 1 of the Act, as implemented through section 309(a) and (k)(1), generally requires broadcasters to air programming in the public interest,[105] this general grant of authority is a far cry from the kind of "scrupulously clear" delegations elsewhere in the Act concerning specific content such as indecent material, "educational and informational" children's programming, or political programming.[106] The Commission cannot assume that its statutory authority over recordkeeping is without limit.[107]

B. A Standardized Form Based On Uniform, Government-Created Content Categories Suffers From Constitutional Infirmities

The *NOI*'s failure to address the clear constitutional questions raised here is peculiar in light of the First Amendment case law that has developed since the last court review of the broadcast program reporting rules nearly three decades ago.[108] Even then, however, the D.C. Circuit in *Office of Com. of United Ch. of Christ v. FCC* acknowledged arguments that a

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104 *MPAA*, 309 F.3d at 805.

105 *See* 47 U.S.C. §§ 151, 309(a) and (k)(1).

106 18 U.S.C. § 1464; 47 U.S.C. §§ 303(b), 315, 399.

107 *See MPAA*, 309 F.3d at 805-06 (*citing Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd*, 29 F.3d 655, 671 (1994)). Moreover, as discussed *supra* Section II.A.2, the Communications Act explicitly bars the Commission from comparing broadcasters in the context of individual licensing adjudications. That directive would be in significant tension with any construction of the Act extending the Commission's general authority to nonetheless permit such comparisons.

108 *UCC II*, 779 F.2d 702; *see also UCC I*, 707 F.2d 1413. Whatever statutory authority the Commission may have to regulate broadcasting is, of course, subject to constitutional boundaries. *See, e.g.*, *Fox TV Stations v. FCC*, 613 F.3d 317 (2d Cir. 2010) (indecency policy unconstitutionally vague), *cert. granted*, 131 S.Ct. 3065 (June 27, 2011). More recent Commission rulemaking efforts concerning program reporting rules appear to recognize that the old D.C. Circuit precedent concerning statutory authority can no longer be deemed a shield from First Amendment challenge. *Compare Enhanced R&O*, 23 FCC Rcd at 1280-81 ¶ 16 (intermediate scrutiny analysis applied to Form 355 adoption) *with UCC II*, 776 F.2d at 707.

"Commission requirement mandating particular program categories would raise very serious First Amendment questions."[109]

Since that time, courts have developed noteworthy precedent concerning both the rigors of the intermediate scrutiny test and the constitutionality of disclosure and reporting requirements.[110] Under it, a content-categorization approach like that discussed in the *NOI* would face significant obstacles. As an initial matter, a reviewing court today is likely to find a reporting regime based on program content distinctions that treats some content (*e.g.*, "local electoral affairs") differently than other topics to be, by definition, a content-based regulation and therefore subject to a heightened level of review.[111]

As NAB has pointed out in earlier phases of the *Enhanced Disclosure Proceeding*, the more specific and proscriptive the government mandate, the more likely it is to raise constitutional concerns.[112] A reporting requirement that incorporates strict content-categorization will almost inevitably operate as a soft dictate about that content. It could hardly

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109 *UCC I*, 707 F.2d at 1430.

110 *See, e.g.*, *SUNY v. Fox*, 492 U.S. 469, (1989); *Greater New Orleans, B'cast Ass'n v. U.S.*, 527 U.S. 173 (1999); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) (striking down compelled disclosure requirement having "no necessary relationship to the danger sought to be prevented"). *See also, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (striking down restraint on pharmaceutical marketing under "heightened scrutiny" for failure to directly advance a substantial government interest); *R.J Reynolds Tobacco Co. et al. v. U.S. FDA*, Case No. 11-1482, 2011 U.S. Dist. LEXIS 128372 (D.D.C. 2011) (enjoining implementation of statute mandating additional speech disclosures on tobacco warning label because existing disclosure already served the stated purpose).

111 Indeed, a reporting scheme that effectively favors certain types of content over others might even raise questions about whether intermediate scrutiny offers sufficient First Amendment protection to the regulated speaker. *Cf. IMS Health Inc.*, 131 S. Ct. at 2653.

