

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

In the Matter of)	
)	
Broadcast Localism)	MB Docket No. 04-233
)	
)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcasters (“NAB”) hereby submits its comments in response to the Commission’s *Report on Broadcast Localism and Notice of Proposed Rulemaking* (“*Notice*” or “*Localism Report*”). NAB respectfully disagrees with the statements in the *Localism Report* suggesting that radio and television broadcasters are out of touch with their communities and are failing to provide sufficient community-responsive programming.

A closer examination of the record in this and in other proceedings shows that local stations recognize and embrace their obligation to serve the public interest. Local broadcasters offer a wealth of national and local news and other informational programming, vital emergency information and entertainment to the American public free of charge, and provide additional, unique community service, including giving a voice to local organizations and entities and raising monies for charities, local groups and causes and needy individuals. Broadcasters participate in their local communities – they understand the needs of their audiences and work every day to provide programming to address those needs. Indeed, serving the needs of their communities is the cornerstone of the broadcasting business. Without local programming and services, broadcasters will lose viewers and listeners and thus the advertisers that are the lifeblood of their business, especially in today’s highly competitive media marketplace. The record contains no evidence that responsive programming and other services are not widely available to viewers and listeners on a market basis.

In light of the record, the Commission has no factual or legal basis to turn back the clock to reinstate a myriad of regulations that the agency found ineffective and unnecessary in the less competitive media marketplace of the 1980s. Today, with the media market changing rapidly and fresh competition from multiple digital sources increasing continuously, there is no reason to maintain the current level of regulation on broadcasters, let alone *increase* regulation on an industry that remains the most heavily-regulated in the market. A number of the proposals in the *Notice* would impair broadcasters' abilities to serve their local communities by imposing significant costs and diverting resources away from programming and services that directly serve their local markets. Overturning Commission precedent on the rules regarding main studio and unattended operation, for example, would saddle many broadcasters with significant, possibly economically devastating, new costs. Small broadcasters and station groups and those in more rural areas, in particular, would be adversely impacted in their ability to serve their local audiences.

Furthermore, an inflexible, one-size-fits-all approach fails to consider the vast differences between the communities that broadcasters serve. What may be appropriate for a television station in Portland, Maine may not be appropriate for a radio station in Portland, Oregon. Requiring all broadcast stations in the country to form community boards for the purpose of ascertaining the needs and interests of their communities, for example, is an impractical solution in search of a problem that ignores the many diverse ways broadcasters currently determine what their local audiences want to see and hear.

Moreover, the legal basis for several of the proposals appears questionable at best. The courts have directly questioned the agency's statutory authority to adopt regulations affecting program content without express congressional directive, and any such regulations of the content aired on broadcast stations raises significant First Amendment concerns. These concerns are only heightened by proposals that would apply to all radio and television stations across the nation, regardless of the level of service being provided by any individual station and regardless of the level of service available to consumers in their local markets. For example, proposed content-based license renewal processing "guidelines," which were eliminated as an unnecessary and burdensome in the 1980s, would operate as *de facto* programming quotas that would infringe upon broadcasters' editorial discretion and interfere with the rights of viewers and listeners. Basing radio stations' license renewals, at least in part, on mandatorily-supplied data about their compilation of playlists and their airing of particular content raises similar legal and constitutional concerns.

In sum, instead of achieving the Commission's stated goal of promoting closer contact between broadcasters and their communities, the proposed rule changes will, in many cases, produce the opposite effect, resulting in a broadcasting industry less able to serve the public interest. Especially in light of broadcasters' and other outlets' increasing service to local markets made possible by technological developments, NAB urges the FCC not to return to a regulatory regime from the analog era that would harm rather than help promote our common goal of providing service to our local communities.

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**COMMENTS OF THE
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The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the *Notice of Proposed Rulemaking* in the broadcast localism proceeding.² Initially, NAB emphasizes that broadcasters embrace localism and agree that radio and television stations must serve their local communities. NAB disagrees, however, with the FCC’s conclusion in the *Localism Report* that the specific rule changes proposed by the Commission are necessary. Moreover, there is serious doubt that proposed changes will achieve the Commission’s goal of promoting closer contact between broadcasters and their communities. NAB respectfully submits that the consequences of the proposed rule changes will, in many cases, produce the opposite effect, resulting in a broadcasting industry less able to serve the public interest.

¹ NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, the Courts, and other federal agencies.

² *Report on Broadcast Localism and Notice of Proposed Rulemaking* in MB Docket No. 04-233, FCC 08-218, released on January 24, 2008 (“*Notice*” or “*Localism Report*”).

I. Introduction

Broadcasters agree that localism is a core value for both the radio and television over-the-air mediums. Since the inception of the service, broadcasting has been defined by localism. As we have explained in earlier phases of this proceeding, broadcasters that do not strive to serve their local audiences will be left without an audience to serve.³ Viewers and listeners naturally migrate to those stations that provide news, information, and entertainment that directly impacts their lives. Localism is more than a Washington D.C. ideal. For broadcasters across the country, it is a matter of business survival.⁴ With this in mind, NAB's comments on the *Notice* start with observations that go to the document as a whole, then turn to the proposed rules.

To support any regulation, it is axiomatic that the Commission must supply a reasoned analysis supported by an adequate factual basis.⁵ Where, as here, the Commission has already experimented with nearly all the rules proposed in this *Notice*, and has previously dismissed each of them as ineffective, burdensome, unnecessary,

³ See, e.g., Comments of NAB in MM Docket No. 04-233 at 4-10 (Nov. 1, 2004) ("NAB Localism Comments").

⁴ See, e.g., Comments of WLTZ-NBC 38 in MB Docket No. 04-233 (March 25, 2008) ("We know full well how important it is to address the needs and interests of the people in our communities. If we don't address the needs and interests, we know that market forces will drive listeners and viewers elsewhere. Government mandates will not change that equation, except to make it far more difficult and expensive to be a good broadcaster.").

⁵ See, e.g., *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (FCC rules restricting participants in spectrum auctions were arbitrary because agency had no factual support for them); *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (FCC's criterion for licensing broadcast applicants was invalidated as arbitrary and capricious due to lack of evidence that the agency's policy "achieve[d] even one of the benefits ... attribute[d] to it"); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) (FCC rule affecting costs of local exchange carriers found arbitrary and capricious because agency's decision had "no relationship to the underlying regulatory problem").

and/or as a likely violation of the First Amendment, the burden is even higher. As the Supreme Court has expressly held, “an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”⁶ As NAB will show, the analysis in the *Notice* does not meet this evidentiary and legal burden.⁷

Since the early 1980s, when the Commission reformed several of the more onerous rules for radio and television stations, the Commission’s deregulatory policies have recognized that market forces are best suited to shape a broadcast industry that serves the public interest.⁸ These free market principles have been a boon to the public interest. For example, radio listeners today enjoy a greater diversity of radio station formats, including hundreds more foreign-language formats,⁹ a greater total quantity of local news,¹⁰ and technological delivery advancements as both television and radio

⁶ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). See also *ACT v. FCC*, 821 F.3d 741, 746 (D.C. Cir. 1987) (FCC had failed to establish “the requisite ‘reasoned basis’ for altering its long-established policy” on certain television commercial limits).

⁷ Returning to outdated localism regulations would also contradict Congress’s stated purpose for the 1996 Telecommunications Act, namely, to: “provide for a pro-competitive, de-regulatory national policy framework... .H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

⁸ See, e.g., *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076 (1984) (“*TV Deregulation Order*”); *Deregulation of Radio*, Report and Order, 84 FCC 2d 968 (1981) (“*Radio Deregulation Order*”).

⁹ See Comments of NAB in MB Docket No. 06-121, Attachment G, BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences* (Oct. 23, 2006).

¹⁰ See *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13664-65 (2003).

broadcasters make the leap to digital transmission systems.¹¹ Reversing field and reimposing burdensome localism regulations would, of necessity, cause broadcasters to alter their business practices and priorities. Resources currently focused on satisfying the needs and interests of their local communities and completing the digital transition would instead be focused on satisfying the arbitrary needs of the government.

Unnecessary regulation could also lead to a decrease in the number of stations serving the public. Despite an influx of new competitors in both video and audio services that have cut into market share and advertising dollars, the total number of full power broadcasters has increased by more than 55 percent since 1981.¹² This is due, in large part, to the flexibility the Commission has afforded stations that need to, for example, co-locate stations, or rely on technology to maintain nighttime broadcasts. Without that flexibility, many stations undoubtedly will reduce services and some will likely not be able to survive, leaving the public with fewer broadcast options.

Burdensome and intrusive regulation on all radio and television stations cannot be justified by unquantified and unproven suggestions that not all broadcasters are providing some “appropriate” level of service or a feeling that some members of the public are dissatisfied with the media industry as a whole. Although the *Notice* suggests that the record overwhelmingly shows concerns by citizens with the service provided by

¹¹ See, e.g., John R. Quain, *Local Radio is Cutting the Static and Going Digital, Finally*, The New York Times (March 25, 2007) (available at <http://query.nytimes.com/gst/fullpage.html?res=9C03E0D61430F936A15750C0A9619C8B63&scp=13&sq=digital+transition&st=nyt>)

¹² See FCC News Release, *Broadcast Station Totals as of December 31, 2007* (released March 18, 2008).

their local radio and television stations,¹³ that is not the case. For example, at the Portland, Maine localism hearing, an area with a population of 994,000,¹⁴ approximately 114 individuals spoke from the audience. Of those, 51 described positive coverage by and relationships with local broadcasters. In contrast, only around a dozen had fairly specific comments about local stations' coverage of certain segments of the local community and about the coverage of certain issues. Similarly, at the Rapid City, South Dakota localism hearing, an area with a population of 243,000,¹⁵ approximately 75 individuals spoke from the audience. Of those, 33 described in positive terms the coverage of local broadcasters and their relationships with local stations. About 13 had specific complaints relating to coverage of local issues and segments of the community.¹⁶ In sum, there were about a dozen complaints from the public at both of these hearings that directly related to the actual service provided by their local television

¹³ See *Notice* at ¶ 142 (noting that the FCC had “received over 83,000 comments and heard from hundreds of participants at the six field hearings,” which “eloquently demonstrates the importance with which the public views the concept of localism: the obligation of stations to provide service to their communities”).

¹⁴ 2006 population figure for Portland-Auburn, ME Designated Market Area (DMA), BIA TV Market #2 Report (2007).

¹⁵ 2006 population figure for Rapid City, SD DMA, BIA TV Market #2 Report (2007).

¹⁶ At both of these hearings, the remainder of the public commenters did not address issues relating to their local radio and television stations. For example, there were a number of generic complaints about “big” media and media consolidation (including by people from outside the local community), general statements about bias in media, and general complaints about violence and indecency. Still others complained specifically about the FCC itself or addressed other particular issues, such as support for PEG access channels; obtaining help in licensing a new noncommercial station or in getting a particular station back on the air; complaints about the digital television transition; and complaints about lack of good reception for certain television stations that were not available via satellite.

and radio stations – a considerably fewer number than those commenting positively about the coverage of and their relationships with local stations.

This same pattern is true of the record as a whole. Few commenters presented data or real-world information with which the Commission could inform their decision to overturn FCC precedent, and this dearth of quality comments is reflected in the *Localism Report*.¹⁷

In Section III, subsection A of the *Notice* (“Communication Between Licensees and their Communities”), for example, not one of the comments cited as “critical testimony” supports the position that a widespread communication problem between broadcasters and their communities exists. Indeed, the cited comments at ¶13 show that the state of broadcaster communication with local communities as it exists today is positive, highlighting a broadcast industry actively involved with local communities. And these comments represent only a fraction of the hundreds, maybe thousands, of comments from local broadcasters, community officials, and community organizations that show a close connection between broadcasters and their communities. Indeed, the *Notice* makes no reference to clear record evidence that a problem exists, only a leap to proposed solutions, based on a thin rationale that “many commenters see a need for additional efforts by broadcasters.” See *Notice* at ¶ 14.

¹⁷ See, e.g., *Localism Report*, FN 2, citing the testimony of Martin Kaplan to support this statement: “the record indicates that many stations do not engage in the necessary public dialogue as to community needs and interests and that members of the public are not fully aware of the local issue-responsive programming that their local stations have aired.” Mr. Kaplan’s statement, however, only addresses the issue of campaign coverage, and says nothing about the types and levels of ascertainment done by broadcasters. Nor does his testimony suggest that members of the public are not aware of the kinds of issue-responsive programming that local broadcasters air.

Obviously, such a record does not meet the legal standard necessary to support Commission proposals to impose restrictions on all television and radio stations across the nation, regardless of the level of service being provided by any individual stations and regardless of the level of service available to consumers in their local markets. As the Commission has previously acknowledged, its policies should ensure adequate service to consumers across markets as a whole.¹⁸ Given the vast amount of national and local news and other informational and entertainment programming offered by broadcast stations (and by numerous multichannel and Internet-based outlets as well), no one can seriously contend that consumers lack access to responsive programming on a market basis. Given this fact, it makes little sense to conclude that the public interest requires a return to a “one size fits all” regulatory regime from the analog era when every television and radio station in the country was expected to offer programming in the same particular categories.

The *Notice* fails to make an adequate case that a problem exists that requires more regulation or governmental oversight. As NAB noted in its initial comments in this proceeding four years ago, “[t]he Commission will need to generate an overwhelming record of broadcaster failures to justify reversing its deregulatory course.” See NAB Localism Comments at 11. The law, we noted, “requires real evidence to demonstrate a pattern of broadcaster failure,” and that without such a record, “the Commission’s

¹⁸ See, e.g., *Radio Deregulation Order* at 977-79; *TV Deregulation Order* at 1088.

inquiry [will] amount to little more than a fix in search of a problem.” *Id.* Nearly four years hence, the record provides no real evidence of a problem.¹⁹

The *Notice* raises serious Constitutional concerns as well. It is well-established that, “broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties,”²⁰ and the Supreme Court has specifically held that the “FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations.”²¹ Proposals to impose content-based programming requirements as part of the license renewal process appear contrary to these precepts.

Yet another flaw of the *Notice* is that it refers repeatedly to “local programming” or “locally-oriented” programming, or “locally produced” programming, or “community-responsive” programming, but fails to supply a specific definition for any of these terms, or to provide any clear definitional difference between the terms as they are uniquely applied. In NAB’s initial comments responding to the *Notice of Inquiry* in this proceeding, we noted that whatever the Commission means by “local” or “locally-oriented,” it cannot mean that only “locally produced” or “locally originated” programming serves the needs of the community. NAB Localism Comments at 24-25. It

¹⁹ To the extent that some believe that changes to localism rules are required because of changes made to the ownership rules in 1996 (in effect to “correct” perceived ills from the ownership changes), we posit that such a reaction is inappropriate and against the specific will of Congress as expressed in the 1996 Telecommunications Act. The Commission itself noted that the localism proceeding “specifically excluded from consideration in this inquiry the subject of the Commission’s structural broadcast rules.” See *Notice* at FN3.

²⁰ *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984).

²¹ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994).

is long-standing policy that programming does not have to be originated locally to qualify as “issue-responsive” for purposes of a licensee’s public service obligations.²² The D.C. Circuit endorsed this view when it decided, over the specific objections of certain parties, that Section 307(b) of the Communications Act governing the allocation of broadcast facilities requires only “that the Commission act to ensure a fair, efficient, and equitable distribution of radio service throughout the country,”²³ and that “as long as the Commission requires licensees to provide programming – *whatever its source* – that is responsive to their communities, § 307(b) is satisfied.”²⁴

Moreover, it is more realistic and practical to treat programming as locally relevant regardless of where it is produced. News and public affairs programming of importance to the entire nation also can be important to the citizens of a particular community, especially concerning such issues as national security, terrorism, the war in Iraq, global warming, the economy or the Presidential election. Programming and public service campaigns focusing on a range of issues, such as AIDS, anti-smoking, drug abuse, breast cancer awareness, drunk driving or crime prevention, can obviously be responsive to the needs of local communities. It is irrelevant to a local station’s audience where these campaigns are produced; the messages can still resonate locally.

²² See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12431 (2004) (“*Localism NOI*”).

²³ *Office of Communications of the United Church of Christ v. FCC, et al.*, 707 F.2d 1413, 1430 n.54 (D.C. Cir. 1983) citing *Loyola University v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982).

²⁴ *Id.* at 1430 n.54 citing 47 U.S.C. § 307(b) (emphasis added).

Additionally, there seems to be some confusion on exactly *who* qualifies as a local audience under the Commission's new regulatory framework. For example, in the *Notice* (¶ 8), the Commission notes that it has "consistently held that ... broadcasters are obligated" to serve the needs and interests of "their community of license." In the next sentence, however, the *Notice* says that the "broadcast regulatory framework is designed to foster a system of local stations that respond to the unique concerns and interests of the audiences within the stations' *respective service areas*." *Id.* (emphasis added). The "respective service area" is, of course, often much larger than the "community of license." In the *Notice of Inquiry* in this proceeding, the Commission noted the "[d]ifficulties associated with defining 'local' programming present geographic questions." *Localism NOI* at 12431. Nowhere does *Notice* address this crucial question, however.

This issue is particularly problematic if the Commission decides, as it proposes, to revert back to the pre-1987 main studio rule, or to impose new ascertainment requirements in the form of community boards. Broadcasters across the country serve areas that are vastly different geographically, culturally, topographically and economically. What works or is appropriate for a television station in Portland, Maine may not work or be appropriate for a radio station in Portland, Oregon. As NAB has noted throughout these comments, a single mandate approach to regulation is fraught with difficulties and impracticalities.

The lack of a workable and consistent definition for "local" in this proceeding undermines the entire regulatory regime that the Commission is attempting to implement. The uncertainty created by this failure will leave the agency, the public and

broadcasters mired in regulatory uncertainty for years. Such concerns have obvious constitutional implications, as vague and measureless definitions could sweep in more speech than necessary.²⁵

As a final general point on the *Notice*, NAB submits the Commission cannot ignore the economic realities of the broadcast industry when crafting localism rules. The Commission is responsible for ensuring a useful broadcast system. That result can best be achieved through a healthy broadcast industry. In this regard, it is important to recognize that despite a three decade trend of deregulation, broadcasters remain the most heavily regulated segment of the media industry. For this reason, the Commission must be particularly cautious when it considers new regulatory burdens. Cumbersome regulations with no demonstrable benefit are antithetical to Commission's duty to ensure a competitive media marketplace and a level regulatory playing field.

