

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

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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcasters (“NAB”) hereby submits its reply comments in response to the Commission’s *Report on Broadcast Localism and Notice of Proposed Rulemaking* (“*Notice*”). As NAB stated in its initial comments, and as thousands of commenters, both broadcasters and third parties, have now shown, radio and television broadcasters are closely connected with their local communities and provide a wealth of community-responsive programming.

The record in this proceeding demonstrates that local stations acknowledge and embrace their obligation to serve the public interest every day. Local broadcasters offer valuable local and national news, political, public affairs and other informational programming, vital emergency information and entertainment to viewers and listeners free of charge. They also provide additional, unique community service, including giving a voice to local organizations and raising monies for charities, local groups and causes and needy individuals. Broadcasters actively participate in their local communities – they work hard to understand the needs and interests of their audiences and to provide programming every day to address those needs.

Moreover, as demonstrated by commenters in this proceeding, serving the needs of local communities is the cornerstone of the broadcasting business. Without local programming and services to differentiate their offerings from a myriad of competitors, broadcasters will lose viewers and listeners and thus the advertisers that are vital to their business. The record contains no evidence that responsive programming and other services are not widely available to viewers and listeners on a market basis.

Certainly the general, empirically unsupported assertions of small numbers of media critics that local stations should do “more” – especially offer more programming of the specific type preferred by these critics of all commercial media – cannot justify the imposition of new and intrusive regulation in the name of localism. As an initial matter, the record demonstrates that, despite the Commission’s elimination of its non-entertainment programming requirements in the 1980s, there has not been a decline – in fact there has been an increase – in the amounts of non-entertainment programming, especially local news, aired by television stations and available to consumers on a market basis. Moreover, consumers evidently do not believe that their local radio and television stations are failing to serve their needs. As NAB shows in these replies, during the last two license renewal cycles, petitions to deny or informal objections were filed against only approximately 0.9% of all renewal applications, indicating that 99.1% of all licensees were serving their communities so well that their license renewal applications were unopposed. The Commission cannot disregard this concrete, numerical evidence as to viewer and listener satisfaction with their local broadcast stations, and adopt intrusive regulation on the alleged (but unproven) existence of a small number of underperforming stations.

The record clearly does not provide any factual or legal basis to turn back the clock to reinstate regulations that the Commission found ineffective and unnecessary in the less competitive media marketplace of the 1980s. Today, with the media market changing dramatically and competition from multiple digital sources growing 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 media market. While NAB and other commenters agree that local community service is an important part of their public service obligations, the reimposition of burdensome and outdated restrictions is not needed to enhance local public service. In fact, numerous commenters explain that certain proposals in the *Notice* would impair broadcasters' abilities to serve their local communities by imposing significant costs and diverting limited resources away from programming and services that directly serve their local markets. Reversing course and reimposing more restrictive rules regarding main studio location and unattended operation, for instance, would burden many broadcasters with substantial, possibly financially devastating, new costs. Commenters stress that small- and mid-sized broadcasters and those in rural areas would be particularly adversely affected in their ability to serve their local communities.

An inflexible, one-size-fits-all federal mandate also fails to consider the vast differences between the communities that broadcasters serve. What may be appropriate programming for a television station in a top-ten Designated Market Area ("DMA") may likely not be appropriate for a television station in DMA #100, let alone a radio station in an unrated rural area. Given these differences, commenters virtually unanimously oppose the proposal to require all broadcast stations in the country to form community advisory boards for the purpose of ascertaining the needs and interests of their communities. Commenters point out the numerous practical problems with such an inflexible approach, especially because broadcasters today already employ a wide variety of proven and effective methods to ascertain the specific needs and interests of their audiences. Initial comments filed by hundreds of broadcasters demonstrated the range of voluntary ascertainment activities currently undertaken, and reflect the need for

such ascertainment methods to be tailored to the mission of the station. For example, successful and cost effective ascertainment methods will likely differ greatly between a radio station with an all-news format and one that plays country music.

Moreover, commenters virtually unanimously agree that the legal basis for several of the proposals in the *Notice* appears questionable at best. The D.C. Circuit Court of Appeals has found that the Commission lacks statutory authority to adopt regulations affecting program content without express congressional directive, and any such regulation of the content aired on broadcast stations raises serious First Amendment concerns. These concerns are only magnified by proposals that would apply to all radio and television stations in the country, regardless of the level of service being provided by an individual station and regardless of the level of service available to consumers across their local markets as a whole. Many commenters, for example, explained that proposed content-based license renewal processing “guidelines,” which were eliminated as unnecessary, ineffective and constitutionally suspect 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.