112 NAB Comments at 6-9; NAB Reply Comments at 5-10. In this regard, the proposal that TV licensees report to the government on their "electoral affairs" programming – perhaps to the point of documenting every minute of it – should raise serious constitutional qualms, for the speech at issue is the type of core political speech that the Framers intended the First Amendment to protect. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (broadest First Amendment protection afforded to political speech "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

be otherwise, given the regulated environment in which broadcasters operate – which the courts expressly have recognized.[113] The lack of explicit demands that TV broadcasters air a specified amount of government-favored content does not obviate the problem. By selectively choosing what type of content merits reporting as public interest programming and downplaying, if not altogether ignoring, the rest, the Commission would perforce pressure stations to air more of what the FCC believes viewers should see. That, in turn, would require stations to cut back on programming they might believe best suits their community's needs and interests to make room for the government's preferences.[114]

Such a result would be in great tension with the Supreme Court's admonition that the Commission may not, consistent with the First Amendment, "impose" upon licensees "its private notions of what the public ought to hear."[115] It also would contravene Congressional intent concerning the FCC's role in regulating broadcast content;[116] mire the agency in constitutional

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[113] *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir 2001) (noting that "a regulatory agency may be able to put pressure on a regulated firm in a number of ways, some more subtle than others" and pointing to the FCC's "long history" of "'raised eyebrow' regulation of program content"). The D.C. Circuit in fact has repeatedly criticized the Commission for using its broadcasting reporting rules to indirectly shape licensee behavior. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (1998) ("It cannot seriously be argued that [the FCC's EEO] screening device does not create a strong incentive to meet the numerical goals.").

[114] This concern is not a theoretical one, for if the Commission instituted a content-categorization reporting requirement, broadcasters that do not air programming every quarter that ticks each category box are likely to draw questions and complaints during their next renewal review – regardless of how meritorious their overall programming service may be. If such scenarios were not likely, there would be no reason for a standardized form to include space for the licensee to "discuss any mitigating factors" concerning its performance. *See NOI*, ¶ 40.

[115] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (quoting *Network Programming Inquiry*, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960)).

[116] Congress has enacted only a limited number of explicit content directives, *see, e.g.*, Section 315 of the Act (political candidate "opportunities"), and has otherwise declined to tread on broadcasters' freedom to determine how best to serve the public interest needs of their communities. *See UCC I*, 707 F.2 at 1430 (Congress "has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities"); *see also, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations.").

difficulties it historically has sought to avoid;[117] and potentially involve the Commission in making inappropriate and constitutionally highly suspect determinations about the quality of news and political coverage.[118] Even in those rare instances when Congress has directed licensees to provide a specified type of programming, as in the case of children's programming, lawmakers and the agency in its implementing rules have taken care to afford broadcasters considerable editorial discretion in choosing responsive content.[119]

With these considerations in mind, a court analyzing a content-categorization reporting mandate like that under discussion in this docket would, at the very least, apply intermediate scrutiny. Under any iteration of that standard, onerous mandates that do not actually advance a

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[117] For example, more than 30 years ago the D.C. Circuit upheld the Commission's decision against adopting quantitative programming standards in license renewals. The court concluded that the concept "would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission." *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978).

[118] For instance, PIPAC's definition of 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." *NOI*, ¶ 29 (emphasis added). The language regarding "substantive discussions" clearly invites public interest groups and the government to make judgments about what does and does not constitute such discussions.

[119] The Children's Television Act of 1990 ("CTA") directs TV broadcasters to provide some "educational and informational" programming for children age 12 and younger, § 103, 47 U.S.C. § 303(b)(a), with the emphasis on the age demographic to be served rather than on the precise boundaries of the relevant content. Since the CTA's enactment, the FCC has given considerable thought to the statute's implementation. *See, e.g.*, *Policies and Rules Concerning Children's Television Programming; Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 6 FCC Rcd 2111 (1991); *Policies and Rules Concerning Children's Television Programming; Revision of Programming and Policies for Television Broadcast Stations*, Report and Order, 11 FCC Rcd 10660 (1996); *Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943 (2004). Accordingly, the Form 398 Children's Television Report requires licensees to provide a brief description of how responsive programming serves the educational and informational needs of children, but it does not require any kind of specific content categorization or labeling. This intentionally sensitive approach to legislation and its implementation has never been tested in court.