In our current competitive environment, neither the Commission nor broadcasters can afford burdensome regulation based on speculative assertions. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. Reasonable regulation will foster that service, unnecessary regulation will stifle it. As the Commission found more than 15 years ago, the broadcast "industry's ability to function

²⁵ See, e.g., *Colten v. Kentucky*, 407 U.S. 104, 110 (1972) ("The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable test to ascertain guilt."). See also *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.").

in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”²⁶

These rule changes could have a significant economic impact on broadcasters of every size and stripe, but especially on smaller broadcasters that have been hit particularly hard by a shrinking advertising market.²⁷ Any rule change that will substantially increase the administrative costs of running a station, or worse, cause stations to relocate facilities would have a disproportionate impact on stations that struggle to turn a profit.²⁸ Without adequate reason or a supportive record, it would be arbitrary and capricious for the Commission to re-establish these rules in light of the real world burden they would place on broadcasters across the country.

In contrast to some of the burdensome and unnecessary regulations proposed in the *Notice*, the pending proceeding directed at allowing AM radio licensees to use FM translators is an excellent example of the Commission’s efforts to advance broadcast

²⁶ *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992) (“1992 Radio Ownership Order”).

²⁷ The financial pressures facing smaller market television broadcasters have been especially well documented. See, e.g., *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13698 (2003); Reply Comments of NAB in MB Docket No. 06-121 (Jan. 16, 2007) at Attachment, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Dec. 2006); NAB *Ex Parte* in MB Docket No. 06-121 (Nov. 1, 2007) at Attachment A.

²⁸ See, e.g., Comments of John W. Hoscheidt in MB Docket 04-233 (filed April 3, 2008) (“From what I have been able to gather from reading about the “localism” rule making, I feel it would cause tremendous harm to small market radio stations like mine.”)

localism in a meaningful manner.²⁹ This simple rule change will help AM broadcasters overcome many of the interference obstacles that have plagued AM radio service for years. AM radio is a primary source for local news, weather and traffic, local public affairs and current events, local religious programming, and niche community-responsive entertainment such as regional music, jazz, gospel, and high school sports.³⁰ The use of FM translators will enable AM radio stations to provide a clearer, more consistent signal, and thereby improve or expand their delivery of these kinds of locally-relevant content, to the benefit of listeners. Moreover, this rule change will enable AM broadcasters to leverage their creativity and experience to better serve local audiences, rather than expend resources responding to inflexible government mandates. NAB submits that practical, technical solutions such as this would better serve the Commission's goal of fostering localism than some of the potentially counter-productive proposals offered in the *Notice*. We now turn to these specific proposals.

II. Mandatory Permanent Advisory Boards Are Unnecessary, Impractical and Likely Counter-Productive to the Goal of Promoting More Locally Responsive Programming

The *Notice* expresses concern that all broadcasters may not be effectively communicating with their audiences to identify the needs and interests of their communities, and in turn, not airing community-responsive programming aimed at meeting those needs and interests. *Notice* at ¶ 13. The Commission concludes that

²⁹ Notice of Proposal Rulemaking, *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MB Docket No. 07-172, RM-11338, 22 FCC Rcd 15890 (2007).

³⁰ See, e.g., Reply Comments of the National Association of Broadcasters, MB Docket No. 07-172 (Feb. 4, 2008).

the record of broadcasters' efforts in this regard is "decidedly mixed," and therefore additional methods of improving communication between broadcasters and their local communities are necessary. *Id.* at ¶¶ 13 and 16. Among other things, the Commission proposes that all broadcasters convene a permanent advisory board consisting of officials and other local leaders, and meet with these boards regularly to discuss the important local issues of the day that may warrant on-air coverage. *Id.* at ¶ 26.

As noted above, NAB respectfully disagrees with the premise of the Commission's tentative conclusion. The full picture of the record in the localism proceeding demonstrates a substantial, consistent commitment by broadcasters to communicate and interact with their local audiences to identify the topics and programming of interest to community members. The record therefore does not support the imposition of unnecessary and burdensome new ascertainment rules. Moreover, given the breadth and variety of radio and television broadcasters in terms of market characteristics and station resources, among other factors, a federally mandated obligation on all stations to create a permanent advisory board would be impractical to implement. More importantly, such a mandate would be potentially counterproductive to the Commission's underlying goal of fostering more locally-oriented programming, as it would force licensees to devote their limited resources to fulfilling this obligation at the expense of other more effective and established methods of communicating with their local audiences.

A. The Record Does Not Support a Return to the Discredited Policies of the Past

As discussed in the *Notice*, the Commission previously imposed comprehensive ascertainment requirements on radio and television licensees over 20 years ago. *Notice* at ¶ 11. Under these procedures, broadcasters were required to conduct ascertainment studies designed to identify the needs and interests of their communities, log and report how much programming they aired within government-defined classifications, and air specific minimum amounts of particular categories of programming. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 682 (1971). These requirements were burdensome, paperwork-intensive, and time-consuming.

In the early 1980s, the Commission correctly recognized that federal mandates were no longer needed to guarantee that licensees would fulfill the programming needs of their local communities. *See, e.g., Radio Deregulation Order* at 971. The Commission found that marketplace incentives would ensure that broadcasters continued to educate themselves on the interests of their local audiences, and serve those interests, thereby rendering federal regulation unnecessary.³¹ The Commission held that “marketplace and competitive forces are more likely to [result in community-

³¹ Specifically, the Commission determined that “market incentives will ensure the presentation of programming that responds to community needs. . . .” *TV Deregulation Order* at 1077. Regarding radio, the Commission stated that “marketplace forces will assure the continued provision of news programs in amounts to be determined by the discretion of the individual broadcaster guided by the tastes, needs and interests of its listenership.” *Radio Deregulation Order* at 978. *See also* Letter dated April 11, 2008 from Representative John M. McHugh to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233; Letter dated April 11, 2008 from Representative Bob Goodlatte to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 (“mandating how broadcasters interact with their communities” would “unfairly burden broadcasters” while competitors are “free to compete without comparable government regulation”).

responsive programming] than are regulatory guidelines and procedures.” *Radio Deregulation Order* at 1022-23.

The Commission also found no evidence that the ascertainment obligations were effective since broadcasters typically aired a greater amount of locally-oriented, non-entertainment programming than the rules required. *TV Deregulation Order* at 1080-84 and 1098. The available evidence demonstrated that broadcasters were driven by the combination of marketplace incentives and journalistic discretion to ascertain community interests, rather than the Commission’s rules. Accordingly, the Commission eliminated the ascertainment procedures for radio in 1981 and television in 1984.

The Commission’s conclusions in the early 1980s are even more valid today. Competition to broadcasting has continued to expand, probably at a much faster pace than anyone imagined at the time, which has substantially amplified broadcasters’ motivation to distinguish their product with unique, locally-relevant programming.³² Broadcasters now face competition from a wide array of services and technologies. Thousands more radio and television stations exist now than in the early 1980s, cable penetration has increased exponentially, satellite television has grown into a significant option for video programming with almost 30% of all multichannel video programming subscribers.³³ Television licensees have also been impacted by the market acceptance

³² The Commission identified a trend “in favor of greater and more effective competition” that lent confidence to its decision that marketplace incentives would safeguard consumer interests. *Radio Deregulation Order* at 1003.

³³ See Reply Comments of NAB in MM Docket No. 04-233 (filed January 3, 2005)(“NAB Reply Comments”); Federal Communications Commission, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, Public Notice (Nov. 27, 2007) (“13th Annual Report PN”).

of digital video recorders and VCRs, while radio stations are responding to rapidly expanding competition from satellite radio and MP3 players. See 13th Annual Report PN at 3-4. Overlaying all of these developments is the competition presented by the Internet for the attention of consumers, especially younger Americans. *Id.*

In light of this exponential increase in competition, the Commission also correctly predicted that broadcasters, in their “economic best interest,” would “stay informed about the needs and interests of [their] community.” *TV Deregulation Order* at 1101. The many alternatives to radio and television create inescapable incentives for broadcasters to independently ascertain the needs and interests of their local communities in order to offer a unique, locally-relevant product. Ascertainment-like efforts are a matter of survival for broadcasters, and would be performed regardless of whether the Commission imposes new rules.³⁴ Although the *Notice* describes the record as mixed, when examined closely, the overwhelming majority of the record reveals that broadcasters around the country engage in creative, consistent efforts to communicate with their audiences.

First, NAB has calculated that, in the *NOI* round of comments in this proceeding, at least 241 television stations and 1383 radio stations filed comments addressing

³⁴ See, e.g., Testimony of Eduardo Dominguez, Vice President and General Manager, KSTS-TV, San Jose, CA (Monterey Tr. 54); Testimony of Jim Keelor, President and COO, Liberty Corporation (Charlotte Tr. 30); Comments of Steve Giust, General Manager, KWEX-TV (San Antonio Tr. 76); Testimony of Bill Duhamel, President, Duhamel Broadcasting (Rapid City Tr. 52). See also Letter dated April 10, 2008 from Representatives Gene Green and Charles Gonzalez to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 (“we are skeptical of ... requirements prescribing how broadcasters must interact with their local audience” because “broadcasters compete fiercely for their audience, a dynamic which is much more likely to produce responsive programming than regulations”).

ascertainment issues. Specifically, these commenters referenced their efforts to ascertain which local issues are most important, which other specific topics audience members would like the broadcaster to cover, and/or what kind of music or other programming is most desired. Broadcasters also provided a number of specific examples of their ascertainment efforts. NAB Reply Comments at 2-4.

Second, numerous parties offered additional examples of their ascertainment efforts during the Commission's localism hearings:

- Station KENS-TV, San Antonio, TX, regularly calls on community leaders to find out, from their vantage point, what the problems and needs are that KENS should address in its programming. KENS also conducts annual market surveys asking citizens for the local issues of importance to them, and also obtains input informally through personal involvement with a variety of community organizations.³⁵
- Bonneville's three stations in the San Francisco Bay area combined spent more than \$290,000 in 2003 researching the attitudes and concerns of Bay Area residents. These projects examined music and non-music programming content, as well as attitudes on life issues and the needs of our community.³⁶
- Spanish-language Station KSTV-TV, San Jose, CA, conducts multiple surveys to discern the type of information its audience seeks in order to live a better life in the United States. Striving to meet those demands is a primary method by which the station attempts to earn the trust and loyalty of its audience.³⁷
- Station WCHH-FM, Charlotte, NC, regularly invites listeners to its offices to obtain feedback on its programming, which it then combines with other research

³⁵ Testimony of Robert G. McGann, President and General Manager, KENS-TV (Localism Task Force Hearing, San Antonio, TX, Jan. 28, 2004).

³⁶ Testimony of Chuck Tweedle, Senior Vice President of Bonneville (Localism Task Force Hearing, Monterey, CA, July 21, 2004).

³⁷ Testimony of Eduardo Dominguez, Vice President and General Manager, KSTV-TV (Localism Task Force Hearing, Monterey, CA, July 21, 2004).

to help it understand which music artists, whether national or local, its audience wants to hear.³⁸

- Clear Channel's radio stations in San Antonio spent over \$200,000 in 2003 alone to identify local audience needs, as well as maintain telephone hotlines, conduct polls, conduct call-out research, and perform auditorium testing to allow their audiences input into programming.³⁹

Indeed, the *Notice* itself recognizes that broadcasters partake in “inventive and ongoing” efforts to discern the needs and interests of their local communities. The Commission cites endeavors ranging from formal ascertainment at regularly scheduled meetings with community leaders, stations that conduct in-person interviews with community members, online and telephone solicitations of audience feedback, and one station that works with an organized minority community board, among others. *Notice* at ¶ 13.

Finally, numerous commenters have described their experiences, including:

- Independence Television Company in Louisville, Kentucky established an Editorial Advisory Board consisting of top business, political and community leaders in the Louisville, Kentucky and Southern Indiana area, and solicits comments from viewers on their editorials via email and telephone, and the President and General Manager serves on multiple community boards of directors.⁴⁰
- Station WSOU-FM (Seton Hall University, South Orange, NJ) opposes mandatory advisory boards even though it already consults with a voluntary board. WSOU explains that any federal mandate would be impossible to enact consistently with the university's academic mission, and editorial discretion to

³⁸ Testimony of Debbie Kwei, General Manager, WCHH-FM (Localism Task Force Hearing, Charlotte, NC, Oct. 22, 2003).

³⁹ Testimony of Tom Glade, San Antonio Market Manager, Clear Channel Radio (Localism Task Force Hearing, San Antonio, TX, Jan. 28, 2004).

⁴⁰ Comments of Bill Lamb, MB Docket No. 04-233 (Sept. 29, 2004).

reflect the values of the Catholic Church in its programming. WSOU recommends that the creation of a advisory board should be voluntary.⁴¹

- Station WYXC-AM (Cartersville, GA) invites the public to call or email with their questions or comments on the station's programming, and posts an online survey to ascertain the community's attitudes. The station has one full-time employee and no resources to assemble and administer a mandatory community advisory board.⁴²
- Station WMOT Radio (Middle Tennessee State University) routinely contacts community leaders in covering the local news, and therefore believes that a mandatory advisory board would be redundant.⁴³

Although these are only a few examples, they represent the consistent, substantial efforts of all broadcasters to educate themselves on the topics of interest to their local communities, and to meet those interests. The contrary view – that the record is “decidedly mixed,” or that “there is some question as to whether these practices have been widespread” -- is not supported. *Notice* at ¶¶ 13 and 15. For example, the *Notice* cites the testimony of Charlie O'Douglas of Rushmore Radio to support its call for more community access to broadcasters. However, a close look at this testimony reveals that Mr. O'Douglas did not mention mandatory advisory boards, but instead issued a challenge to Rapid City's Native American community to open the lines of communications with broadcasters to enable Rushmore and other stations to better express the needs and concerns of the Native American population in the Rapid City area. Nowhere did Mr. O'Douglas suggest that advisory boards were the most

⁴¹ Comments of Station WSOU-FM (South Orange, NJ), MB Docket No. 04-233 (Apr. 21, 2008).

⁴² Comments of Charles Shifflett, MB Docket 04-233 (Feb. 13, 2008).

⁴³ Comments of John Egly, MB Docket No. 04-233 (Mar. 17, 2008).

appropriate way to accomplish this. To the contrary, Mr. O'Douglas seemed to express frustration that broadcaster efforts to reach out to the community do not receive more response from the community.⁴⁴

The *Notice* also cites a candidate for a local water conservation board who would have appreciated offers of free advertising and Web space from his local broadcasters,⁴⁵ and the Chair of the Hispanic Chamber of Commerce in Monterey County who offers several substantive suggestions for regulating programming content, but does not describe any failures by broadcasters to reach out to their local communities for ideas on what local issues to cover.⁴⁶ In short, nothing in the record seems to point to advisory boards as the best option for enhancing community-broadcaster communications, or demonstrates that broadcasters are not readily open to education from community members on what locally-relevant topics to cover.

B. Permanent Mandatory Advisory Boards Should Not Be Imposed on All Stations, Regardless of Size and Unique Market Conditions

The critical point demonstrated by the record is that different stations discern community attitudes in different ways, depending on their particular circumstances. For example, establishing an advisory board of minority community leaders may be suitable for a television station like WTVD-TV, which is located in a large market (Raleigh-Durham, NC) with a large minority population, but less suitable for others. Likewise, a radio station like KCOR(AM), which is part of a large station group (Univision) and

⁴⁴ Testimony of Charlie O'Douglas, Operations Manager, Rushmore Radio (Rapid City Tr. 160-161).

⁴⁵ Comments of Gray Newman (Char. Tr. 68-69).

⁴⁶ Testimony of Blanca Zarazua (Monterey Tr. 48).

located in a large market (San Antonio), may have the resources to conduct 100 formal ascertainment interviews every year, but many other stations certainly would not. On the other hand, it is perfectly suitable and sufficient for a small station such as WYXC-AM in a very small market like Cartersville, Georgia to solicit input from the public by telephone or email to determine the needs and interests of their local community, but this method may not work for larger sized stations. More generally, radio broadcasters in mid-sized and smaller markets may find it more economical to rely on listener surveys from Arbitron and other independent firms that can provide more complete, current information on audience interests. Still others in smaller markets may find it most helpful to interact with community members in less formal settings to ascertain community attitudes, such as through boards and committees of various local governmental, business, civic and volunteer organizations.

It would be erroneous to discount the ascertainment value that stations derive from on-air call-in shows. Inner City Broadcasting station WLIB (AM), in New York City, for example, host a weekly call-in show featuring former NYC mayor David Dinkins discussing issues important to station listeners. Such programming not only provides an outlet for interaction with the community, but also provides insight and information about what is most important to WLIB's listeners.⁴⁷

The variety of methods is virtually endless, but in all cases, stations employ the ascertainment-like techniques that best suit their particular circumstances. A Commission decision to impose a single ascertainment requirement, such as the creation of a permanent community advisory board, on all radio and television stations

⁴⁷ See WLIB Programming Schedule, *available at* <http://wlib.com/pages/143245.php>

in every market in the country, would clearly be impractical and unrealistic for many licensees.

Indeed, the Commission's own questions concerning advisory boards reveal the inherent problems. For instance, the *Notice* (at ¶26) asks how members of such a board should be selected, which of course begs the question of how can a licensee possibly convene a board that represents every segment of its community or one that does not leave some community member or group feeling left out. Moreover, it would be a completely different endeavor for a station in a large market to create an adequate board than a station in a small market. The Commission also asks if such boards will be able to "alert each broadcaster to issues that are important to its community." *Id.* However, the *Notice* says nothing about what a broadcaster is supposed to do with the information obtained. Will a licensee still have the editorial discretion to decide what issues to cover, and if so, will this be meaningful since a broadcaster will feel pressure to cover the issues raised by any such board, lest it be accused of ignoring the concerns of certain segments of the community? Could this actually undermine the bedrock principle that the licensee is solely responsible for all programming on the station?

The inevitable result is that mandatory advisory boards will be impractical and unwieldy for many broadcasters, and in some situations, counter-productive to the Commission's goal of fostering localism. Instead of allowing broadcasters to devote their often limited resources to employing their most effective, proven methods for communicating with their local communities, broadcasters would be forced to convene a permanent community advisory board that might be ill-suited for the broadcaster's

particular market, or ineffective for any number of reasons. NAB urges the Commission not to adopt an inflexible proposal when more effective methods are available.

The wisest course of action is the one understood and undertaken by the Commission decades ago, when the agency realized that marketplace incentives would spur broadcasters to remain locally relevant and responsive, and that its ascertainment rules had little actual effect on broadcaster practices. There is certainly nothing in the current record that would allow the Commission to meet its heightened burden of reversing course now. See *State Farm*, 463 U.S. at 42, in Section I. *supra*. If anything, the record demonstrates that there is widespread interaction between broadcasters and their communities as broadcasters face more competition than ever before, and must therefore be more responsive to their local audiences than ever before. Broadcasters should be afforded the flexibility to design their own ascertainment programs, consistent with the various characteristics of their particular markets, stations, and communities. Ascertainment techniques reflecting the realities of highly divergent local radio and television markets will, by definition, be more effective than an inflexible, one-size-fits-all federal mandate.