truly important government interest and that fail to reflect serious consideration of less burdensome alternatives are unlikely to survive.[120] There are three distinct steps in the analysis:

- First, what is the "important" goal that the government asserts here? Or, put another way, is the problem that regulators seek to address a real and valid area for government action? Courts have called regulator claims on this issue into question in recent years.[121]

- Second, does the regulation actually "advance" that government goal? Expressed more simply, does the new mandate actually operate in a way that delivers the desired results? Regulators have lost on this prong in recent decades.[122]

- Finally, is the regulation "narrowly tailored" to fit the stated purpose? In other words, has the government considered and rejected other alternatives to the regulatory burdens it chose to impose? Although the new obligations need not be the "least restrictive means" of serving the stated objective, regulators do not get a free pass on this prong.[123]

Applying this analysis methodically through the lens of each of the Commission's three identified goals reveals differing sets of constitutional hurdles. The first stated goal of encouraging communication between licensees and local viewers is an important and valid

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120 *See, e.g.*, *SUNY v. Fox*, 492 U.S. at 469; *Rubin v. Coors Brewing Co.*, 514 U.S. at 476. Even for regulations deemed content neutral, the intermediate scrutiny test holds the same rigors. *See Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997) ("*Turner*").

121 *See, e.g.*, *Coors Brewing Co.*, 514 U.S. 476; *IMS Health Inc.*, 131 S. Ct. at 2653; *R.J. Reynolds Tobacco Co.*, 2011 U.S. Dist. LEXIS 128372 at *22. *See also Turner*, 520 U.S. at 189 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1997) (intermediate scrutiny applied to content neutral regulation requires determination that government purpose is "important")).

122 *See, e.g.*, *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999) (regulation not sustained if it provides only ineffective or remote support for the government's stated purpose (citing *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm. Of New York*, 447 U.S. 557, 568 (1980)); *IMS Health Inc.*, 131 S. Ct. at 2668. *See also Turner*, 520 U.S. at 189 (intermediate scrutiny applied to content neutral regulation requires determination that regulation "advances" government's stated purpose).

123 *See, e.g.*, *City of Cincinnati v. Discovery Networks*, 507 U.S. 410 (1993) (though regulation need not be "least restrictive means," regulator must "affirmatively establish" the "fit" required between means and ends) (internal citations omitted); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *IMS Health Inc.*, 131 S. Ct. at 2653 (finding law at issue does not advance claimed interest). *See also Turner*, 520 U.S. at 189 (intermediate scrutiny applied to content neutral regulation requires determination that regulation is "narrowly tailored" to serve purpose).

governmental objective,[124] but it is far from clear that a content-categorization scheme would actually advance it.[125] It is highly unlikely that the FCC could empirically demonstrate that a reporting scheme based on government-crafted content labels would better inform local viewers about the station's programming than would short, simple descriptions in plain English.[126] To truly advance the goal of improving viewer access to, and understanding of, TV stations' public interest programming – and to do so in a narrowly tailored manner – the Commission must seriously consider whether other alternatives, such as making the existing program reports more accessible via online posting, with further guidance as to more uniform presentation or other preferred practices, would achieve the objective without need for imposing additional burdens.

Similarly, there is no reason to conclude that a category-based reporting mandate would better advance the Commission's second identified goal, that of helping the agency to determine whether a licensee is meeting its public interest obligations.[127] Because the Commission must limit itself to a station-specific analysis in considering each renewal application,[128] imposing content coding requirements on TV broadcasters designed to facilitate comparisons among stations would serve no purpose.[129] Such a mandate therefore could not actually advance the

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124 *See supra* Section II.A.1.

125 *See id*.

126 For example, would a non-academic viewer in a station's community be more engaged by the content coding label of "local civic/government affairs" as opposed to a description of a newscast that reported coverage of the "school board" or "city council"?

127 *See NOI*, ¶ 10.

128 As noted *supra* Section II.A.2, the FCC is barred by statute from conducting comparative hearings to award licenses and therefore must evaluate each station on its own merits, without regard to the conduct of other broadcasters in the same market or across the industry as a whole.

129 The *NOI* contains no explicit discussion of how content categories will be used in the license renewal context. One suggestion appears in connection with the proposed requirement that broadcasters fit each program or program segment into one category, regardless of how many might actually apply. *NOI*, ¶ 26. But if calculating the *total* time a station devotes to public interest programming is the sole objective related to renewal application processing, the content categorization concept would fail the narrow tailoring prong of the constitutional analysis.

stated goal, much less be narrowly tailored to the purpose. Were the Commission nonetheless to insist on imposing standardized content-coding requirements, the new obligations would raise questions as to whether the agency actually was pursuing an unstated – and illegitimate – objective: indirectly pressuring broadcasters to air more government-favored content.[130]

Finally, the proposed goal of "assisting researchers" is not an objective that the agency may legitimately advance in the first instance, even if it were limited to the creation of data sets to support professional quality research on which the Commission may wish to rely.[131] Nothing now stands in way of media researchers, whether they are members of the FCC's staff or independent academics, from undertaking content analyses and similar studies. Assuming that research has value as an abstract matter does not empower the Commission to burden the subjects of that research for only social science purposes. In any event, even if the goal were a valid one for Commission action, the proposed content categorization scheme could not advance it.[132] And under the narrow tailoring prong of the analysis, the costs that such a mandate would impose on broadcaster speech, in terms of time and personnel costs, are insupportable.[133]

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130 *See supra* Section II.A.2.

131 *See supra* Section II.A.3.

132 *See supra* Section II.B; Attachment A at 2-5.

133 PIPAC's proposal appears designed to offload the significant costs inherent in content analysis research from academics – and, perhaps, from the Commission itself – to the stations. *See* Letter from Public Interest Public Airways Coalition to Chairman Genachowski, FCC, MM Docket No. 00-168, App. A, p. 3-4 (filed Aug. 4, 2011) (stating that content coding "would be worthless" unless "accessible in a format that is conducive to rigorous analysis. Thus, this information should be made available online in an electronic format that is easily exportable to spreadsheet and statistical analysis programs."). The FCC already is well aware of the expense of conducting reliable content analyses; it has commissioned such studies in each quadrennial cycle of its statutorily mandated media ownership review since 2002 and has spent hundreds of thousands of dollars to obtain research of sufficient quality that the government may rely upon it. *See* Attachment A at 2-3.

The discussion above demonstrates that the *NOI*'s explicit proposals for dramatically increasing TV broadcaster's program reporting burdens come with a web of legal, practical, and policy problems – many of which are inherent in the concept of a standardized form built around rigid, government-crafted content categories. Before the Commission further pursues the proposal set forth in the *NOI*, the agency should carefully consider its objectives and alternative means of fulfilling them. NAB is aware that other parties will present options in the course of this proceeding that are worthy of serious consideration, particularly if they would more effectively serve the goal of fostering meaningful dialogue between viewers and their local stations. For example, the Commission might want to consider adapting the general format or approach of other FCC forms – such as the Children's Television Programming Report, Form 398 – for its purposes here. Adapting an existing broadcast program reporting form with which stations and the public are familiar would seem less burdensome for broadcasters and the Commission, and less confusing for viewers. This is just one approach that all participants in the proceeding, including the Commission, should thoughtfully explore.

V. CONCLUSION

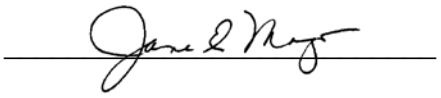
For more than two decades, TV broadcasters have provided valuable information to their viewers about the programming that stations air to serve the needs and interests of the community. The current reporting rules already require licensees to identify the "most significant" examples of their public interest programming in a specific, user-friendly way, by directing stations to provide the title, airdate, airtime, and duration of such programming, along with a brief description in plain English of the program content.