III. The Proposed Return of License Renewal Processing “Guidelines” Is Unwarranted, Unnecessary and Contrary to Law

In this *Notice*, the Commission has tentatively concluded that it should “reintroduce” license renewal application processing “guidelines” that mandate a set percentage or amount of “locally-oriented” programming. *Notice* at ¶ 40. Broadcast stations that do not meet or exceed the percentage or amount of “locally-oriented” content will be unable to have their license renewal applications routinely processed by the Media Bureau, but will require consideration by the full Commission (and perhaps

risk their loss of license). *Id.* The Commission also inquires whether these “guidelines” should cover very specific types of programming, including local news, political, public affairs and entertainment. *Id.* at ¶ 140. To implement these numerical programming quotas, the Commission would need to reverse two decisions that eliminated very similar rules for television and radio stations in the early 1980s.⁴⁸ This proposal to reinstate content-based renewal processing guidelines apparently stems from erroneous suggestions that the current license renewal system is a “postcard” process that saps the Commission’s ability to effectively scrutinize the public interest performance of licensees. To the contrary, as the attached white paper shows, the current license renewal process is rigorous and thorough – in fact, anything but a “postcard” process.⁴⁹ Beyond refuting the “postcard” myth, NAB also submits that reintroduction of content-based renewal processing guidelines is unjustifiable based on the record in this proceeding, unnecessary to ensure the provision of responsive programming to local communities, beyond the FCC’s statutory authority, and likely contrary to the First Amendment.

⁴⁸ See *TV Deregulation Order*, 98 FCC 2d 1076; *Radio Deregulation Order*, 84 FCC 2d 968. In fact, the renewal programming guidelines previously eliminated by the FCC appear less content-specific than the guidelines discussed in this *Notice*. The previous television guidelines provided that the full FCC would have to act on any commercial television station renewal application reflecting less than 5% local programming, 5% informational programming (news and public affairs), or 10% total non-entertainment programming. The previous radio guidelines had called for AM stations to offer 8% non-entertainment programming and for FM stations to offer 6% non-entertainment programming.

⁴⁹ See Fletcher, Heald & Hildreth, *Busting the Broadcast “Postcard” License Renewal Application Urban Legend* at Attachment A (“*Renewal White Paper*”).

A. Programming-Based Processing “Guidelines” Have Previously Been Eliminated by the Commission as Unnecessary and Burdensome, and the Record Does Not Support Reversal of Course

The Commission has tentatively concluded that content-based processing guidelines are necessary to satisfy “criticisms and calls for improvement to the license renewal process.” *Notice* at ¶ 117. The limited numbers of members of the public that expressed concern with the current broadcast license renewal process, however, appear to be reacting more to myths and gross generalizations about the license renewal process than reality. For example, in the *Notice* (at footnote 301), the Commission cites two witnesses at the Monterey localism hearing who call for “more teeth” to the license renewal process, and who claim that the current license renewal process is “a sham.”⁵⁰ Neither of these commenters suggests that a return to content-based processing guidelines is necessary or, indeed, evidences any actual knowledge of the specifics of the current license renewal process. Other commenters relied on by the *Notice*, including Martin Kaplan, Associate Dean of the Annenberg School of Communication, cite problems with a license renewal process that, they claim, is nothing more than a “returned postcard.” *Notice* at ft. 302-303. Mr. Kaplan called the “current postcard renewal process ... a joke.”⁵¹

As we show in the attached *Renewal White Paper*, however, the current license renewal process involves much more than a “returned postcard,” and it is certainly not a

⁵⁰ NAB notes that the Commission also cites the testimony of Kathy Bissi (Monterey Tr. 230-231) who does not, according to the transcript, discuss the license renewal process at all.

⁵¹ See Statement of Martin Kaplan, Associate Dean, Annenberg School for Communication, University of Southern California, Monterey Localism Hearing (July 21, 2004) at 3.

“joke” to broadcasters. Nonetheless, the myth of the “postcard renewal” appears to influence not only the opinion of professional media critics, but Commission decision making as well.⁵² As the attached examination of the license renewal process shows, however, the current demands on broadcasters seeking license renewal are indeed very real. Broadcasters are required to file potentially hundreds of pages of documents and spend many hours gathering information and completing forms, as well as complying with on-going requirements throughout the license term. At a bare minimum, the renewal application itself is 38 pages of instructions and forms, not including the additional forms the FCC requires to be filed as part of the renewal process. Even according to the government’s own conservative estimates, the total annual cost to broadcasters of completing the license renewal applications is \$7,302,951 – a rather expensive postcard. *Renewal White Paper* at 1, 11.

Furthermore, broadcast renewal applications are hardly “rubber stamped” by the FCC, as some critics have suggested. The FCC has taken, on average, six months to review the applications that it has granted (ten months for television stations) and has issued hundreds of forfeitures and admonishments. During the past renewal cycle, 8.1% of all applications (28% of television applications) either were not granted, have yet to be granted, or were granted with a forfeiture or admonishment. *Id.* at 12-13.

Clearly, the Commission cannot rely on the myth of “postcard” renewals to justify the reimposition of unnecessary and burdensome renewal requirements. The license

⁵² See *Notice*, Statement of Commissioner Michael J. Copps, Concur in Part, Dissent in Part (referring to license renewal as a “postcard” and “a rubber stamp” with “no substantive review”).

renewal application and review process is rigorous, substantive and expensive. It properly and seriously reviews the performance of applicants during the preceding license term.⁵³

Beyond the postcard license renewal urban legend, NAB notes that the record in this proceeding provides little evidentiary cover for reimposition of programming quotas that the Commission has previously eliminated as ineffective and unnecessary.⁵⁴ There is, for example, no evidence that stations were more responsive to local communities in the 1970s because of the FCC's renewal processing guidelines. And, there is no evidence of widespread market failure in local programming since the license renewal processing guidelines were removed in the early 1980s. To the contrary, the record provides ample evidence that local broadcasters continue to air local news, local public affairs programming, emergency information, local weather and sports information, and public service announcements that address local problems in response to their desire to serve the public interest and significant competitive pressures.

Even a brief summary of the evidence presented in a number of proceedings in recent years, including this one, refutes any claims that the broadcast industry is failing to offer non-entertainment programming, including local news, as a result of the

⁵³ As part of the license renewal process, the licensee, each quarter throughout the license term, must have placed in its public file the list of issues that are important to the community the station serves and the programming that was responsive to those issues. As explained in the *Renewal White Paper*, this is more than just a list – it is one of the ways the licensee declares the programming it aired that was responsive to the needs of the local community. In other words, the issues/programs list is a written, public recitation of the daily and special programming a particular station airs that serves the needs of its local audience. See *Renewal White Paper* at 8, 10.

⁵⁴ See *TV Deregulation Order* at 1079; *Radio Deregulation Order* at 977.

elimination of the FCC's previous renewal processing guidelines. For example, a study submitted to the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters examining the non-entertainment programming of stations affiliated with the four major networks in 17 markets showed that the average amount of non-entertainment programming offered by these stations in each of those markets was more than double the 10% benchmark that the Commission had specified in its earlier renewal processing guidelines.⁵⁵ A similar Belo study of major network affiliates in a range of markets found that these television stations dedicated about one-third of their total broadcast hours to non-entertainment programming.⁵⁶ According to CBS, the amount of news and public affairs programming it offered tripled in the period between 1979 and 1990 alone.⁵⁷

Indeed, the FCC itself has found that the number of hours of news and public interest programming aired on television stations has increased over the decades. Comparing the number of hours aired of this type of programming in 1960, 1980 and 2003 in a large, medium and small markets, the Commission found that, in 1960 and

⁵⁵ See Comments of NAB in MM Docket No. 99-360 at 35 (March 27, 2000).

⁵⁶ See Comments of Belo in MM Docket No. 99-360 at 6-9 and Appendix A (March 27, 2000). The majority of the Belo owned stations included in this survey aired 72 or more hours per week of non-entertainment programming, while all of the Belo stations surveyed aired over 60 hours per week of non-entertainment programming (newscasts, news/information programs, public affairs shows, instructional programs, children's educational programming and religious programs). Again, this amount of non-entertainment programming is significantly above the 10% benchmark for such programming for television stations eliminated as unnecessary in 1984.

⁵⁷ See Comments of CBS Corporation in MM Docket No. 99-360 at 9-11 (March 27, 2000).

1980, there were on average only about one or two hours of local news programming per station, per day. However, by 2003 local news programming expanded to about two to four hours per station per day and several regional and local cable news networks had been launched. The Commission also found that public interest programming and national news had proliferated. Although television broadcast stations in 2003 were airing about the same amount of public interest programming and national news programming per station as they were in 1980, in 2003 there were more broadcast stations per market and numerous new non-broadcast networks. Thus, more such programming was available on a market basis.⁵⁸ Clearly, the evidence shows that, despite the elimination of the FCC's processing guidelines in the 1980s, there was not a decline -- and in fact there was an increase -- in the amounts of non-entertainment programming, especially local news, aired by television stations and available to consumers on a market basis.

The record already compiled in this proceeding also shows broadcasters' commitment to localism and to providing local non-entertainment programming, including local news. As previously discussed by NAB, parties representing more than 1,773 radio licensees and 454 television licensees have detailed their local news operations. Among these television stations commenting, approximately 139 discussed

⁵⁸ *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13664-65 (2003). Academic studies have also shown increases in the amounts of local television news aired during the 1980s and 1990s. See, e.g., Angela Powers, *Toward Monopolistic Competition in U.S. Local Television News*, 14 J. Media Econ. 77, 82 (2001) (as the number of competitors in local television news markets increased between 1989 and 1998, stations responded to the increased competition by increasing the number of newscasts they aired each day).

how many hours they devote to local news and, of these, approximately 120 stations reported airing at least 20 hours of news per week, with the majority airing between 25 to 40 hours of news per week. Local radio stations – not including the hundreds of stations with an all-news or news/talk format – broadcast many newscasts (generally of shorter length) that often focus on local events. See NAB Reply Comments at 5-10.

Many radio and television broadcasters also discussed their local news operations at the FCC's localism hearings.⁵⁹

⁵⁹ See, e.g., Testimony of Steve Thaxton at Portland Localism Hearing (June 28, 2007) (network affiliated television station produces 37 hours of regularly scheduled news and other local programming every week, including editorials) (Portland Tr. 89-90); Testimony of Gordon Wark at Portland Localism Hearing (June 28, 2004) (small television station in Maine airs over three hours of local news each day) (Portland Tr. 46); Statement of Michael Ward at Charlotte Localism Hearing at 2 (Oct. 22, 2003) (network affiliated television station airs 27 hours of local news per week, as well as news specials and political debates); Statement of Joseph Heston at Monterey Localism Hearing at 1 (July 21, 2004) (local television station in California's central coast region invested in three full news bureaus and uses three live vans and three ENG receive sites to provide on-the-spot news coverage); Statement of Dr. William F. Duhamel at Rapid City Localism Hearing at 2 (May 26, 2004) (nearly 40% of each weekday schedule on South Dakota, Nebraska and Wyoming television stations devoted to news and public affairs programming, and these stations carry over seven hours a day of network news and public affairs and about two and a half hours each weekday of local news and public affairs programs); Statement of Robert G. McGann at San Antonio Localism Hearing at 2 (Jan. 28, 2004) (network affiliated television station aired 39 hours of non-entertainment programming during one surveyed week, amounting to 23.2% of its total weekly broadcast program hours); Statement of Alan Harris at Rapid City Localism Hearing at 2 (May 26, 2004) (three Wyoming radio stations broadcast 72 local newscasts every week, about 40 sportscasts, and a daily public affairs interview program); Statement of Chuck Tweedle at Monterey Localism Hearing at 3 (July 21, 2004) (three radio stations in Bay area broadcast more than four hours of locally produced newscasts every week); Statement of Jerry T. Hanszen at San Antonio Localism Hearing at 2 (Jan. 28, 2004) (on a typical day, two small market Texas radio stations broadcast five local newscasts); Statement of Terri Avery at Charlotte Localism Hearing at 2-3 (Oct. 22, 2003) (detailing local, state and national news coverage of three local radio stations, including programs with live interviews with local community leaders).

The current proceeding also includes comments from at least 1,904 radio licensees and 287 television licensees specifically stating that they air local public affairs programming. See NAB Reply Comments at 10-13 (detailing range of issues covered and setting forth specific examples). A number of broadcasters testified at the FCC's localism hearings about their provision of public affairs programming.⁶⁰ A recent Gannett survey finding that their stations average nearly 30 hours per week of local news and 3 hours per week of local public affairs programming shows that this trend continues.

Despite claims that broadcast stations fail to cover properly political campaigns and political issues, parties representing at least 1472 radio stations and 255 television stations specifically discussed their coverage of political issues in this proceeding. See NAB Reply Comments at 14-16 (providing numerous examples of stations' political programming).⁶¹ NAB has also detailed radio and television stations' political

⁶⁰ See, e.g., Statement of Tom Glade at San Antonio Localism Hearing at 3 (Jan. 28, 2004) (listing radio stations' multiple public affairs shows); Statement of Terri Avery at Charlotte Localism Hearing at 2-3 (Oct. 22, 2003) (discussing radio stations' public affairs programming covering topics from health to education to politics); Statement of Joseph Heston at Monterey Localism Hearing at 2 (July 21, 2004) (describing television station's local, state and national public affairs programming); Statement of Chuck Tweedle at Monterey Localism Hearing at 2-3 (July 21, 2004) (describing radio stations' three weekly local public affairs programs); Statement of Steve Giust at San Antonio Localism Hearing at 1-2 (Jan. 28, 2004) (discussing local television station's weekly community and political affairs shows).

⁶¹ See also Statement of James M. Keelor at Charlotte Localism Hearing at 2 (Oct. 22, 2003) (discussing free air time devoted to covering local politics, including candidate debates, interviews and profiles by local television stations); Statement of Dr. William F. Duhamel at Rapid City Localism Hearing at 2-3 (May 26, 2004) (describing extensive political debates and voter PSAs carried by television stations).

programming, especially coverage of the 2006 elections, in other FCC proceedings.⁶²

This evidence shows that local stations serve their local communities by covering candidate debates and forums, airing “get out the vote” public service campaigns, and providing free air time to candidates. See Attachment B (including recent articles discussing free air time offered to political candidates and other political coverage efforts).

The record already established in this proceeding further demonstrates that local radio and television stations provide a variety of other locally produced programming that serves the needs and interests of their audiences, including sports, religious, arts, agricultural, weather and other community-oriented programming, as well as interviews with local leaders and coverage of local events.⁶³ Local stations are a public voice for local community and charitable organizations, allowing these organizations to speak directly to local citizens, raise their public profiles, cement connections within local communities and raise necessary funds.⁶⁴ Stations also air innumerable public service

⁶² See NAB Comments in MB Docket No. 06-121, at 64-66 and Attachment L (Oct. 23, 2006).

⁶³ See, e.g., Statement of Robert G. McGann at San Antonio Localism Hearing at 3-4 (Jan. 28, 2004); Statement of Alan Harris at Rapid City Localism Hearing at 2-3 (May 26, 2004); Statement of Jerry T. Hanszen at San Antonio Localism Hearing at 3 (Jan. 28, 2004); Statement of Joseph Heston at Monterey Localism Hearing at 2 (July 21, 2004); Statement of Dr. William F. Duhamel at Rapid City Localism Hearing at 2-4 (May 26, 2004); Statement of Mark Antonitis at Rapid City Localism Hearing at 2 (May 26, 2004); Testimony of Gordon Wark at Portland Localism Hearing (June 28, 2007) (Portland Tr. 46-47).

⁶⁴ See, e.g., Statement of Jerry T. Hanszen at San Antonio Localism Hearing at 3 (Jan. 28, 2004) (“[T]he most important contributions that broadcasters make to their community has very little to do with money. We raise the level of awareness, discussion, and education in our communities. And we give a voice to local

announcements, the majority of which are about local issues.⁶⁵ Above all, broadcasters provide important and often life-saving weather and other emergency information to their local communities, including emergency information about child abductions through the AMBER PLAN, a program pioneered by broadcasters.⁶⁶

In sum, there can be no doubt that broadcasters are continuing – as they have always done – to provide responsive programming and services, including local programming, to their local communities. Thus, the Commission would have no evidentiary basis upon which to conclude that the re-imposition of outdated programming guidelines is needed to ensure that news and other informational programs are available to local communities. Attempting to reinstate such programming requirements would constitute arbitrary and capricious decision-making. See, e.g., *Cincinnati Bell Telephone*, 69 F.3d at 763.

NAB further observes that the real complaint some parties have about broadcasters is not their failure to provide news and other informational programming

organizations, groups and individual citizens.”). Attachment B includes a recent sampling of broadcasters’ service to local communities across the country.

⁶⁵ See NAB, *National Report on Broadcasters’ Community Service* at 3 (June 2006). 61% of the PSAs aired by the average radio station in 2005 were about local issues. For the average television station, the figure was 55%.

⁶⁶ Broadcasters have discussed their provision of emergency information in other proceedings before the Commission. See, e.g., Comments of NAB in MB Docket No. 06-121 at 61-63 (Oct. 23, 2006). Numerous broadcasters also addressed this topic at the localism hearings. See, e.g., Statement of Dr. William F. Duhamel at Rapid City Localism Hearing at 3-4 (May 26, 2004); Statement of James M. Keelor at Charlotte Localism Hearing at 1 (Oct. 22, 2003); Statement of Mark Antonitis at Rapid City Localism Hearing at 2-4 (May 26, 2004); Statement of Jerry T. Hanszen at San Antonio Localism Hearing at 3 (Jan. 28, 2004).

but with the specific substance and perceived quality of that programming. See, e.g., *Notice* at ¶ 65 (one party asserting that the question about broadcasters' political programming is not the amount but the "quality of the programming," and another party contending that there has been a decline in news coverage of "substantive" campaign and election issues). However, opinions about the perceived quality and specific content of news and informational programming are simply not relevant to this proceeding. From the above discussion, it is clear that regulations requiring broadcasters to provide a certain minimum amount of news or non-entertainment programming are unnecessary because broadcasters already provide very substantial amounts of such programming. The Commission certainly cannot, to satisfy broadcasters' critics, adopt regulations requiring that stations make their news and public affairs programming "higher quality" or "better" or "harder." And the Commission cannot satisfy those commenters criticizing the substance of particular news stories (e.g., political stories should not cover "horse race" or fund raising aspects of political campaigns but more "substantive" aspects) without venturing into very specific – and constitutionally-suspect – content mandates.