The Commission should not lose sight of these useful elements of the existing requirements as it considers workable options that could help viewers to more quickly and easily comprehend their local stations' programming records. Whether the alternatives include a

modest revamp of the existing issues/programs list, an adaptation of an existing FCC reporting form, or other options, the focus should remain on devising a reporting mechanism that is easy to fill out and easy to read – and thereby encourages viewers to engage in informed conversation with individual licensees. Station-specific dialogue can have the most effective and positive impact on station performance and, in turn, may better assist the Commission in reviewing a station's public interest record at renewal time.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

By: 

Jane E. Mago
Jerianne Timmerman
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W., Sixth Floor
Washington, DC 20036
(202) 429-5430

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Attachment A

The Challenge of Producing Reliable Content Analyses

This brief overview is designed to provide Commission decision-makers with a general understanding of one key step involved in producing content analysis research: the process of categorizing – or "coding" – data.[1] As an institution, the Commission has had considerable experience with content analysis techniques, for it has commissioned studies that incorporate content analysis in each quadrennial cycle of the agency's statutorily mandated media ownership review since 2002.[2] Moreover, it is well established that research used to support an agency's official purposes must satisfy at least a threshold level of quality.[3] The Commission's records

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[1] Content coding step is just one of several critical steps in designing and executing a valid and reliable content analyses. The process begins with the research design, which is intended to address a specific research question and so varies by individual study. *See* DANIEL RIFFE ET AL., ANALYZING MEDIA MESSAGES: USING QUANTITATIVE CONTENT ANALYSIS IN RESEARCH 41-42 (2005) ("ANALYZING MEDIA MESSAGES"). Consequently, before any content coding work begins, the researcher typically makes decisions about the sample size (*e.g.*, the time span to be covered, the sampling technique to be used if a full review of all content is infeasible) and the appropriate size of each data point to be analyzed (*e.g.*, for print-oriented studies, the data point might range in size from a sentence to a full story). *Id.* at 49-51, 53. In other words, one size does not fit all with respect to the initial steps needed to conduct content analyses – and to begin any coding work *before* the design phase would be anomalous. *Id.* at 50-52. ("Content analysis is the appropriate research method for answering the research question; the research design is what some might call a 'nuts-and-bolts' blue print for the execution of a specific content analysis to ensure that the specific research hypothesis … are tested effectively.").

[2] *See, e.g.* DAVID PRITCHARD, VIEWPOINT DIVERSITY IN CROSS-OWNED NEWSPAPERS AND TELEVISION STATIONS: A STUDY OF NEWS COVERAGE OF THE 2000 PRESIDENTIAL CAMPAIGN (FCC, WORKING PAPER NO. 2), MB Docket No. 02-277 (Sept. 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A7.pdf; JEFFREY MILYO, THE EFFECTS OF CROSS-OWNERSHIP ON THE LOCAL CONTENT AND POLITICAL SLANT OF LOCAL TELEVISION NEWS, MB Docket No. 06-121 (updated Sept. 17, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A7.pdf; LISA M. GEORGE AND FELIX OBERHOLZER-GEE, DIVERSITY IN LOCAL TELEVISION NEWS, MB Docket No. 09-182 (rev. July 13, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308602A1.pdf..

[3] Since 2001, Congress has mandated that all federal agencies "ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information)" used in making reports to lawmakers or for other purposes. *See* Consolidated Appropriations Act of 2001, Pub. L. No. 106-554 § 515, 114 Stat. 2763, 2763A154 (2000) (legislation informally dubbed the "Data Quality Act"). Accordingly, the Commission since 2007 has submitted the studies in its quadrennial media ownership reviews to independent peer review in order to ensure their reliability before basing any action upon them, a practice that safeguards against arbitrary and capricious decision-making and is consistent with the goals of the Data Quality Act. Peer reviewers are called upon to "consider, among other things,

also reflect an understanding of the costs involved in producing a content analysis with a high enough degree of quality that the Commission may make use of it. For example, according to the federal government's USAspending.gov website, the Commission spent a total of $200,400 on the *Diversity in Local News* study, which appears to be the single most expensive research work reported for the 2010 round of the media ownership review.[4]

I. PRODUCING A HIGH-QUALITY CONTENT ANALYSIS IS A DIFFICULT AND DEMANDING PROCESS, AS THE COMMISSION'S OWN RESEARCH WORK ILLUSTRATES

High-quality content coding is a challenging, time-intensive endeavor.[5] The Commission's own studies in this record agree with academia on this point. Several studies commissioned by the agency for its 2010 media ownership review proceeding discuss the complexities. For example, the authors of one study explained why they chose not to engage in a traditional content analysis for their research work:

> [C]ontent-based approaches to diversity measurements face three difficulties. First, accurate content quantification is quite difficult. Human collection of

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whether: (1) the methodology and assumptions employed are reasonable and technically correct; (2) whether the methodology and assumptions employed are consistent with accepted theory and empirical (*e.g.*, econometric) practices; (3) whether the data used are reasonable and of sufficient quality for purposes of the analysis; and (4) whether the conclusions, if any, follow from the analysis." Letter of Scott L. Althaus, Associate Professor, Departments of Political Science and Communications, University of Illinois, to Dr. Jonathan Levy, Deputy Chief Economist, Federal Communications Commission (Apr. 4, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307466A1.pdf (reciting FCC charge to peer reviewer in connection with analysis of Study 3, HOW THE OWNERSHIP STRUCTURE OF MEDIA MARKETS AFFECTS CIVIC ENGAGEMENT AND POLITICAL KNOWLEDGE, 2006-2008).

[4] *See* USASpending.gov (search in the available search box for FCCPUR11000031, reporting $192,171, which appears to be the major cost of the study, and FCCPUR11000031: 1, reporting $8,229, which appears to be for the production of transcripts used in the coding). Publicly available data indicates that the total costs for the 2010 media ownership studies amounted to at least $646,060. *See* USASpending.gov (search for FCCPUR11000026, FCCPUR10000562, FCCPUR10000562:1, FCCPUR10000540, FCCPUR11000027, FCCPUR11000027:1, FCCPUR11000018, FCCPUR11000031, FCCPUR11000031:1, and FCCPUR11000030 in the available search box). It is not clear whether these figures include the costs for use of third-party data sets such as Nielsen ratings.

[5] *See generally* ANALYZING MEDIA MESSAGES at 141-44 (characterizing coder training as an iterative, time-consuming process critical to the reliability of a study, and emphasizing the need to minimize coder differences).

> content data is typically labor-intensive and subjective, and therefore may be costly, slow or inaccurate. Computer collection of content data can be performed quickly but may fail to capture aspects of the content which are important but difficult to quantify. Second, time and cost constraints force the researcher to decide which aspects of content to encode, and those decisions may be at odds with the aspects of content that actually matter to consumers. Third, measures which are based solely on media content cannot predict how different audiences would react to the same content.[6]

Other studies provide similar descriptions of the challenges of content analysis. One author noted that "subjective classifications ... often plague content analysis."[7] Another study even determined that a coding scheme used by business analytic company comScore was insufficiently rigorous for research purposes because "[s]ubstantively identical news sites [were] often placed in different categories and subcategories."[8] The author himself had to re-code the sites in a "labor-intensive" effort.[9]

II. CONTENT ANALYSIS REQUIRES SOPHISTICATED RESEARCH DESIGN AND SAFEGUARDS TO PRODUCE VALID AND RELIABLE RESULTS

Third-party media researchers typically employ several safeguards in their research design to address the challenges mentioned above and to ensure the reliability of the data they collect.[10] Data reliability depends on safeguards that control for the high level of subjectivity inherent to content-coding efforts:

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6 ADAM D. RENNHOFF and KENNETH C. WILBUR, LOCAL MEDIA OWNERSHIP AND VIEWPOINT DIVERSITY IN LOCAL TELEVISION NEWS 5 (June 2011).

7 JACK ERB, LOCAL INFORMATION PROGRAMMING AND THE STRUCTURE OF TELEVISION MARKETS 15 (May 20, 2011).

8 MATTHEW HINDMAN, LESS OF THE SAME 4, 6 (June 10, 2011).

9 *Id*.