B. In Light of Developments in the Media Marketplace, There Is Even Less Reason Today for the Commission to Impose Content-Based Programming Requirements

As noted above, content-based renewal processing guidelines have been previously utilized by the Commission and found wanting. Implementing the current proposal would constitute a direct reversal of well-considered prior FCC decisions. In the 1984 *TV Deregulation Order*, the Commission determined that programming guidelines were simply "not necessary" and that they presented "several inherent disadvantages." *Id.* at 1080. For example, the Commission found "potential conflicts

with Congressional policies expressed in the Regulatory Flexibility Act and the Paperwork Reduction Act, imposition of burdensome compliance costs [on broadcasters], possibly unnecessary infringement on the editorial discretion of broadcasters, and distortion of the Commission's traditional policy goals in promulgating and monitoring programming responsibilities." *Id.* The *Notice* provides no explanation or reason why these "inherent disadvantages" no longer apply or are not relevant.

When the Commission eliminated its broadcast renewal processing guidelines, it also determined that the rules were unnecessary because market conditions ensured that broadcasters would supply local programming to differentiate themselves from other media. The Commission further predicted that "the emergence of new technologies, coupled with the continued growth in the number of [broadcast] stations, will create an economic environment that is even more competitive than the existing marketplace." *TV Deregulation Order* at 1086. These predictions have proven true, as evidenced by the substantial increase in the total number of over-the-air broadcast stations,⁶⁷ and the explosive growth in the numbers of cable and satellite television and radio subscribers.⁶⁸ If it was appropriate to eliminate quantitative programming

⁶⁷ Today there are 13,977 full power radio stations and 1759 full power television stations, as well as 556 Class A television stations, 2295 low power television stations and 831 low power FM stations. FCC News Release, *Broadcast Station Totals as of December 31, 2007* (March 18, 2008). In 1975, there were only 7785 radio stations and 952 television stations licensed in the United States. *Order and Notice of Proposed Rule Making* in MM Docket Nos. 01-235 and 96-197, 16 FCC Rcd 17283, 17288 (2001).

⁶⁸ The Commission and other parties in numerous proceedings have previously documented the explosive growth in the number of media outlets in local markets over time. See, e.g., FCC, Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Sept. 2002); David Pritchard, *A Longitudinal Study of Local Media Outlets in Five American*

requirements in 1984 given the state of media competition then, when the majority of Americans still received television programming via antenna, certainly it is difficult to justify a reversal of policy in the current media environment, where close to 90 percent of American homes subscribe to either cable or satellite television services and millions listen to satellite radio, downloaded music and podcasts.

Furthermore, in the 1980s Commission did not even contemplate the emergence of the Internet, which has already radically transformed the media marketplace. About half of all American homes have access to the Internet through high-speed broadband connections that act as a gateway to millions of Web sites, including nearly limitless online video and audio offerings.⁶⁹ And these numbers do not account for millions of other users that access the Internet through high speed connections at work and others who access the vast information available online through dial-up services. As a result, millions of Americans, especially younger users, are increasingly turning to the Internet as an important source of information, news, and entertainment.⁷⁰ And increasingly,

Communities, Appendix A, Comments of Viacom in MM Docket Nos. 01-317 and 00-244 (March 27, 2002); BIA Financial Network, *Media Outlets Availability by Markets*, Attachment A, Comments of NAB in MB Docket No. 06-121 (Oct. 23, 2006).

⁶⁹ See Scarborough Research, Press Release, “*THE NEED FOR INTERNET SPEED: BROADBAND PENETRATION INCREASED MORE THAN 300% SINCE 2002*,” released April 15, 2008, available at http://www.scarborough.com/press_releases/Broadband%20FINAL%204.15.08.pdf (showing a 300 percent increase in home broadband usage since 2002). Note also that these numbers do not include millions of users that “piggyback” onto other’s wireless networks for free. NAB has described these vast changes in the media marketplace in more detail in other proceedings. See, e.g., NAB Comments in MB Docket No. 06-121 at 6-22 (Oct. 23, 2006); NAB Reply Comments in MB Docket No. 06-121 at 16-34 (Jan. 16, 2007).

⁷⁰ See, e.g., *Internet Activities*, Pew Internet & American Life Project, available at http://www.pewinternet.org/trends/Internet_Activities_2.15.08.htm. This compilation of

they are accessing that information and entertainment through video on the Internet. According to recent research, about 75 percent of Americans with high-speed Internet access watch and/or download videos online.⁷¹ As Internet video increases in both technical and editorial quality, those numbers are expected to rise dramatically every year. These technological advances and shifts in consumer behavior put increasing pressure on broadcasters to strengthen their local programming niche and differentiate themselves in this ever-expanding media market. It would be arbitrary and capricious for the Commission to ignore these altered marketplace conditions when considering the imposition of intrusive and burdensome regulations that will only apply to broadcasters, but not other competing providers of video and audio programming.

NAB also observes that the emergence of numerous competing audio and video services and outlets have profoundly affected the ability of local stations to compete for vital advertising revenues.⁷² Thus, NAB takes issue with media critics who suggest broadcasters are somehow failing to serve the public interest because they are

Pew surveys shows that more than 90% of Internet users have used the Web for information gathering purposes, that more than 70% use the Internet to get news, 78% use the Web to get weather information, 66% have visited a local, state or federal government Web site, and close to half of all Internet users have utilized the Web for information about political or upcoming campaigns.

⁷¹ See Mary Madden, *Online Video*, Pew Internet & American Life Project, July 25, 2007, available at http://www.pewinternet.org/pdfs/PIP_Online_Video_2007.pdf. See also Lee Rainie, Pew Internet Project Data Memo, January 9, 2008, available at http://www.pewinternet.org/pdfs/Pew_Videosharing_memo_Jan08.pdf (showing that the average number of visitors to video sharing Web sites such as YouTube had nearly doubled in one year, from the end of 2006 to the end of 2007).

⁷² See, e.g., NAB Comments in MB Docket No. 06-121 at 29-35 and Attachment F (Oct. 23, 2006).

concerned with “ratings and revenues.” *Notice* at ¶ 37. In an advertiser-supported media environment, ratings and revenues are absolutely essential for broadcast stations to survive, let alone be able to offer the kind of resource intensive programming, such as local news and public affairs, that these critics want.⁷³ A study cited prominently in the *Notice* (at ¶ 38) expressly found that the provision of public affairs programming is “a function of station revenues.”⁷⁴ In other words, to the extent that stations’ limited resources are sapped by burdensome and unnecessary regulation, those are resources that cannot, by definition, be used to provide programming and other services to the public.

C. The One-Size-Fits-All Approach to Regulation Is Inappropriate in the Modern Media Market

The proliferation of broadcast outlets and the rise of multichannel video and audio programming distributors and the Internet have produced an exponential increase in programming and service choices available to viewers and listeners. In such an environment, NAB reemphasizes that it is neither necessary nor economically efficient for every broadcast station to be “all things to all people,” so long as wide varieties of

⁷³ See *1992 Radio Ownership Order*, 7 Rcd at 2760 (the radio “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability”). See also *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940) (observing that the Communications Act “recognized that the field of broadcasting is one of free competition,” and that Congress intended each licensee “to survive or succumb according to his ability to make his programs attractive to the public”).

⁷⁴ Numerous additional studies have similarly found connections between station profitability and the provision of news and other non-entertainment programming. See, e.g., Raymond Carroll, *Market Size and TV News Values*, 66 *Journalism Quarterly* 49, 55-56 (1989); R.E. Park, Rand Corp. *Television Station Performance and Revenues*, P-4577 (Feb. 1971).

programming are available to consumers on a market basis.⁷⁵ In considering whether the public's interest in receiving a diversity of programming and services is being met, the Commission therefore should focus on the variety of programming offered across markets as a whole. Indeed, when the Commission eliminated program processing guidelines for radio in 1981, it explained that it was no longer necessary for the government to require "every radio station to broadcast a wide variety of different types of programming" because a "full complement of programming services" will be available through "the totality of stations" in a market.⁷⁶ As discussed above, the grounds for that decision in 1981 – the expansion of broadcast service and the development of other competing media – is even more valid today.

Accordingly, there is no reason for the Commission to adopt rules impelling all stations to offer the same categories of local programming, at the expense of other categories of local programming or regional or national programming that stations may wish to offer and that audiences may prefer to receive. Adopting guidelines that coerce

⁷⁵ See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 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" and "clashes with the reality of the radio market"); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1434 (D.C. Cir. 1983) (audiences "benefit by the increased diversity of programs" offered by the growing number of outlets "across the market"); Benjamin J. Bates and Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. Media Econ. 19, 28 (1999) (observing the "expansion of the number of all-news/all-talk format stations," and noting that such expansion "tend[ed] to support the arguments of deregulation that the public's interest in news and public-affairs programming is being served, if not by every station, at least by stations in many markets").

⁷⁶ *Radio Deregulation Order* at 977-79. *Accord Television Deregulation Order* at 1088 (requiring television stations to "present programming in all categories" is "unnecessary and burdensome in light of overall market performance").

thousands of broadcast stations in differing markets across the country into a one-size-fits-all framework would ignore precedent and produce results contrary to the public interest.

Indeed, in light of the Commission's long-standing acknowledgement that its policies should ensure adequate service to consumers across markets as a whole, the current proposal to use regulatory pressure to incent all radio and television stations in the country to air set amounts of the same types of local programming is unwarranted. This is particularly true given the vast amount of local news and other informational and entertainment programming offered by broadcast stations (and by numerous multichannel and other outlets as well), especially on a market basis.⁷⁷

D. The Commission Lacks Authority to Impose Content-Based Programming Requirements

It is also important to keep in mind in this context that the Communications Act of 1934 ("Act") forbids the FCC from engaging in "censorship" or from promulgating any "regulation" that "interfere[s] with the right of free speech by means of radio

⁷⁷ The Commission recognizes that many broadcasters take very seriously their responsibility to inform their listeners and viewers, but then suggests that regulation is needed because "not all stations do as much as they can and should ...". See, *Notice* at ¶66. This concern is unnecessary in light of the fact that, as shown above, many commenting or testifying in this proceeding expressed approval of broadcasters' programming and services and relatively few had specific complaints about the service actually being provided by their local stations. Moreover, even if every station may not air programming some individual viewers or listeners would personally regard as optimal, this does not mean that consumers in local markets are actually being harmed by any lack of service, especially given the number of other broadcasters and nonbroadcast outlets providing service within local markets.

communication.” 47 U.S.C. § 326. On its face, Section 326 precludes the Commission from regulating the content of speech on radio and television.⁷⁸

The D.C. Circuit Court of Appeals has also stressed the strict limits on the Commission’s authority to adopt regulations significantly affecting the content of broadcast programming. In *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 802-803 (D.C. Cir. 2002), the court found that no provision (including § 1) of the Act authorized the Commission to adopt video description requirements for television broadcasters because such regulations “significantly implicate[d] program content.” The court explained that the “very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content” in order to “avoid potential First Amendment issues.” *Id.* at 805. The court also noted that “Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content.” *Id.*

Thus, to the extent that the proposed regulations “significantly implicate program content,” the Commission cannot rely on its general authority to adopt any such regulations. *Id.* at 805-807 (holding that the FCC’s general powers under Sections 1, 4(i) and 303(r) did not authorize the adoption of rules “about program content”). Lacking the general authority to regulate the amounts and types of local programming offered by broadcast stations – and given the absence of any “clear” congressional directive specifically “delegat[ing] authority to the FCC to address” the airing of local news, public

⁷⁸ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650, 652 (1994) (“*Turner I*”) (quoting Section 326 to illustrate the “minimal extent to which the FCC” is allowed “to intrude into matters affecting the content of broadcast programming”).

affairs, political or other local content – the Commission does not possess the authority to make license renewal dependent on the broadcast of such specific content.

The Commission must also be mindful that direct governmental pressure – enforced through the license renewal process – on stations to offer certain amounts and types of local programming overrides broadcasters’ “discretion over programming choices,” could interfere with the rights of viewers and listeners, and contradict established First Amendment precepts. *Turner I*, 512 U.S. at 650-51 (the Commission may not impose upon broadcasters “its private notions of what the public ought to hear”). As the D.C. Circuit has explained, Congress “has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities,” and any “Commission requirements mandating particular program categories would raise very serious First Amendment questions.”⁷⁹ Moreover, quantitative guidelines that operate as a “screening device” create for licensees a “strong incentive to meet the numerical goals.”⁸⁰ “No rational firm – particularly one holding a government-issued license – welcomes a government audit.” *Lutheran Church*, 141 F.3d at 353.

The Commission’s goal in implementing these guidelines is clear. The processing guidelines are intended to “ensure” that broadcasters air the government’s preferred amount of locally-oriented programming and likely even mandated amounts of very specific types of local programming (e.g., political, public affairs, news and

⁷⁹ *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983). See also *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (“broadcasters are entitled under the First Amendment to exercise the widest possible journalistic freedom consistent with their public duties”).

⁸⁰ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998).

entertainment). *Notice* at ¶¶ 40, 124. And if broadcasters do not comply with these so-called guidelines then their ability to renew their licenses – upon which they depend to remain in business – will be put at significant risk. Under these circumstances, “[n]o rational” broadcaster will treat these programming guidelines as anything other than a strict government mandate. *Lutheran Church*, 141 F.3d at 353.⁸¹

Particularly in light of the lack of any demonstrated need for government interference in licensees’ programming decisions, NAB urges the Commission not to adopt content-based programming requirements. As the Commission has previously recognized, 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.”⁸² Specific quantitative standards cannot be regarded as “other than an encroachment on the broad discretion” of licensees “to broadcast the programs they believe best serve their audiences.” *Renewal R&O* at 427. Renewal standards coercing the provision of specific amounts of programming in government-preferred categories would not only interfere with the editorial independence of broadcasters, but would also effectively reduce or eliminate broadcast time for other,

⁸¹ This is clear from experience with the children’s television programming “guidelines.” Television broadcasters treat these guidelines as a hard-and-fast rule and comply with the three hour children’s programming standard to ensure the renewal of their licenses. *See also MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (observing that “a regulatory agency may be able to put pressure upon a regulated firm in a number of ways” and that the FCC “in particular has a long history of employing a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content”).

⁸² *Report and Order* in Docket No. 19154, 66 FCC 2d 419, 428-29 (1977) (declining to adopt quantitative program standards for television broadcasters involved in comparative renewal proceedings, finding that quantitative programming standards were a “simplistic, superficial approach to a complex problem”) (“*Renewal R&O*”).

less favored program categories.⁸³ The Commission further recognized, when eliminating the television renewal processing guidelines in the 1980s, that such First Amendment concerns were only “exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance.” *TV Deregulation Order* at 1089 (citing cases noting that an increased quantity of certain types of programming does not guarantee improved or more responsive service). In light of this overwhelming precedent disfavoring quantitative programming guidelines, NAB urges the Commission in this proceeding to act consistent with its earlier decisions and to decline to adopt the proposed content-based renewal processing standards that raise such profound legal and constitutional questions.

IV. Limiting Broadcasters’ Ability to Engage in Remote Operations Will Unjustifiably Harm Public Access to Local Programming and Emergency Information

The *Notice* seeks comment on whether to revise the remote operations rules to require a physical presence at each broadcast facility during all hours of operation.⁸⁴ As explained below, NAB submits that limiting broadcasters’ ability to engage in remote operations will disserve the Commission’s stated goals of improving the connection

⁸³ Religious broadcasters, for example, have opposed on First Amendment grounds proposals to adopt quantitative programming requirements because they would disfavor the types of programs (such as religious) for which quotas were not set. See *Renewal R&O* at 426.

⁸⁴ *Notice* at ¶¶ 29, 87. Specifically, the Commission notes that in its Digital Audio Broadcasting proceeding, it has requested comment on whether to require a physical presence at a radio broadcasting facility during all hours of operation and seeks comment on whether to impose such a requirement on television broadcasting. *Id.* (citing *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service*, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10391 ¶ 119 (2007) (“*Digital Audio FNPRM*”).

between stations and their communities and facilitating access to emergency information. Indeed, there is no reason for the agency to reverse the precedent on which broadcasters have relied by limiting their ability to operate stations on a remote or unattended basis, particularly in light of advancements in technology that have strengthened the original justifications for allowing remote operation and the reductions in service that would likely result from mandating attendance during all hours of broadcast operations.

A. The Commission’s Elimination of the Requirement to Maintain a Physical Presence at a Broadcast Station Was Firmly Grounded Upon Record Evidence and Congressional Intent

Sixteen years ago, Congress eliminated a provision of the Act that proscribed Commission waiver of a broadcast licensee’s obligation to maintain personnel during all periods of operation.⁸⁵ In response to this amendment, the Commission commenced a rulemaking proceeding to determine whether and under what circumstances it should waive this requirement.⁸⁶ The Commission sought and received comment on wide-ranging issues relating to unattended operation, including whether a waiver should apply universally to all stations, the relationship between unattended operation and the availability of emergency information, the appropriate time period for correcting any malfunctions, and monitoring, measurement, and calibration requirements.

⁸⁵ Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, 106 Stat. 3533.

⁸⁶ *Amendment of Parts 73 and 74 of the Commission’s Rules to Permit Unattended Operations of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, Notice of Proposed Rulemaking, 10 FCC Rcd 508 (1994) (“*Unattended Operations NRPM*”).

In the resulting order waiving the prohibition on remote operations for all classes of stations, the Commission observed that there was “general agreement that the technology exists to automate the monitoring and control of broadcast stations,” that better service could result from “constant (automated) technical monitoring than with human attendance,” and that waiver would “permit licensees to make more effective use of resources by implementing the operating and maintenance policies most appropriate for their stations.”⁸⁷ The Commission “concur[red] with the majority opinion that waiver ... to permit unattended operation is not likely to result in an increase in operation outside the tolerances specified in the Rules or the station authorization and will not adversely affect the public interest.”⁸⁸ No party sought reconsideration of the *Unattended Operations Order*, nor did the order face a court challenge. In all the years since the order was adopted, no party has filed a petition for rulemaking urging the Commission to reinstitute the ban on remote station operations. Violations of the rules governing unattended operations are virtually nonexistent, having generated only a single notice of apparent liability since 1995.⁸⁹

The Commission’s unattended station operation rules have successfully generated numerous public interest benefits. Stations that might otherwise have signed off during late night hours are able to provide programming and emergency information to the public twenty-four hours per day, seven days per week. Funds that might

⁸⁷ *Amendment of Parts 73 and 74 of the Commission’s Rules to Permit Unattended Operations of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, Report and Order, 10 FCC Rcd 11479 ¶ 4 (1995) (“*Unattended Operations Order*”).