10 *See* Fico, Lacy & Riffe, *A Content Analysis Guide for Media Economics Scholars*, 21 J. Media Econ. at 118 (2008) ("*Content Analysis Guide*") ("social science content analysis is informed and guided by systems of rules that ensure that other analysts – regardless of their beliefs, opinions, and knowledge – can make similar categorizations and judgments"); *id*. at 119 (discussing various steps in research design and execution, including measures to "assess the reliability of the coding and measurement" and the "validity of the measures"); *see also generally* KRIPPENDORF & BOCK, THE CONTENT ANALYSIS READER 209-66 (Thousand Oaks, CA: Sage Publications, 2009) ("CONTENT ANALYSIS READER").

> "When researchers talk about reliability, they are addressing whether measurement yields results that are *stable and consistent from time to time, place to place, and observer to observer*. Unless the measures are reliable, it is pointless to discuss whether operations or analyses involving those measured data are valid."[11]

To ensure the reliability of the data-gathering and -coding process, researchers often employ graduate or undergraduate students with an academic background in the subject area or other "professionals" as coders.[12] These coders typically undergo extensive training that involves trial runs and the assistance of a study-specific "coding protocol" or "codebook" that explains in detail the content categories that have been fashioned for that particular study.[13] Researchers frequently direct two or more coders to review the same material, thereby ensuring that coding decisions are replicable – and not the result of some random bias or misunderstanding on the part of an individual coder.[14] When studies rely on multiple coders who review different material, researchers pull a random sample of each coder's results and conduct a cross-check review to verify that each coder is producing a statistically significant degree of uniform coding results.[15] A change among coders during the active coding period is heavily discouraged, and new training efforts and additional cross-checks are required when

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[11] *Content Analysis Guide* at 122-23 (emphasis added); *see also id*. at 126-127 ("[A] measure must be reliable for it to be valid. Coders and a protocol that do not consistently classify content cannot yield a valid measure.").

[12] *See* Hak & Bernts, *Coder Training*, CONTENT ANALYSIS READER, at 222; Krippendorf, *Testing the Reliability of Content Analysis Data*, CONTENT ANALYSIS READER, at 352.

[13] *See Content Analysis Guide* at 119 ("operational definitions for the variables in the form of a coding protocol or set of instructions"); *id*. at 127; McQueen, et al., *Codebook Development for Team-Based Qualitative Analysis*, CONTENT ANALYSIS READER, at 211-19; Krippendorf, *Testing the Reliability of Content Analysis Data*, CONTENT ANALYSIS READER, at 351.

[14] *Content Analysis Guide* at 123; Hak & Bernts, *Coder Training*, CONTENT ANALYSIS READER, at 221-22. *See also* Krippendorf, *Testing the Reliability of Content Analysis Data*, CONTENT ANALYSIS READER, at 354 (80% intercoder agreement "customary" to "ensure that the data under consideration are at least similarly interpretable by researchers").

[15] *Content Analysis Guide* at 123-24 ("intracoder reliability assessment is more likely to become important over the duration of a long coding process. Coders can become fatigued, they can lose the "frame of reference need to apply the coding protocol….").

circumstances require that coders be replaced.[16] Each component of these safeguards "is critical to the quality of the research, and the decisions made at each step must be defended."[17]

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The overview above reveals that the type of content coding envisioned in the *NOI* – which would rely upon a changing cast of untrained coders at hundreds of stations spread across the country – cannot produce valid and reliable data needed for studies upon which the Commission could officially rely. Deciding whether to place programming into one of a limited number of government-favored programming categories, or a single catch-all category, requires difficult judgment calls. This would be problematic even in the context of traditional news programming, and even if station newsroom personnel were pressed into service as content coders. The content categories at issue in the *NOI* are concepts relevant to social scientists, not to professional journalists, who are trained to think and operate differently. Newsroom staffers typically are assigned to cover one or more "beats" that focus on reliable generators of news.[18] Plainly, work on several of these traditional beats could generate "civic/government affairs" stories and "electoral affairs" coverage, and all of it would be "local news."

As an illustration of the inevitable reliability problems that would arise under the *NOI*'s proposed content-coding scheme, consider again the paradigm news story about incumbent city

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16 *See generally* ANALYZING MEDIA MESSAGES at 141-44.

17 *Content Analysis Guide* at 119; *see also* Hak & Bernts, *Coder Training*, CONTENT ANALYSIS READER, at 231 ("The implication for editors of professional journals is that they must not accept papers for publication in which information on coding consists merely of a discussion of the coding instructions and a presentation of measures of reliability. In research reports it must be shown also how specific coding problems have been solved and what kind of practical rules have been applied.").