⁸⁸ *Unattended Operations Order* at 11480 ¶ 7.

⁸⁹ See *New World Broadcasting Co.*, 17 FCC Rcd 7216 (2002).

otherwise be spent on wages or salaries for personnel during overnight hours can be devoted to maintaining or upgrading the station's programming and facilities. Moreover, stations have in place a variety of mechanisms to ensure that up-to-the-minute emergency information is available from stations that are sometimes operated remotely. During the summer of 2007, NAB polled radio executives representing 400 stations in markets of various sizes, all of which run unattended for some period on a weekly basis. A list of "best practices" emerged from this survey, and is attached hereto as Attachment C.⁹⁰ Among other things, the best practices include having station points of contact that are regularly updated for local emergency officials, training multiple station personnel in emergency procedures during periods of unattended operation, and using "on-call" procedures in the event of severe weather to monitor the content on the air, ensure it is up to date, and/or go to the station to keep the public informed if necessary.⁹¹

The success of the Commission's unattended operation rules should not be obscured by undocumented doubts or myths about remote operations. Certainly the record in this proceeding does not cast doubt on the Commission's current approach.

B. There Is No Record Evidence Supporting the Proposal for Change

In discussing communication between licensees and their communities, the *Notice* states that the Commission "agree[s] with those commenters who expressed concern about the prevalence of automated broadcast operations" and the "perceived negative impact that such remote operation may have on licensees' ability to determine

⁹⁰ See Attachment C, *Unattended Station Operations Best Practices Synopsis*.

⁹¹ See Attachment C, *Unattended Station Operations Best Practices Synopsis*.

and serve local needs.” *Notice* at ¶¶ 28-29. The Commission does not, however, identify any current commenters who raise such localism concerns or perceive a negative impact from remote operations. It cites only concerns expressed in the 1994 proceeding in which the Commission eliminated the requirement that a licensed operator be on duty at all times—concerns focusing on technical compliance and interference that it deemed unmeritorious over thirteen years ago.⁹²

The *Notice* (at ¶¶ 84, 87) also focuses on the issue of remote station operation in connection with its discussion of disaster warnings and availability of emergency information. The overwhelming majority of comments and testimony concerning emergency information cited by the *Notice*, however, in fact provide evidence of strong, effective working relationships between broadcast stations and local emergency agencies or personnel.⁹³ In contrast, the *Notice* cites the views of only two commenters

⁹² *Notice* at ¶ 28 (citing *Unattended Operations Order* at 11479-80 ¶¶ 5-7). The comments quoted were filed by StationWatch, which was concerned about the effects of unattended operations on compliance with technical parameters and interference limits, not ties between the local stations and their communities. See Comments of StationWatch in MM Docket No. 94-130 (filed January 23, 1995). In response, the Commission held that “based upon its experience in enforcing broadcast rules, concurs with the majority opinion that waiver of Section 318 of the Act to permit unattended operation is not likely to result in an increase in operation outside the tolerances specified in the Rules or the station authorization and will not adversely affect the public interest.” *Unattended Operations Order* at 11480 ¶ 7.

⁹³ *Notice* at ¶ 83 (citing Testimony of Jay Kimbrough, Director of Homeland Security for the State of Texas (San Antonio Tr. 17)(local broadcasters and law enforcement worked together to create the nation’s first Amber Alert); Testimony of Bob Forcello (Charlotte Tr. 109)(without local broadcasters in North Carolina, there would be no Amber Alert system); Statement of Park Owens, Director of Emergency Management, Rapid City and Pennington County, South Dakota (Oct. 20, 2006) (broadcasters provide local officials with expedited access to their facilities during emergencies); Testimony of same (Rapid City Tr. 57-59); Testimony of Rapid City, South Dakota Mayor Jim Shaw (Rapid City Tr. 107) (local broadcasters assist with production and distribution of public service announcements for emergency management agencies)).

that had any concerns about unattended operation, neither of which urges the Commission to limit broadcasters' ability to use remote operations.⁹⁴

Harry Robins, the Emergency Services Manager for Monterey County, California, provided testimony that largely praised the efforts of local broadcasters, stating that the relationship between the Office of Emergency Services and local media in Monterey County "is strong, viable, and mutually supportive."⁹⁵ Mr. Robins provided no example of any instance in which he was unable to reach local media because of unattended operation; rather, he merely posited that if he had to reach such a station at a late hour that he "probably would not be able to get there, because they're controlled from someplace else." There are, in fact, a host of voluntary measures to address this concern without wholesale changes in the ability of stations to operate remotely. For example, both emergency services personnel and stations could elect to conduct systematic, periodic updates of their respective points of contact.⁹⁶ In any event, at no point during Mr. Robins' testimony did he urge the Commission to "reduce the ability of broadcasters to control their programming from a remote location," as stated in the *Notice* (at ¶ 85).

The only other commenter reported to have addressed unattended operations, Thomas C. Smith, asserted without citing any source or even an anecdote, that stations operated on an unattended basis "only air a warning from the EAS system as it comes in without the repeating or updating that a live announcer would be able to do. And that

⁹⁴ *Notice* at ¶ 84 (citing Testimony of Harry B. Robins, Emergency Services Manager for Monterey County (Monterey Tr. 130-31) and Comments of Thomas C. Smith in MB Docket No. 04-233 (filed Nov. 2, 2004) at 3-4).

⁹⁵ Testimony of Harry B. Robins, Emergency Services Manager for Monterey County (Monterey Tr. 130).

⁹⁶ See Attachment C, *Unattended Station Operations Best Practices Synopsis* at I, III.

may not happen depending on how the automatic alert function of the EAS decoder is set.”⁹⁷ These concerns are unfounded. The Commission’s rules require that broadcasters engaged in remote operations employ procedures which will ensure compliance with the Emergency Alert System (“EAS”) at all times.⁹⁸ Moreover, stations have every incentive to ensure that their audiences have access to emergency information and severe weather alerts. As one broadcaster explains: “In our market...severe weather is the number one cause for crisis. For that reason, competition drives our company to do whatever is necessary to make sure we are on the air first with severe weather information, no matter what time of day it is, and whether we are manned or not.”⁹⁹ Significantly, Mr. Smith also did not urge the Commission to limit the ability of broadcasters to operate remotely in order to remedy the perceived problem.¹⁰⁰

⁹⁷ Comments of Thomas C. Smith in MB Docket No. 04-233 (filed Nov. 2, 2004) at 3-4.

⁹⁸ See 47 C.F.R. § 73.1300 (“licensees must employ procedures which will ensure compliance with Part 11 of this chapter, the rules governing the Emergency Alert System”). EAS Rules further mandate that “*automatic* interrupt of programming and transmission of EAS messages are required when facilities are unattended.” 47 C.F.R. §§ 11.51(k)(1). Similarly, with respect to EAS monitoring, “*automatic* interrupt of programming is required when facilities are unattended.” See 47 C.F.R. § 11.52 (e)(1). Manual interrupt can only be used if EAS decoders/encoders are located such that staff at their “normal duty” locations can initiate EAS transmissions or be alerted immediately when EAS messages are received. See 47 C.F.R. §§ 11.51(k); 11.52(b).

⁹⁹ See Letter from Marsha J. MacBride, National Association of Broadcasters to Marlene H. Dortch, Secretary, FCC (filed in MB Docket No. 04-233 on December 17, 2007) at attachment pp. 6-7, email correspondence from Trey Stafford, President and General Manager, Triple FM Radio Group (emphasis in original).

¹⁰⁰ In fact, Mr. Smith stated that “most stations seem to do a reasonable job with storm warnings and Amber Alerts.” Comments of Thomas C. Smith in MB Docket No. 04-233 (filed Nov. 2, 2004) at 3-4. He correctly noted that the issue of “disaster warnings” is “being covered in another action that the Commission is seeking comments on” and

NAB's review of the record indicates that, other than Mr. Robins, not one of the parties testifying at the Monterey, CA, Charlotte, NC, Rapid City, SD, San Antonio, TX or Washington, DC hearings even mentions the words "remote" or "unattended" in connection with station operations. Presumably, if unattended operations were contributing to a lack of connection between stations and their communities or a lack of emergency information, several parties providing testimony at the Commission's multiple localism hearings would have discussed this issue – or at least mentioned it. In short, the existing record does not support the Commission's stated "concern" about the prevalence of automated broadcast operations, much less a change to current rules.

C. Because of Technological Developments and Efficiencies that Have Improved Service to the Public, the Record in Response to the Notice Will Not Support a Change to the Unattended Operations Rules

The primary reasons that the Commission changed its rules to permit unattended station operation were technological developments permitting such operations on a reliable basis and economic efficiencies which would allow stations to better serve the public. These justifications are only stronger today, when further technological advancements have only increased the functionality and reliability of remote operations and when eliminating efficiencies derived from remote operations could actually reduce service to the public.

As NAB and others have observed in responding to the *Digital Audio Broadcasting NPRM*, transmitters and other broadcasting equipment are much more stable and reliable than they were when the Commission revised its unattended

asserted that "any issues concerning disaster warnings should be dealt in that proceeding." *Id.*

operations rules in 1995.¹⁰¹ Today's sophisticated automation technology, including Internet protocol-based features, affords stations monitoring and control capabilities that were not possible at that time.¹⁰² Numerous commenters opposed the re-imposition of the ban on remote operations for radio,¹⁰³ citing, among other things, that "advances in technology have improved the capability for reliable unattended operations and remote monitoring."¹⁰⁴ All of these justifications apply equally to any potential ban on remote operations by television broadcast stations. As over one hundred members of the United States House of Representatives have observed, the ban on remote operation "was abandoned in 1995 after the Commission deemed it 'superfluous' and archaic in

¹⁰¹ See NAB Comments in MM Docket No. 99-325 at 13 (filed Oct. 15, 2007).

¹⁰² *Id.* at 13-14.

¹⁰³ See, e.g., Comments of Clear Channel Communications, Inc. in MM Docket No. 99-325 at 13 (filed Oct. 15, 2007); Joint Comments of the Alaska Broadcasters Association, The Arkansas Broadcasters Association, The Mississippi Association of Broadcasters, The New Mexico Broadcasters Association, The Radio Broadcasters Association of Puerto Rico and The Washington State Association of Broadcasters in MM Docket No. 99-325 at 3-8 (filed Oct. 15, 2007); Comments of the Alabama Broadcasters Association, *et al* in MB Docket No. 99-325 at 8-9 (filed Oct. 15, 2007); Joint Comments of the North Carolina, Ohio, and Virginia Associations of Broadcasters in MM Docket No. 99-325 at 9 (filed Oct. 15, 2007); Comments of Christian Broadcasting System, Ltd. in MM Docket No. 99-325 at 1-4 (filed Sept. 12, 2007) ("CBSL"); Comments of Miller Media Group in MM Docket No. 99-325 at 1-2 (filed July 11, 2007); Comments of Native American Christian Voice in MM Docket No. 99-325 at 1-6 (filed Oct. 1, 2007) ("Native"); Comments of Augusta Radio Fellowship Institute, Inc. at 2-5 ("ARFI"), Comments of Houston Christian Broadcasters, Inc. at 1-7 ("HCBI"), Comments of Life on the Way Communications, Inc. at 1-5 ("LOTWCI"), Comments of The Moody Bible Institute of Chicago at 1-6 ("Moody"), Comments of The Praise Network at 1-6 ("PNI"), in MM Docket No. 99-325 (filed Sept. 28, 2007).

¹⁰⁴ See NAB Reply Comments in MM Docket No. 99-325 at 8 (filed Nov. 13, 2007) (citing Comments of the Alabama Broadcasters Association, *et al* in MB Docket No. 99-325 at 8 (filed Oct. 15, 2007)).

light of modern technology. Technology hasn't reverted—so why go back?"¹⁰⁵ Given the technological advancements that have occurred since the remote operations ban was eliminated, the Commission cannot justify, as a matter of law or policy, re-imposition of such a ban, or any new limitation on broadcasters' ability to operate stations remotely.

If the Commission's goals are to advance localism and access to emergency information, both goals will in fact be disserved by re-imposing the ban. As the Commission recognized thirteen years ago, waiving the requirement to have personnel on hand during all operating hours would "permit licensees to make more effective use of resources by implementing the operating and maintenance policies most appropriate for their stations."¹⁰⁶ If broadcasters are required to staff their stations during all operating hours, many of them will not have the economic resources to operate during

¹⁰⁵ See Letter dated April 15, 2008 from Representative Mike Ross, Representative Marsha Blackburn *et al* to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 at 2 ("*Ross-Blackburn Localism Letter*"). See also Letter dated March 25, 2008 from Representative Michael L. Michaud to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 (expressing concerns about the proposed re-imposition of "a restriction that was determined to be unnecessary given new technologies that allowed these facilities to be operated remotely") ("*Michaud Localism Letter*"); See also Letter dated April 4, 2008 from Representative Barbara Cubin to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 at 2 ("*Cubin Localism Letter*") (the Commission's 1995 waiver of the ban recognized that "as technology has advanced it became increasingly clear that a constant physical presence in the transmitting studio was an unnecessary burden."). See also Letter dated April 24, 2008 from Senators Pat Roberts, Sam Brownback *et al* to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 (proposed changes to the main studio and unattended operations rules "believe the fact that advances in technology make these burdensome regulations needless in today's marketplace").

¹⁰⁶ *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Unattended Operations of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, Report and Order, 10 FCC Rcd 11479 ¶ 4 (1995) ("*Unattended Operations Order*").

late night hours, thereby *reducing* options available to the public for local programming, news, weather, and emergency warnings. Such reduced service will result in harm to the public interest.¹⁰⁷ Undoubtedly, these public interest harms will disproportionately impact the viewers and listeners of smaller stations—stations that serve niche audiences, operate in rural areas, and/or are not part of station groups.¹⁰⁸ When the Commission waived the ban on unattended operation, it explicitly acknowledged that “smaller broadcasters ... stand to benefit the most from the reforms at issue in this proceeding” and declined to adopt stringent technical requirements that might have foreclosed the opportunity for smaller stations and their audiences to benefit from remote operations.¹⁰⁹ Smaller stations compete for fewer advertising dollars and face

¹⁰⁷ See Letter from Marsha J. MacBride, National Association of Broadcasters to Marlene H. Dortch, Secretary, FCC (filed in MB Docket No. 04-233 on December 17, 2007) at attachment p. 17, email correspondence from Larry Patrick, Managing Partner, Legend Communications (estimating that it will cost \$25,000 - \$50,000 more per year per station to staff stations during all hours of operation and complete forms associated with other rule changes proposed in this proceeding, diverting resources from the stations’ programming and their contributions to community groups).

¹⁰⁸ See *Michaud Localism Letter* at 1 (elimination of the ban on remote operations “allowed locally-owned broadcasters in Maine that wouldn’t otherwise be able to financially support multiple fully-equipped, fully-staffed studios and broadcast facilities” to provide service to the public in remote areas; reinstating the ban “would likely remove locally-owned broadcasters from the air rather than encourage more local voices”); *Cubin Localism Letter* at 2 (“Resurrection of the physical presence rule would impose a terrible expense on small broadcasters. Indeed, operating in a rural state with significant labor shortages, Wyoming’s broadcasters would be forced to pay a premium for unnecessary staffing.”). See also Letter dated April 24, 2008 from Senator Mary Landrieu to FCC Chairman Kevin J. Martin regarding MB Docket No. 04-233 (the current main studio and unattended operations rules allow small local stations in Louisiana to remain viable and serve the public).

¹⁰⁹ *Unattended Operations Order* at 11480 ¶ 8. The Commission’s Regulatory Flexibility Analysis indicated that “the action taken in this proceeding is expected to benefit smaller broadcast licensees by eliminating the need for a transmitter duty operator. This is expected to result in a significant operational cost savings.” *Id.* at Appendix B.

even greater financial pressures than their counterparts serving large markets. In today's media marketplace, smaller station owners and new entrants will be particularly ill-equipped to afford the cost of staffing their stations during all operating hours.¹¹⁰

For all of these reasons, NAB urges the Commission to retain its current rules governing remote operations for both television and radio broadcast stations.

V. Additional Restrictions on Main Studio Location Will Undermine Stations' Ability to Serve the Public Interest

The Commission should not re-instate its pre-1987 main studio rule, or otherwise further restrict main studio location. More restrictive rules cannot be justified today, when stations' main studios are more accessible to the public than ever before, and when technological advancements allow stations to interact easily with their public and cover issues of concern to people within their communities of license. A return to outdated restrictions would adversely affect the Commission's goal of ensuring that each station offers programming responsive to the needs of its community of license.¹¹¹

A. The Commission's "Concern" About Main Studio Location Is Not Grounded in the Record or the History of the Rules

The *Notice* states that the Commission "shares the concern underlying proposals that [it] require that licensees locate their main studios within the local

¹¹⁰ See Randy J. Stine, *Radio: We Already Do Localism*, RADIO WORLD NEWSPAPER ONLINE (Mar. 12, 2008), available at: <http://www.rwonline.com/pages/s.0046/t.12093.html> (visited April 23, 2008) (citing former station owner's view that "many small broadcasters would ... be unable to afford to keep their stations on the air overnight if forced to hire additional manpower...the FCC is considering options that would actually cut services in smaller markets.").

¹¹¹ See, e.g., *Notice* at ¶ 6 ("broadcasters are obligated to operate their stations to serve the public interest—specifically, to air programming responsive to the needs and issues of the people in their communities of license").

communities...”¹¹² While use of the word “proposals” suggests that there was extensive comment or hearing testimony on the issue of main studio location, the *Notice* cites to the views of only one commenter on this point. And, significantly, while that commenter did state that the Commission should “urge main studios to be located within the local communities so that the local studios are, quote, part of the neighborhood,” her testimony never suggested that the stations she considered “local” were too physically distant today, nor did she discuss main studio location in the context of promoting the development of programming that was locally originated. Instead, she specifically encouraged the Commission to “[d]efine locally oriented programming as programming of interest to the local community, *regardless of the source.*” *Id.* (emphasis added). As an example of this, she cited the need for stations to cover natural disasters in foreign countries, which “often are of particular interest to local communities because of the community members’ ties to the foreign country.”¹¹³

More than twenty years ago, the Commission amended its main studio rules to “tailor their requirements to broadcast station operations in today’s marketplace and regulatory environment.”¹¹⁴ Until 1987, stations were required to locate their main studios within their communities of license and to originate a specified percentage of programming from their studios. When the Commission adopted these rules in the early

¹¹² *Notice* at ¶ 41 (citing Testimony of Blanca Zarazua, Chair, Hispanic Chamber of Commerce of Monterey, California) (Monterey Tr. 48-49).

¹¹³ See Comments of Blanca Zarazua, Chair, Hispanic Chamber of Commerce of Monterey, California in MB Docket No. 04-233 (filed August 20, 2004) at 2-3.

¹¹⁴ See *Amendment of Sections 73.1125 and 73.1130 of the Commission’s Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, Report and Order, 2 FCC Rcd 3215 ¶ 4 (1987) (“1987 Main Studio Order”).

1950s, it thought physical accessibility had a role in determining the extent to which stations could take part in community activities and members of the community could participate in live programs and present suggestions or complaints to the station.¹¹⁵

The Commission in 1987 permitted a station to locate its main studio anywhere within its principal community contour and eliminated the program origination requirement. In so doing, the Commission acknowledged that its goals of assuring accessibility for the public and promoting station responsiveness to community needs were no longer being met by the requirements. Specifically, the Commission found that the role of the main studio had evolved since the adoption of location requirements in the early 1950s, that the studio was no longer the center of program production and that it “may not be the best place for the origination of responsive programming.”¹¹⁶ The Commission observed that new technology and “innovative production methods” were permitting stations to present programming in different ways from a variety of locations.¹¹⁷ Using mobile units and remote studios connected by microwave and satellite links, stations could obtain live feeds of events of local, regional, and national significance from both local and distant points.¹¹⁸ Significantly, the Commission also reasoned that “coverage of local issues does not necessarily have to come from locally

¹¹⁵ *1987 Main Studio Order*, 2 FCC Rcd at 3215 ¶ 6 (citing *Promulgation of Rules and Regulations Concerning the Origination Point of Programs*, 43 FCC 570, 571 (1950) and *Television Main Studio Location*, 43 FCC 888 (1952)). Separate radio and television main studio rules were later combined into a single rule governing both radio and television. See *Regulations and Rules Oversight of the AM, FM, and TV Broadcast Rules*, 44 Fed. Reg. 69933 (Dec. 5, 1979).

¹¹⁶ *1987 Main Studio Order*, 2 FCC Rcd at 3218 ¶ 30.

¹¹⁷ *1987 Main Studio Order*, 2 FCC Rcd at 3218 ¶ 30.

¹¹⁸ See *1987 Main Studio Order*, 2 FCC Rcd at 3218 ¶ 30.

produced programming” and therefore “no longer believe[d] that main studio facilities within the political boundaries of the community of license necessarily promote responsive programming.”¹¹⁹

The record also indicated that locating the studio in a station’s community of license was no longer required to assure the station’s accessibility to viewers and listeners. The Commission cited the public’s frequent use of telephone or mail to communicate with stations, as well as reduced travel time due to the rise of highways and mass transit.¹²⁰ The Commission held that revising the rules would serve the public interest by “extend[ing] additional flexibility to broadcast stations without affecting the station’s ability to meet its local service obligations” and permitting stations to “obtain the efficiencies to be realized by collocating the station’s studio at its transmitter site.”¹²¹ In addition to such efficiencies, stations could reduce operating expenses by relocating their studios to lower cost areas.¹²²

The Commission further held that it could no longer justify a requirement that stations originate a specified minimum amount of programming from their main studios or other points within their communities. The Commission held that the original rationale for the rule—facilitating locally-oriented programming by promoting the use of local talent and ideas—was no longer valid.¹²³ As the Commission observed, the program origination requirements never dictated the nature of the programming to be

¹¹⁹ *1987 Main Studio Order*, 2 FCC Rcd at 3218 ¶ 31.

¹²⁰ *Id.* at ¶ 32.

¹²¹ *Id.* at ¶ 33.

¹²² *Id.* at ¶ 33.

¹²³ *Id.* at ¶ 39.

originated locally.¹²⁴ Thus, the programming could have been locally *originated*, but not locally *oriented*. More importantly, the Commission observed that in light of developments in broadcast station operations,¹²⁵ it could “no longer presume that location alone is relevant to the provision of programming which is responsive to the needs and interests of the community.”¹²⁶ Finally, the Commission observed that the rule was imposing significant costs on licensees and even greater costs upon the public in terms of loss of locally responsive programming that originated outside the main studio.¹²⁷

Ten years later, the Commission initiated a proceeding to re-examine its main studio rules in light of changes to other rules resulting from the Telecommunications Act of 1996.¹²⁸ In that proceeding, the Commission sought comment on “ways to lessen the burden on licensees, particularly those owning multiple stations, by giving them greater flexibility in locating their main studios.”¹²⁹ The Commission also was concerned about the impact of its rules on certain classes of stations, which enjoyed less flexibility in the

¹²⁴ *Id.* at ¶ 40.

¹²⁵ See *1987 Main Studio Order*, 2 FCC Rcd 3219 ¶ 41 (“remote production and transmission equipment permits responsive programming to originate from outside the main studio or community of license and marketplace forces dictate the provision of such programming from whatever its source.”).

¹²⁶ *Id.* at ¶ 42.

¹²⁷ *Id.* at ¶ 43.

¹²⁸ See *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Notice of Proposed Rule Making*, 12 FCC Rcd 6993, 6997 ¶ 8 (1997) (“1997 Main Studio NPRM”).

¹²⁹ *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order*, 13 FCC Rcd 15691, 15693 ¶ 7 (1998) (“1998 Main Studio Order”) (citing *1997 Main Studio NPRM*, 12 FCC Rcd at 6999).

location of their studios because of the smaller size of their principal community contours.¹³⁰ The Commission's revised rule, which remains in place today, consists of a combination of a signal contour and a mileage standard.¹³¹ The Commission held that its revised rule would expand the area in which many stations could relocate their main studios while "maintaining a close connection to the community."¹³² The Commission anticipated that its revised rule would place smaller stations "on equal footing" with their competitors,¹³³ and would allow multiple station owners to "combine the resources of their jointly-owned stations, which can allow them to better serve the public."¹³⁴

The Commission expected its new approach to substantially reduce regulatory burdens on broadcast licensees without compromising its goal of assuring accessibility of main studios to members of the public. The record before the Commission in 1998 demonstrated that "more people use remote rather than face-to-face means of

¹³⁰ See *1997 Main Studio NPRM*, 12 FCC Rcd at 6998 ¶ 9.

¹³¹ See *1998 Main Studio Order*, 13 FCC Rcd at 15694-5 ¶ 7. Specifically, a station may locate its main studio at any location that is within either the principal community contour of any station, of any service, licensed to its community of license or 25 miles from the reference coordinates of the center of its community of license, whichever it chooses. *Id.*, see also 47 C.F.R. § 73.1125. The Commission also amended Sections 73.3526 and 73.3527 of its rules to require all stations to locate their public files at their main studios, and established requirements regarding requests for public file material via telephone or mail. *1998 Main Studio Order*, 13 FCC Rcd at 15702 ¶ 24.

¹³² *Id.* at ¶ 7.

¹³³ *Id.* at ¶¶ 7, 10 (rule will "lessen the disproportionate effect that the previous rule had on owners of small stations").

¹³⁴ *Id.* at ¶ 7, 9 (amendment of the main studio rule is "particularly warranted in light of the 1996 Act and its changes to the local radio ownership rules" and will "generate savings that can be put to more productive use for the benefit of the community served by the station").

communication for routine contact with their local stations.”¹³⁵ In addition, the Commission noted that the principal community contour of a station encompasses the stations’ community of license, as well as the area in which its signal is strongest, thereby ensuring reasonable access for members of the community who might choose to interact with their local stations in person.¹³⁶

B. The Commission’s Past Rationales for Relaxing the Main Studio Rule Have Only Been Reinforced by Technological Advancements

The Commission is suggesting a return to a main studio rule adopted at a time when the U.S. telephone penetration rate was only 61.8%,¹³⁷ before the Interstate Highway and National Highway Systems were instituted,¹³⁸ before it was typical for American households to own multiple cars,¹³⁹ and before the advent of federal funding programs for the construction and expansion of mass transit.¹⁴⁰ Even the main studio

¹³⁵ 1998 *Main Studio Order*, 13 FCC Rcd at 15695-97 ¶ 8, 11.

¹³⁶ *Id.* at ¶ 11.

¹³⁷ See FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Historical Telephone Penetration Estimates, Table 17.3 (rel. Feb. 19, 1999), available at: http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend199.pdf (visited April 22, 2008) (reporting the telephone penetration estimate for 1950, the year in which the pre-1987 main studio rule was adopted).

¹³⁸ Historical information concerning the Interstate Highway System, which was launched in 1956, is available from the Department of Transportation’s Federal Highway Administration at: <http://www.fhwa.dot.gov/interstate/history.htm> (visited April 22, 2008). Information on the National Highway System, launched in 1996, also is available at the site: <http://www.fhwa.dot.gov/hep10/nhs/> (visited April 22, 2008).

¹³⁹ The Boston Foundation, *Boston Indicators Report 2004*, Section 10.4.1, available at: <http://www.tbf.org/indicators2004/transportation/index.asp> (visited April 25, 2008) (“While the nation’s population has increased 80% since 1950, car ownership has increased by 383%”).

¹⁴⁰ In 1964, the Urban Mass Transportation Act was enacted, establishing the program of financial assistance for mass transportation that is today managed and run by the Federal Transit Administration. See 49 U.S.C. § 5301 *et seq.*

rule changes adopted in 1987 and 1998, which partially reflect advances in the areas of telephony and transportation, still do not reflect the electronic communications capabilities widely used by the public today.

Today's broadcast viewers and listeners are not contacting stations using the "party lines" of the 1950s—they are calling from their own home and/or mobile phones.¹⁴¹ Members of the public are learning about local programming using station Web sites, Web-based program guides, and other information available on the Internet.¹⁴² With sophisticated customer premises equipment available from retailers or subscription services, viewers and listeners can search for desired content using their remote controls. Most importantly, communications via the Internet are *not* one-way: viewers and listeners use station Web sites to request their favorite songs and post feedback on stations' programming content, and send emails expressing their views about what should or should not be aired by their local stations. These technological developments, as well as developments in broadcast equipment and operations, make

¹⁴¹ If a station locates its main studio and public file outside its community of license, the station must mail public file documents to persons within the station's service area when requested to do so by telephone. See 47 C.F.R. § 73.3526(c)(2).

¹⁴² Many Web sites offer searchable listings that include local broadcast programming, such as www.tvguide.com, www.zap2it.com, television.aol.com, and www.meevee.com. For some cities, there are even online radio programming guides. See *New York Radio Guide*, available at: <http://www.nyradioguide.com/> (visited April 24, 2008). The Commission's own Consolidated Database System offers the public access to every application or other form electronically filed with the Commission, and is easily searchable by various criteria such as call sign, channel/frequency, station owner, or community of license. The Commission also makes children's programming information available at a separate section of its Web site, where the public can search for specific programs, search by station, or find the times and titles for children's programming by DMA. See *FCC, Children's Educational Television (KidVid)*, available at: <http://www.fcc.gov/mb/engineering/kidvid/>.

it easier for station personnel to learn about and provide coverage of their local communities regardless of physical distance.

The Commission has twice relaxed the main studio rule primarily on the grounds that advancements in communications and transportation are expanding public access to stations' main studios. The means and ease of communication between stations and their communities have increased and improved dramatically since even the most recent revisions to the main studio rule. Accordingly, NAB submits that any return to a more restrictive rule on grounds that changes are needed to improve the accessibility of main studios or interaction between stations and the communities they serve cannot be sustained.

C. Encouraging “Locally Originated” Programming in Lieu of Programming That Is Responsive to Community Needs Fails to Serve the Public Interest

The Commission also asks whether it “should revert to [its] pre-1987 main studio rule in order to encourage broadcasters to produce locally originated programming.” *Notice* at ¶ 41. The Commission should not revert to this outdated version of the rule or otherwise institute rules or policies to “encourage” local origination of programming. As discussed in detail above, programming need not be locally produced to serve the public interest. Moreover, as the Commission has previously determined in proceedings specifically addressing the main studio rule, “locally-originated” programming does not necessarily equate to programming that is responsive to community needs. When the Commission eliminated its requirement that stations originate a certain percentage of their programming from their main studios, it did so because it correctly determined that the very premise underlying the rule—that local

origination would automatically result in programming relevant to the needs and interests of the local community—was flawed. At the time it repealed the rule, the Commission feared that the rule had already harmed the public interest by preventing the importation of locally responsive programming produced outside the studio or even the stations' community of license.¹⁴³

In any event, the relocation of a station's main studio has no logical relationship to the production of local programming.¹⁴⁴ There is no reason to assume, for example, that if a television station is forced by a change in the main studio rule to move its studio five, ten, 15, or 20 miles back into its community of license, that station would change any of its programming content whatsoever, let alone begin producing more "local" programming (however defined). Today, regardless of where a station's main studio is physically located, technology permits programming to be originated and/or produced within the station's community of license, elsewhere within the station's principal community contour, or from distant sources that may interest a station's viewers and/or listeners.¹⁴⁵

¹⁴³ *1987 Main Studio Order*, 2 FCC Rcd 3217, 3219 ¶¶ 22, 43.

¹⁴⁴ See, e.g., *Ross-Blackburn Localism Letter* at 1-2 ("the stated goal of the re-regulation [of main studio locations], namely 'to encourage broadcasters to produce locally originated programming,' requires a logical leap that has no place in government regulation").

¹⁴⁵ See, e.g., Letter from Marsha J. MacBride, National Association of Broadcasters to Marlene H. Dortch, Secretary, FCC (filed in MB Docket No. 04-233 on December 17, 2007) at attachment p. 76 (Mr. George DeVault, President of Holston Valley Broadcasting Corporation, states that "the location of a station's main studio means very little with regard to localism in an age in which more often than not the broadcaster takes the subject station's microphones and cameras to the local event or community leader rather than conducting the broadcast or telecast from the station's 'main studio.'").

D. Changes to the Main Studio Rule Would Be Counterproductive

The Commission should not reverse decades of sound policy by reverting to a rule adopted in the 1950s. As discussed above, each time the Commission relaxed the main studio rule, it identified cost savings, efficiencies, and competitive effects that would benefit the public. The Commission should not now toss aside these public interest benefits, especially as there is no record in this proceeding demonstrating any problem with or reason for altering the current rule. No rationale or evidence has been cited or, indeed, can be found that would justify the tremendous costs to broadcasters and significant harm to the public interest that would result from requiring every broadcast station to relocate to a main studio within its community of license. Such FCC action would clearly be arbitrary and capricious.¹⁴⁶

The impact of any rule change on competition within the broadcasting industry will be substantial. As discussed above, the pre-1987 main studio rule, and even the rules in place before 1998, placed broadcasters operating at lower power levels at a competitive disadvantage, because they had considerably less flexibility in locating their main studios than their high power counterparts.¹⁴⁷ The 1998 rule was intended to foster parity among large and small broadcasters and to ensure competition on a level playing field.¹⁴⁸ A return to a more restrictive rule will eliminate this public interest benefit, harming competition among broadcasters and particularly injuring the ability of

¹⁴⁶ See *State Farm*, 463 U.S. at 42; *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) (if the Commission rejects a “time-tested procedure” and replaces it with a new one, then it must be able to show that this “new procedure is superior” because, “if not, why the change?”).

¹⁴⁷ See *supra* Section V.A.

¹⁴⁸ *Id.*

smaller stations to serve their local markets. As with many other proposals in this proceeding, further restrictions on main studio location will have a greater impact on new broadcast entrants, stations with lower operating power, and stations that serve niche or rural audiences.¹⁴⁹ These and smaller stations generally are the ones that most frequently struggle financially and would have the fewest resources to bear the costs of a more restrictive main studio rule.¹⁵⁰ The Commission should carefully consider the disproportionate impact of its proposed rule changes on smaller broadcasters and their audiences.

The public interest benefits identified by the Commission when it relaxed the main studio rule in the past, including cost savings associated with locating studios in less expensive areas, efficiencies arising from co-locating studios with transmitter sites, co-locating the studios of commonly-owned stations, and co-locating the studios of stations involved in certain joint agreements—would be lost by imposing a stricter rule.¹⁵¹ The costs associated with operating main studios within each station's community of license would ultimately steal resources away from priorities that truly serve local audiences, such as upgrading station equipment and services and providing

¹⁴⁹ See *Michaud Localism Letter* (asserting that relaxation of the main studio rule has expanded local service offerings in remote areas of Maine, while a return to the former rule would reduce options available to Maine residents).

¹⁵⁰ See, e.g., *1992 Radio Ownership Order*, 7 FCC Rcd at 2760 (the “outlook for small radio stations” was “particularly bleak” in the early 1990s, with more than half of all radio stations in the country, especially smaller ones, losing money).

¹⁵¹ See, e.g., Testimony of Richard Gleason, President and General Manager, Mountain Valley Broadcasting, Inc. (Portland Tr. 50) (the current main studio rule establishes an important balance and “has enabled me to cut costs, and, therefore, cut my advertising prices so that the small businesses can afford to advertise with me.”)

local programming.¹⁵² The Commission's intended goal of fostering local service to the public would be undermined by a more restrictive main studio rule, depriving stations of important efficiencies and imposing higher costs at a time of unprecedented competitive challenge.

In addition to compromising the public interest benefits the Commission identified when it previously relaxed the rules, imposing a more restrictive rule will adversely affect broadcasters' ability to participate meaningfully in today's media marketplace, where local stations are competing with many outlets that are free to locate any aspect of their operations anywhere, and staff them however they see fit.¹⁵³ The Commission must also recognize broadcasters' good faith reliance on rules long in force. If not, the negative economic impact of a more restrictive rule would be compounded by the obligation to unwind existing operations and relocate studios that are presently located outside their communities of license. Some broadcasters own the buildings where they presently operate their main studios, and have invested millions or even billions in

¹⁵² *1998 Main Studio Order*, 13 FCC Rcd at 15694 ¶ 7 (relaxed rule will allow stations to "better serve the public"); *id.* at 15695-96 ¶ 9 (rule changes will "generate savings that can be put to more productive use for the benefit of the community served by the station"). See also *1992 Radio Ownership Order*, 7 FCC Rcd at 2761 (savings from the sharing of studio space and equipment by commonly owned radio stations will help stations improve their competitive standing and may also improve the diversity of programming available to the public).