18 *See* The Missouri Group, NEWS REPORTING AND WRITING (Bedford/St. Martin's: 10th edition, 2011) at 291-309. Standard beats include, *e.g.*, schools, police/public safety, local government (usually meaning the elected officials in city hall but not necessarily other components of local government such as the school board), and courts. Missouri Group at 291, 301-309.

council member's actions in a council meeting during election season.[19] Perhaps experienced journalists might be able to discern whether a particular "incumbent politician at work" piece is predominantly a "local civic/government affairs" story as opposed to an "local electoral affairs" one, but the Commission could have no guarantee that similar stories would be coded consistently across stations or over time – or even be assured that two journalists in the same newsroom would necessarily agree about that particular piece. For instance, it is easy to envision a difference of opinion between an assignment editor and a reporter over the content coding of the story. The assignment editor may believe that the piece she assigned was focused on the city council's decisions ("civic/government affairs") while the reporter determined that the incumbent's interest in positioning himself for re-election ("electoral affairs") was the real story. Neither would be wholly right or wholly wrong. Yet under the *NOI* proposal, one choice would have to be made. As different stations resolve such conundrums over time, the inconsistency problem would make the growing nationwide "data set" less and less reliable.

[19] *See supra* Section II.B.2.

Attachment B

DECLARATION OF LAVERNE E. GOERING

Laverne E. Goering declares as follows:

1. I am Director of Programming and Operations for Sunflower Broadcasting, Inc. Sunflower is the licensee of Television Stations KWCH-DT and KSCW-DT, both in the Wichita-Hutchinson, Kansas Designated Market Area.[1] I submit this Declaration in connection with the Comments of the National Association of Broadcasters ("NAB") on a proposed standardized programming disclosure rule.

2. At NAB's request, Sunflower estimated the amount of time that would be required to assemble and file the programming disclosures proposed by the Public Interest Public Airwaves Coalition ("PIPAC"). We have assumed that reports would be required on a segment-by-segment basis for relevant programming during two composite weeks each year, and that reports would have to be filed on a quarterly basis.

3. With respect to news and other locally-produced public affairs programming, Sunflower produces and broadcasts 43 hours each week of such programming on KWCH and KSCW. Based on the time spent preparing other programming reports and analyses, Sunflower estimates that it would require at least one hour of staff time to analyze, categorize and describe the relevant programming in each half-hour of local news and public affairs programming.

4. Preparing the reports for each composite week would, therefore, require 86 hours of staff time. Reports for two composite weeks would take at least 172 hours of staff time to compile.

5. In addition, preparing the reports would require time of station management to instruct staff in how to categorize and describe programming, to review draft reports, and to upload information to the FCC's website.

6. PIPAC further proposes that, in addition to the composite week, stations would be required to report on all local electoral affairs programming during the lowest unit charge "windows." Even looking at only one state and local primary and general election in a given year (and thus excluding local elections that may occur on a different schedule, run-offs and other special elections), that would require analysis of all local programming for 105 days (or 15 weeks) every other year.

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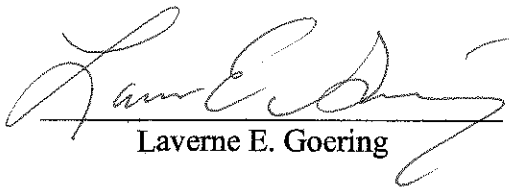
[1] Sunflower is also the licensee of three full-power satellite stations that provide coverage to parts of the market. Sunflower also produces Spanish-language news programming for Television Station KDCU-DT, licensed to Derby, Kansas. This Declaration does not include any information concerning reports for programming on KDCU.

7. Just to analyze all segments of local news and public affairs programming during those weeks would require 1,290 hours of staff time. Analysis and description of other electoral programming, such as debates, coverage on election day, etc. would require further hours of staff and management time. To the extent that there are other election periods, many more hours would be consumed in preparing and filing the proposed reports.

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

Executed on January 26, 2012.



Laverne E. Goering