¹⁵³ See, e.g., Letter from Marsha J. MacBride, National Association of Broadcasters to Marlene H. Dortch, Secretary, FCC (filed in MB Docket No. 04-233 on December 17, 2007) at attachment p. 30, letter from David D. Oxenford, counsel for Buckley Broadcasting *et al* ("re-imposition of ... more stringent main studio rules ... would be particularly unsound policy, especially now, when broadcasters such as those joining in this letter face more competition than ever before").

facilities outside of their communities of license.¹⁵⁴ Others could be faced with finding some way to unwind long-term agreements involving property, tower space, or joint operations with other broadcasters.¹⁵⁵ For example, Allbritton Communications Company (“Allbritton”) operates Station WJLA(TV), Washington, DC, from a large, integrated facility in Arlington, VA, which houses multiple business operations. Relocation would require Allbritton to find comparable space, break a long-term lease, and outfit a new main studio at a cost of “many millions of dollars—to move only a few hundred yards.”¹⁵⁶ Similarly, Schurz Communications, Inc. (“Schurz”) is in the process of constructing a new facility in the South Bend, IN market which will house corporate offices, a newspaper, and studios for three broadcast stations.¹⁵⁷ The 35 million-dollar facility will include “state-of-the-art digital production and distribution facilities and will make possible the introduction of local HDTV programming and, ultimately, digital radio service.” Schurz observes that if the main studio rule is changed and applied retroactively “new facilities for all three stations would have to be located and constructed, including relocation of studio-transmitter and electronic news-gathering

¹⁵⁴ See Randy J. Stine, *Radio: We Already Do Localism*, RADIO WORLD NEWSPAPER ONLINE (Mar. 12, 2008), available at: <http://www.rwonline.com/pages/s.0046/t.12093.html> (visited April 23, 2008) (quoting a broadcast engineer who states that “[f]ewer than a half of our properties actually have main studios physically located in the designated community of license...[m]any of these facilities contain multiple radio stations and offices licensed to multiple communities and cost millions of dollars to construct”). Numerous licensees face similar circumstances which will undoubtedly be identified during the comment phase of this proceeding. Some examples are discussed at Attachment D hereto.

¹⁵⁵ See, e.g., Attachment D.

¹⁵⁶ See Attachment D, Declaration of Jerald N. Fritz, at ¶ 4.

¹⁵⁷ See Attachment D, Declaration of Marcia K. Burdick, at ¶ 2.

links” and “capital investment in the new facility would be lost.”¹⁵⁸ Moreover, an untold number of satellite earth station, microwave, and other auxiliary authorizations would have to be modified or cancelled and re-authorized. It would be impossible for the time, effort and expense of main studio relocation not to detract substantially from broadcasters’ service to the public. On a cost-benefit basis alone, return to the outmoded pre-1987 rule is unjustifiable.¹⁵⁹

In view of the deleterious impact of the proposed rule change on competition among broadcasters and other media outlets, the public interest benefits arising from economic efficiencies and cost savings resulting from past relaxation of the main studio rule, and the absence of any benefit to be gained from a more restrictive rule, NAB urges the Commission to retain the existing rule.

VI. The Commission Should Reject the Proposal to Consider Stations’ Airing of Local Music and Their Methods of Compiling Playlists for Purposes of License Renewal

The *Notice* (at ¶ 112) seeks comment on whether the Commission should require radio licensees to provide data on their airing of local music and artists and on how stations compile their playlists, which would then be used in consideration of licensees’

¹⁵⁸ *Id.*

¹⁵⁹ Courts have not hesitated to reverse, remand, or vacate FCC decisions that failed to reasonably assess the costs of the agency’s actions. See, e.g., *People of the State of California v. FCC*, 905 F.2d 1217, 1231 (9th Cir. 1990)(reviewing court “must be satisfied that the Commission’s assessment of the various costs and benefits is reasonable in light of the administrative record,” and “if the FCC’s evaluation of any significant element in the cost/benefit analysis lacks record support” then the court “cannot uphold the agency action” under the Administrative Procedure Act”); *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (finding that FCC’s failure to explain how it implemented provisions of the Communications Assistance for Law Enforcement Act in a “cost-effective” manner was “a classic case of arbitrary and capricious agency action”).

renewal applications. This proposal stems from concerns over broadcasters' alleged use of national playlists. See *Notice* at ¶¶ 105, 112. Any requirement that licensees submit data directly concerning their selection of content and their airing of particular types of content to be used in the license renewal process would clearly place pressure on radio broadcasters to select and air content favored by the Commission, rather than their listeners. For the reasons discussed below, the Commission should not adopt this proposal, which lacks an evidentiary foundation, is unnecessary and unjustified in light of radio broadcasters' demonstrated service to local markets, and raises serious statutory and constitutional issues.

A. The Record Does Not Establish an Evidentiary Basis to Adopt Requirements Relating to Playlists and the Airing of Particular Content

As the basis for involving itself in the constitutionally sensitive area of broadcast content, the Commission cites the complaints of several commenters that use of national playlists by radio stations reduces the amount of airplay of local musicians. *Id.* at ¶ 105. This alleged "lack of access to the airwaves by local musicians" is the sole reason given for the Commission's inquiry into playlists and the airing of local artists. *Id.* at ¶ 112.

As an initial matter, NAB points out that the record does not establish that local artists lack airplay on local radio stations or, indeed, that national playlists even exist or somehow erode the independence of local stations' programming decisions. The *Notice* (at ¶ 105) cites several witnesses at the FCC's localism hearings praising the airplay of local artists by area radio stations. Beyond this evidence, many broadcasters

have testified or commented in detail about their airing of local artists.¹⁶⁰ The *Notice* (at ¶ 105) also notes radio groups' statements that they do not even have national playlists and that their music programming decisions are made at the local level.¹⁶¹ Other evidence in the record shows that stations make extensive efforts to communicate with their listeners about music selection and programming and to discover listener tastes and preferences.¹⁶²

¹⁶⁰ For example, Infinity Broadcasting alone submitted 38 pages describing their stations' airing of local and independent music and artists. See *Ex Parte* Submission of Viacom in RM-10803 at 3-41 (March 26, 2004). See also Comments of Univision in MB Docket No. 04-233 at 17-18 (Nov. 1, 2004); Comments of Clear Channel in MB Docket No. 04-233 at 16 (Nov. 1, 2004); Comments of Infinity in MB Docket No. 04-233 at Attachment 2 (Nov. 1, 2004); Comments of Entercom Boston License, LLC in MB Docket No. 04-233 at 6 (Nov. 1, 2004); Comments of Entercom Greensboro License, LLC in MB Docket No. 04-233 at 6 (Nov. 1, 2004); Comments of Greater Media, Inc. in MB Docket No. 04-233 at Section E. (Dec. 13, 2004); Statement of Alan Harris at Rapid City Localism Hearing at 2 (May 26, 2004); Statement of Bayard Walters at Nashville Ownership Hearing (Dec. 11, 2006); Statement of Jerry T. Hanszen at San Antonio Localism Hearing at 2 (Jan. 28, 2004); Statement of Kathy Baker at Monterey Localism Hearing at 1-2 (July 21, 2004); Statement of Terri Avery at Charlotte Localism Hearing at 4 (Oct. 22, 2003); Testimony of Debbie Kwei at Charlotte Localism Hearing (Oct. 22, 2003) (Charlotte Tr. 36).

¹⁶¹ Additional radio broadcasters have testified that groups do not dictate playlists and that local management and staff control the programming in local markets. See, e.g., Statement of Terry Avery at Charlotte Localism Hearing at 1-2 (Oct. 22, 2003); Statement of Chuck Tweedle at Monterey Localism Hearing at 1 (July 21, 2004); Statement of Tom Glade at San Antonio Localism Hearing at 4 (Jan. 28, 2004); Comments of Greater Media, Inc. in MB Docket No. 04-233 at Section E. (Dec. 13, 2004).

¹⁶² See, e.g., Comments of WBEB-FM (Philadelphia) in MB Docket No. 04-233 (Oct. 28, 2004); Comments of Sarkes Tarzian, Inc. in MB Docket No. 04-233 at 2 (Nov. 1, 2004); Comments of Greater Media, Inc. in MB Docket No. 04-233 at Section E. (Dec. 13, 2004); Statement of Tom Glade at San Antonio Localism Hearing at 2-3 (Jan. 28, 2004); Testimony of Debbie Kwei at Charlotte Localism Hearing (Oct. 22, 2003) (Charlotte Tr. 35-36); Statement of Chuck Tweedle at Monterey Localism Hearing at 1 (July 21, 2004).

Moreover, NAB observes that there is no showing in this record that consumers are necessarily harmed if, in fact, the amount of airplay given to local musicians has somehow been “reduce[d].” *Notice* at ¶ 105. Such an assumption is unproven and unwarranted. It is not clear that consumers prefer to hear local music rather than artists from all over the country – especially the leading musicians and groups. Indeed, if the record in this proceeding establishes any point, it is that broadcasters, both radio and television, must respond to the programming preferences of local consumers to succeed in today’s competitive, multiplatform, multichannel marketplace.¹⁶³ Radio broadcasters in particular stressed that “ultimately, a station must play whatever music its listeners want to hear.” *Notice* at ¶ 105 (citing Comments of The Cromwell Group in MB Docket No. 04-233 (Nov. 1, 2004)).¹⁶⁴ There is no evidence whatsoever that radio

¹⁶³ See, e.g., Statement of Tom Glade at San Antonio Localism Hearing at 1-2 (Jan. 28, 2004); Statement of Jerry T. Hanszen at San Antonio Localism Hearing at 4 (Jan. 28, 2004); Statement of Robert G. McGann at San Antonio Localism Hearing at 4 (Jan. 28, 2004); Statement of Alan Harris at Rapid City Localism Hearing at 1 (May 26, 2004); Statement of Dr. William F. Duhamel at Rapid City Localism Hearing at 2 (May 26, 2004); Statement of Chuck Tweedle at Monterey Localism Hearing at 2 (July 21, 2004); Statement of Eduardo Dominguez at Monterey Localism Hearing (July 21, 2004); Testimony of Richard Gleason at Portland Localism Hearing (June 28, 2007) (Portland Tr. 52-53); Testimony of James Shaffer at Portland Localism Hearing (June 28, 2007) (Portland Tr. 33). See also Letter from Marsha J. MacBride, NAB, to FCC, MB Docket No. 04-233, attach. (Dec. 17, 2007) (attaching statements of dozens of broadcasters).

¹⁶⁴ See also Statement of Alan Harris at Rapid City Localism Hearing at 1 (May 26, 2004) (radio stations “are required by law to broadcast in the public interest, but we are required by an even higher authority, our local listeners, to broadcast in their interests”); Testimony of Richard Gleason at Portland Localism Hearing (June 28, 2007) (Portland Tr. 52) (“Localism is won and lost in the marketplace”; a radio station “pass[es] the localism test” by . . . “giving the people what they want”); Statement of Tom Glade at San Antonio Localism Hearing at 1-2 (Jan. 28, 2004) (“market forces” require radio stations “to better identify what people want, meet those desires, and adapt to local changes more quickly than ever before,” and if stations “don’t meet those needs, rest assured, we know it just as quick” because the local audience “will simply turn us off”).

broadcasters are blatantly ignoring the desires of their audiences. Regulation to address a problem that does not exist is inherently arbitrary and capricious.

The apparent assumption that the music of local artists must necessarily better serve radio listeners than other content is also inconsistent with the Commission's long held position that programming need not be "local" (however defined) to serve local needs and interests. As explained in Section I., the Commission has expressly noted that programming "that addresses local concerns need not be produced or originated locally" to satisfy a "licensee's program service obligations,"¹⁶⁵ and the courts have agreed with these determinations. See *United Church of Christ*, 707 F.2d at 1430 n. 54.

Clearly, it would not serve the public interest for the Commission to involve itself in stations' decisions about playlists and music selection merely because it thinks that consumers should want to listen more than they do to musicians from their local area, instead of musicians from around the country.¹⁶⁶ Even assuming that the Commission could, consistent with its statutory authority and constitutional precepts, connect stations' license renewals to their selection of particular playlists and the airing of local artists and music, it would be arbitrary and capricious for the Commission to do so in the absence of evidence that consumers' tastes and preferences are being disregarded by

¹⁶⁵ *Localism NOI*, 19 FCC Rcd at 12431. See also *License Renewal Applications of Certain District of Columbia Broadcast Stations*, 77 FCC 2d 899, 906 (1980) ("we have never held that only locally produced material can satisfy local programming obligations").

¹⁶⁶ See *Radio Deregulation Order* at 1064 ("[I]t may be offensive to the public interest to require any type of programming be offered in amounts that please the Commission rather than the public whose interest, after all, is intended to be the interest served under the public interest standard.").

local stations that refuse to respond to their audiences' demands for more local music. As the D.C. Circuit has noted in a case involving FCC regulation of broadcasters, "skepticism is appropriate when agencies are trying to accomplish something that is essential to the survival and prosperity of firms in an ordinary market – such as ensuring that a business identifies and fills available market niches [and] is responsive to its customers."¹⁶⁷ In fact, ample empirical evidence shows that radio stations provide diverse programming services that satisfy listeners in local markets, including increasing service to niche markets.

B. Available Evidence Demonstrates that Radio Stations Provide Diverse Programming that Serves Listeners in Local Markets

The existing diversity of radio programming available in local markets reveals no need for the Commission to press broadcasters to carry any particular type of programming or content, including local music. Due to competitive pressures, local radio stations already respond diligently to consumer demand, which has led to a significant expansion in program diversity in recent years. Between 1996 and 2006, for example, the number of general and specific types of programming offered by stations in the average Arbitron market increased by 16% and 36.4%, respectively.¹⁶⁸ Due to such increases, the diversity of programming types now available in local markets is

¹⁶⁷ *Bechtel v. Federal Communications Commission*, 10 F.3d 875, 881 (D.C. Cir. 1993).

¹⁶⁸ Attachment G to NAB Comments in MB Docket No. 06-121, BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences* at 5, 7 (Oct. 23, 2006) ("*Radio Diversity Study*"). Other analysts have similarly concluded that program diversity has increased during the past decade. See, e.g., Bear Stearns Equity Research, *Format Diversity: More from Less?* (Nov. 2002); Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q.J. Econ. 1009 (Aug. 2001).

truly impressive. For example, on average in the ten largest Arbitron markets, radio stations air 45.4 specific programming formats per market, which obviously serve a wide range of local audiences with differing tastes and interests. *Radio Diversity Study* at 7.¹⁶⁹

Moreover, according to an updated report on radio service by BIA Financial Network, local stations' need to enhance their competitiveness, especially in light of the increase in alternative sources for audio programming, has led to steady expansion of service to more diverse audiences, including different demographic groups.¹⁷⁰ This trend toward greater service to local communities will only continue as more and more stations convert to digital broadcasting and offer multiple programming streams. See *Radio Service Update* at 10-13.

One of the clearest examples of expanded service to local listeners is the growth in the number of Spanish-language stations to respond to increases in the Hispanic population in many markets, including smaller ones. Over the last eight years, the number of Spanish-language radio stations has increased by nearly 56%, from 547 to 853. These stations offer a variety of programming and music, such as Mexican, Tejano, Tropical, and Ranchero, as well Spanish-language news and talk. *Radio Service Update* at 5. Today, 53.3% of the Hispanic population residing in Arbitron metro markets are in markets with ten or more Spanish-language radio stations, and

¹⁶⁹ Even in smaller markets with fewer numbers of over-the-air stations, listeners receive a wide range of radio programming. For instance, on average in Arbitron markets 51-100, local stations air 23.3 different types of programming. *Radio Diversity Study* at 7.

¹⁷⁰ See Attachment E, BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences – An Update* (Apr. 28, 2008) (“*Radio Service Update*”).

over 90% are in markets with at least three Spanish-language stations. *Id.* at 6.

Similarly, radio stations have increased the programming they offer to serve other diverse groups within local markets. About 72% of African Americans living in Arbitron markets are in markets with three or more stations specifically targeting those listeners (up from approximately 62% in 2000), and nearly one-quarter (22.8%) are in markets with six or more such stations (compared to only 6.6% in 2000). *Id.* at 7-8.

The radio industry has also responded to consumer demand for more news and informational programming. Since 2000, the number of news/talk local radio stations has grown by over 300, a 23.7% increase. More than 75% of the population located in Arbitron markets are in markets with at least four news/talk stations, and 60% of the population are in markets with at least six such stations. *Id.* at 9-10.

Local radio stations are also investing in new digital high definition (“HD”) radio services to enhance their programming and attract listeners. Since 2003, the number of digital radio stations has increased from only 75 to 1720. These stations have also greatly expanded their number of multicast programming streams to the point where almost half of Americans (45.6%) residing in Arbitron markets are in markets with at least ten multicast radio signals, and nearly three-quarters (71.6%) are in markets with at least three such signals. *Id.* at 11-12 (reporting 786 additional multicast streams being aired). After analyzing a number of local markets specifically, it is clear that multicasting has significantly enhanced the diversity of programming available to consumers. See Appendix 1 to *Radio Service Update* (listing dozens of programming formats being offered on multicast signals, including jazz, news, classical, Christian, bluegrass, gospel, alternative, R&B, Urban and Spanish). In the 46 Arbitron markets

with new classical multicast signals, 14 previously had no other classical stations in the market; similarly, of the 28 markets with new multicast smooth jazz signals, 21 had no other smooth jazz stations in the market; of the 18 markets with new rhythm/blues signals, 15 had no other rhythm/blues stations in the market; and of the 30 markets with new alternative signals, nine had no other alternative stations in the market.

Beyond increasing the ability of stations to offer new and niche programming in local markets, multicast capabilities also allow radio stations to offer more locally targeted programming. For example, Greater Media's FM talk station WTKK in Boston offers traditional, classic and contemporary Irish music on one of its multicast streams, while in Detroit, the Greater Media rock station WRIF focuses on local music on its multicast signal. Here in Washington, D.C., there are 23 stations broadcasting 38 HD radio channels, including multicast channels offering gospel, global unsigned bands, alternative, classic country, bluegrass, and Hispanic adult contemporary.¹⁷¹ Clearly, the development of digital multicasting has enabled broadcasters to offer niche programming, including locally-oriented programming, much of which would not be economically viable if offered on a single main signal. As multicasting further develops, it will only further enhance stations' abilities to serve the interests of local listeners, including in smaller markets.

¹⁷¹ See http://www.ibiquity.com/hd_radio/hdradio_find_a_station. Similarly, in Baltimore, multicast channel offerings include country, indie rock, classic rock, radio for women and alternative. In Charlotte, NC, the site of one the FCC's localism hearings, multicast streams offer, among other programming, Christian, news, classic country, new country, VIVA (Spanish variety), contemporary jazz and comedy.

Given the growth in the number of traditional radio outlets, the expansion of their programming services due to digital technology, and the development of competing audio programming distributors and the Internet, there can be little doubt that the needs of listeners for audio services are being met. Not only can consumers seek a wide and growing variety of programming from terrestrial stations located within their local markets, but listeners also routinely access radio programming originating on stations located outside their local markets.¹⁷² Moreover, via the Internet, listeners anywhere can easily access programming from radio stations throughout the country and the world. In such an environment, NAB reemphasizes that it is neither necessary nor economically efficient for every radio station to be “all things to all people,” because wide varieties of music programming are available to consumers on a market basis.¹⁷³ As discussed above, in considering whether the public’s interest in receiving responsive programming is being met, the Commission, as it has previously correctly recognized, should focus on the programming offered across markets as a whole, not on whether every single station offers certain types or amounts of programming, such as music by local artists. See *supra* Section III.C.; *Radio Deregulation Order* at 977-79.

¹⁷² See Attachment C to NAB Comments in MB Docket No. 06-121, BIA Financial Network, *A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance* at 5-7 (Oct. 23, 2006) (on average, nearly one-third of the listening in Arbitron markets is attributable to out-of-market radio stations).

¹⁷³ See *supra* Section III.C., discussing, *inter alia*, *Lutheran Church-Missouri Synod*, 141 F.3d at 355-56 (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” and “clashes with the reality of the radio market”).

In light of the increasingly diverse offerings of radio stations in local markets, it is hardly surprising that overall consumer satisfaction with, and use of, radio is high. For example, a survey by Bridge Ratings found that over “three quarters of those interviewed say that their local AM/FM stations are providing what they need in their daily and weekly radio listening.”¹⁷⁴ Another study also conducted by Bridge Ratings shows that music consumers turn to terrestrial radio most as a source to discover new music.¹⁷⁵ And another survey by Hear2.0 similarly found that “74% of all terrestrial radio listeners are satisfied with what they hear on the radio.”¹⁷⁶ Moreover, audiences of programming specifically designed to meet the demands of minority groups (e.g., Latin and Urban programming) are the most satisfied with radio, with 85% of Latin and 80% of Urban listeners reporting satisfaction. These surveys provide empirical data and factual evidence further demonstrating that local radio does serve the needs and interests of local listeners.

Radio’s reach bears out this consumer satisfaction. Just last month, Arbitron released survey findings demonstrating that more than 235 million Americans tune into radio every week, a figure that has increased steadily over the last few years. Arbitron also found consistent delivery of radio to the elusive young adult demographic that

¹⁷⁴ Bridge Ratings, *Bridge Ratings Industry Perceptual – Spring 2006: Traditional Radio Serves the Public Interest*, Apr. 28, 2006, available at <http://www.bridgeratings.com/press.04.28.06.Perceptual.htm>.

¹⁷⁵ See Bridge Ratings, *Bridge Ratings Industry Update – New Music Discovery*, July 21, 2006, http://www.bridgeratings.com/press_07.21.06.New%20Music.htm.

¹⁷⁶ Hear2.0, *Nationwide Study Illustrates Terrestrial Radio’s Strengths*, June 7, 2006, available at http://mercury.blogs.com/news/2006/h20newsradio_satisfaction.pdf.

advertisers target, reaching 84% of adults 18-34, as well as 84% of adults 25-54, and 84% of adults 18-49.¹⁷⁷ These figures are even higher for minority consumers, with 94% of “Black Non-Hispanic persons” and 95% of Hispanic persons, ages 12 and over, tuning into radio on a weekly basis. *Arbitron RADAR 96*. A 2007 analysis of the radio industry found that the industry has responded to competition from new media by reinvesting in their properties, improving content and embracing new technologies, including podcasting and Internet radio simulcasting. As a result, in 2006 and 2007, consumers showed increased loyalty to radio, as measured by the percentage of audience identifying a favorite radio station.¹⁷⁸ Certainly, these figures show that the large majority of consumers enjoy and value the programming that radio broadcasters deliver, thereby casting doubt on the need for government intervention in the programming decisions of local broadcasters. Indeed, in light of empirical evidence demonstrating radio stations’ extensive and expanding programming services to local markets, efforts to regulate stations’ programming choices would be arbitrary and capricious.¹⁷⁹

C. The Commission Lacks Authority to Regulate Radio Content, Directly or Indirectly

¹⁷⁷ Arbitron, *According to RADAR 96, Radio Reaches More than 235 Million Listeners per Week*, March 18, 2008, available at http://www.arbitron.com/national_radio/home.htm (“*Arbitron RADAR 96*”).

¹⁷⁸ Bridge Ratings Analysis, *Terrestrial Radio’s Run Through the New Media Gauntlet 1998-2007* at 7 (May 16, 2007).

¹⁷⁹ A regulation “reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.” *City of Chicago, Illinois v. Federal Power Commission*, 458 F.2d 731, 742 (D.C. Cir. 1971); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).

Although the Commission determined not to prohibit the use of national playlists, nor to require stations to air local artists, it nonetheless is considering whether to force radio broadcasters to document what music programming they air, and why, and use that information in deciding whether to renew a station's license. For the reasons discussed in Section III. D. above, NAB submits that the pressure inherent in such a proposal to select and air music fitting the Commission's conception of "local," or risk significant complications with license renewal, raises serious statutory and constitutional concerns.

Particularly in light of the lack of any demonstrated need for government involvement in radio licensees' programming decisions and the lack of any specifically-defined governmental interest in the promotion of local music and artists, the Commission should decline to adopt requirements raising such serious problems. As the FCC observed decades ago, it "has never imposed a general requirement that stations supply extensive textual data on the *content* of their programming, and doing so would raise significant First Amendment questions." *Radio Deregulation Order* at 1010. Indeed, the Commission only recently reiterated its historical "reluctan[ce] to become involved in making programming judgments" due to "First Amendment sensitivities."¹⁸⁰

¹⁸⁰ *Report and Order and Third Further Notice of Proposed Rule Making* in MB Docket No. 07-294, FCC 07-217 at ¶ 38 (rel. March 5, 2008) (declining to require entities eligible to purchase stations under the distress sale policy "to demonstrate that their proposed service to the community would address needs unmet by existing media" because the Commission should not "sit in judgment of what 'needs' are unmet by existing media" and "whether the programming service proposed by the prospective buyer would fulfill those needs").

Consistent with long-standing precedent, the Commission should be similarly reluctant to become involved in the programming decisions of radio stations in this proceeding.

NAB further observes that it would be difficult, if not impossible, to apply these requirements rationally to many radio stations, such as news, sports, talk, religious and classical. Some of these types of stations do not have playlists at all. And what interest could the Commission have in knowing how classical music stations, for example, compile their playlists? Surely there is not a concern that Beethoven is insufficiently “local” to pass muster. Given these difficulties, would any playlist/local music regulation be applied only to stations airing certain types of music programming but not to others? The operation of such selective regulation could discourage stations from offering particular types of programming or formats so as to avoid additional intrusive regulation. Of course, the inconsistent application of content-related regulations raises additional concerns -- regulations that target stations depending on their programming content or format must be regarded as suspect.¹⁸¹

The potential for arbitrary enforcement of any proposal involving stations’ selection and airing of “local” music and artists is another clear problem. The term “local” is vague and ambiguous. Who, precisely, is a “local” musician? Someone who currently lives in the broadcaster’s community of license (or county or state or region)? Or would an artist originally from an area count? With respect to groups or bands with

¹⁸¹ The Commission has rightly previously determined not to become involved in questions of stations’ musical programming and format changes. See, e.g., *FCC v. WNCN Listeners’ Guild*, 450 U.S. 582 (1981) (upholding FCC policy that a change in radio programming was not a material factor that should be considered in ruling on applications for license renewal or transfer).

multiple members, how many would have to be local for the ensemble to count as local (however defined)? Would the interest in promoting localism somehow be satisfied if three members of a five-member ensemble were local but not if only two? Rather than the performing group or artist being local, would music programming count if the composer instead were local? Such questions, along with many others, demonstrate that it would be challenging to give the playlist proposal sufficient precision to survive constitutional vagueness review, not to mention ordinary administrative law arbitrary and capricious review.¹⁸² For all of these reasons, the Commission should refrain from intervening in the radio marketplace and has no legal or policy basis for doing so.

VII. Restrictions on the Use of Voice-Tracking Are Unwarranted and Should Not Be Adopted

Voice-tracking refers to broadcasters who attempt to increase operational efficiencies by using part-time disc jockeys (“DJs”) (who may be local), or DJs from other markets, and then customizing their programs for their local markets. The *Notice* states that such practices may reduce the presence of licensees in their communities and thus impair their ability to discern the needs and interests of the station’s local audience. *Notice* at ¶ 111. The Commission seeks comment on whether this practice should be limited. *Id.*

¹⁸² See, e.g., *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (for constitutional purposes, a regulation affecting speech must “provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,” and it must not “authorize[] or even encourage[] arbitrary and discriminatory enforcement”); *Trinity Broadcasting v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) (FCC could not deny a license renewal application because the regulation allegedly violated by licensee was not sufficiently clear to warn the party about what was expected of it).

NAB submits that there is little real evidence that voice tracking diminishes localism or causes other harms such that intrusive regulation into stations' business practices is warranted. Although one commenter, AFTRA, apparently more concerned with the loss of positions at radio stations than any perceived impact of voice tracking on the listening public, asserts that voice-tracking somehow deprives listeners of "responsive local programming," it offers no evidence that voice-tracked programming segments contain any fewer references to local news or events than other segments of a broadcast day, or that listeners have strong objections to hearing DJs from other markets.¹⁸³ Another commenter, the National Federation of Community Broadcasters seems largely concerned that voice-tracking may lead listeners to believe they are participating in local, rather than national, contests.¹⁸⁴ However, NFCB apparently fails to understand that any radio contest that involves a local event, such as winning tickets to a music concert, will only air on a particular local radio station and be available only to local listeners of that station.¹⁸⁵ There is no significant difference to listeners if the contest happens to be discussed by a DJ who is located out-of-town.

The entirety of the rest of the record demonstrates the benefits of voice-tracking. For example, Barnstable Broadcasting explains that voice-tracking is typically used to

¹⁸³ Comments of the American Federation of Television and Radio Artists and the American Federation of Musicians, MB Docket No. 04-233 (Nov. 1, 2004) ("AFTRA Comments").

¹⁸⁴ Comments of the National Federation of Community Broadcasters, MB Docket No. 04-233 (Jan. 3, 2005) ("NFCB Comments").

¹⁸⁵ NFCB also raises the alleged impact on localism of voice-tracking, but like AFTRA, primarily because it may reduce on-air opportunities for some employees of radio stations, rather than negatively impact local listeners. See NFCB Comments at 20.

prerecord material to accommodate the schedules of on-air personalities (including local ones), which should not raise any localism concerns.¹⁸⁶ Clear Channel expressly refutes many of AFTRA's unsubstantiated claims about voice-tracking. Regarding the prevalence of voice-tracking, Clear Channel notes that it is already on record that only 9% of all its stations' dayparts are voice-tracked, rather than the 70% alleged without evidence by AFTRA.¹⁸⁷ Clear Channel also explains that most voice-tracking is completed only hours before a DJs shift, and as Barnstable notes, much of it take place within markets by local DJs. Voice-tracking is thus nothing more than a modern version of "a long-used industry tool." Clear Channel Reply Comments at 21.¹⁸⁸

In the *Notice of Inquiry* in this proceeding, the Commission recognized that voice-tracking is an economical use of technology that allows radio stations to "decrease costs and increase ratings and thus revenue" by centralizing operations and enhancing the name recognition of on-air talent or a radio brand.¹⁸⁹ Voice-tracking can allow a local radio station to produce more attractive, interesting programming for less expense. DJs who are based out-of-town may be more available and/or less expensive than locally-based DJs, especially if a station is located in a small or mid-sized market where

¹⁸⁶ Reply Comments of Barnstable Broadcasting Inc., MB Docket No. 04-233 (Jan. 3, 2005).

¹⁸⁷ Reply Comments of Clear Channel, MB Docket No. 04-233 at 20 (Jan. 3, 2005) ("Clear Channel Reply Comments").

¹⁸⁸ See *also* Comments of Thomas C. Smith, MB Docket No. 04-233 (Nov. 2, 2004) (stating that voice tracking has been around in one form or another since the "early sixties").

¹⁸⁹ *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12440 (2004).

radio talent is more scarce.¹⁹⁰ A voice-tracking system can help stations reap substantial savings.¹⁹¹ Many local radio stations are trying to remain financially viable in an increasingly competitive marketplace,¹⁹² and voice-tracking is nothing more than a simple way for stations to use advances in technology to control costs.¹⁹³

Voice-tracking is not merely about cost-cutting either. Program directors are called upon to examine their audiences for information on how listeners typically use the station, when they are listening and for how long, and their commute times, and based on such information, endeavor to best serve the needs of their audience with superior on-air talent at the most opportune times, whether they be live and local, or perhaps voice-tracked from another market.¹⁹⁴ Stations are also aware that local programming no longer needs to be defined by where it is produced. In other words, a DJ who is based out-of-town is no less qualified to inform and entertain listeners than a locally based DJ. The value of programming is determined by how strongly it resonates with listeners, regardless of where it originates. As one media expert states, “in a world that

¹⁹⁰ Anna Wilde Matthews, *From a Distance: A Giant Radio Chain is Perfecting the Art of Seeming Local*, Wall St. J. (Feb. 25, 2002), at A1.

¹⁹¹ *Id.*

¹⁹² See BIA Financial Network, *State of the Radio Industry, Radio Station Transactions 2005: When Is It Going To Get Better?* at 12 (Sept. 26, 2005) (radio is facing an “increasingly diversely competitive marketplace,” in which stations are “combating non-terrestrial radio and all forms of digital media” for “listeners and resulting advertising revenues”). See also NAB Comments in MB Docket No. 06-121 at 71-87 (Oct. 23, 2006); NAB Reply Comments in MB Docket No. 06-121 at 50-59 (Jan. 16, 2007).

¹⁹³ John Eckberg, *Clear Channel’s Move Adds Studio Capability*, The Cincinnati Enquirer (June 2, 2004).

¹⁹⁴ Paul Heine and Katy Bachman, *Personality Crisis: Will Cost Cutting Save Radio?*, MediaWeek (Feb. 11, 2008).

is increasingly global, to whom does it matter that it's live and local, so long as we're satisfying the entertainment and information needs of the listener and providing something that's unique to that signal?"

Voice-tracking is entirely consistent with localism so long as a station endeavors to tailor its programming to suit the station's local community. Local radio stations that leverage voice-tracking, as well as the out-of-town DJs, both take steps to ensure that the content is presented in a community-responsive way. The DJs identify and reference local events, news and public affairs, conduct telephone and other interactive contests with local listeners, and promote local musicians. No evidence suggests that the on-air programming produced by voice-tracked, out-of-town DJs is inferior in quality, or is less interesting to or valued by consumers, than that produced by locally-based personalities.

As Clear Channel explains, if voice-tracking were merely a cost-savings tool that is "built on deception," listeners would "quickly tune out," in favor of the many alternatives available, including other radio stations and the Internet. Clear Channel Reply Comments at 21, quoting AFTRA Comments at 15. There is simply nothing inherent in voice-tracked programming that makes it less likely to serve the needs and interests of radio listeners, and the Commission has not shown that such programming actually fails to serve consumers in local radio markets.

The Commission must also keep in mind that stations using voice-tracking for certain portions of their programming schedule typically air other local programming, including local news and informational programs, during other day parts. For instance, Clear Channel explains that "most voice-tracked shifts are in off-peak hours (nights,

overnights, weekends) “ Clear Channel Reply Comments at 21. Moreover, it is important to note that voice-tracking is performed at the discretion of the local decision-maker, such as the program director or general manager of a station. *Id.* NAB submits that radio station owners and their local management personnel are in the best position to make decisions about their business operations and how to utilize cost-saving technologies to enhance their overall service.

Thus, the use of voice tracking cannot, as the Commission suggests, somehow hinder the ability of stations “to assess the needs and interests of their local communities.” *Notice* at ¶ 111. Moreover, the financial efficiencies of voice-tracking can help ensure that stations are able to afford to produce and air local news, local sporting events, and other community-responsive content, including more expensive and resource-intensive programming. If voice-tracking was artificially restricted or eliminated by the Commission, the ability of many stations, especially smaller stations and those in small and mid-sized markets, to produce and air other non-voiced tracked locally-oriented programming could well be compromised. Rather than disparage voice-tracking as somehow being inimical to localism, the Commission should continue to permit local stations to leverage technology in a creative manner to become more efficient, and encourage them to pass on those savings to listeners in the form of enhanced local service.

VIII. Conclusion

For all the reasons set forth above, NAB respectfully disagrees with the statements in the *Localism Report* suggesting that a number of radio and television broadcasters are out of touch with their communities and are failing to provide sufficient

community-responsive programming. A closer examination of the record in this and in other proceedings in fact shows that local stations recognize and embrace their obligation to serve the public interest. Local broadcasters offer a wealth of national and local news and other informational programming, vital emergency information and entertainment to the American public free of charge, and provide additional, unique community service, including giving a voice to local organizations and entities and raising monies for charities, local groups and causes and needy individuals.

Broadcasters participate in their local communities – they understand the needs of their audiences and work every day to provide programming to address those needs.

Indeed, broadcasters must do so to retain audiences (and thus advertisers) and remain relevant and economically viable in today's highly competitive media marketplace. The record contains no evidence that responsive programming and other services are not widely available to viewers and listeners on a market basis.

In light of the record, the Commission has no factual or legal basis to turn back the clock to reinstate a myriad of regulations that the agency found ineffective and unnecessary in the less competitive media marketplace of the 1980s. While we agree that promotion of broadcasters' service to their local communities is a laudable goal, the re-imposition of burdensome and outdated restrictions is not the proper approach. In fact, as we explained above, a number of the proposals in the *Notice* would impair broadcasters' abilities to serve their local communities by imposing very significant costs and diverting resources away from programming and services that directly serve their local markets. Small broadcasters and station groups and those in more rural

areas would be particularly adversely impacted in their ability to serve their local audiences by the costs and burdens of new and unnecessary regulation.

Moreover, the legal basis for several of the Commission's proposals appears questionable at best. The courts have directly questioned the agency's statutory authority to adopt regulations affecting program content without express congressional directive, and any such regulations of the content aired on broadcast stations raises significant Constitutional concerns. These concerns are only heightened by the Commission's various proposals which would apply to all radio and television stations across the nation, regardless of the level of service being provided by any individual station and regardless of the level of service available to consumers in their local markets. Especially in light of broadcasters' and other outlets' increasing service to local markets made possible by technological developments, the return to a regulatory regime from the analog era cannot be sustained on factual, policy or legal grounds.

Respectfully submitted,

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