The record in this proceeding establishes that, instead of achieving the Commission’s stated goal of promoting connections between broadcasters and their communities, the proposed rule changes will often produce the contrary 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 Commission 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 local viewers and listeners.

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the record since the Commission released the *Notice* oppose the new rules.³ The record shows that instead of increasing local programming and local service, these proposed rules will likely result in a decrease of localism by forcing broadcast stations to devote resources toward ensuring that government mandates are properly met and away from investments in news and other content.⁴ Many broadcasters cited increased administrative costs, maintenance costs, labor needs, and potential changes to their business structure if the rule changes are made.⁵ Commenters also identified potentially devastating costs should the Commission reverse earlier decisions regarding main studio location and unattended operation of broadcast facilities.⁶ Indeed, an oft-repeated theme in the comments was the concern that new rules mandating set amounts of locally-oriented programming, or forcing every broadcaster in the country to form and meet with community boards, will cause them to focus more on satisfying the

³ See Attachment A, *Summary of Comments Submitted to FCC Docket #04-233 January 1 to May 28, 2008*. Our count of the comments filed in the record shows that of the non-form letters filed in the docket, more than 99 percent oppose the rule changes proposed in the *Notice*. Even when identical form letters that feature almost no personalization are included in the counts, a clear majority of comments filed this year vigorously oppose the rule changes.

⁴ See, e.g., Comments of Monticello Media at 3 (Apr. 28, 2008) (“[I]f the localism initiatives go into affect, we will be forced to “undo” many of the positive things we have done and not be able to move forward with many of the plans we have.”).

⁵ See Sections III, V, and VI, *infra*. See also Comments of Withers Broadcasting at 2 (Apr. 28, 2008) (“Forcing broadcast licensees to prepare, keep and maintain voluminous records, hire unneeded staff, operate multiple studio locations for one broadcast station cluster, at great monetary cost to a licensee, is actually counter to the public interest inherent in making sure that small market terrestrial radio continues to exist and continues to thrive.”).

⁶ See Comments of Saga Communications, Inc. at 28 (Apr.28, 2008) (“Relocating the main studios of all of Saga’s stations would be crippling.”).

desires of the government and less on the needs of their local customers.⁷ The record is replete with concrete examples showing the negative real world effect of these rule changes.⁸

On the flip side, among the substantive comments filed in the record since the beginning of the year, fewer than 50 support the proposed rule changes, and among those, few actually address the specific changes the Commission has suggested.⁹ The record does not provide, for example, any empirical evidence that shows a reversion to the pre-1987 main studio rule will lead to an increase in local programming. Quite the contrary, as the Minority Media and Telecommunications Council points out, reverting back to the pre-1987 main studio rule would unfairly penalize minority-owned stations that received their broadcast licenses later than other stations “and were thus unable to assemble clusters of stations which each shared the same community of license.”¹⁰ Nor does the record provide any legal or factual justification for imposition of a community board requirement or what amounts to programming quotas. Neither could we find in the record any commenters that provide solid evidence to support a burdensome rule

⁷ See Comments of Saga Communications, Inc. at 2-3 (Apr. 28, 2008) (“[C]ontrary to achieving their intended goals, these rules could actually decrease services to licensees’ communities; supplant the broadcaster’s right and responsibilities with the unregulated wishes and whims of ill-defines “community leaders”, with their own agendas, who are not legally constrained as is the broadcaster; and further encumber the licensee’s limited resources by requiring compliance to yet more government mandated, time-consuming and counter-productive record-keeping and reporting obligations.”).

⁸ See, e.g., Comments of Joint Public Broadcasters at 7 (Apr. 28, 2008) (“Implementation of at least some of the proposals would impose substantial, costly new burdens on public broadcasters at a time when they face economic challenges and in the absence of any evidence that they are not fully responsive to their constituents.”).

⁹ See Attachment A at 1-2.

¹⁰ See Comments of the Minority Media and Telecommunications Council at 8-9 (May 19, 2008).

that would require broadcasters to maintain playlist data or air some FCC-defined amount of local music. In short, it is simply unfair to read this record to suggest that broadcasters are so disconnected from their communities that widespread regulatory reform is needed.

This record includes hundreds, maybe thousands, of examples of broadcaster involvement in the community. The record shows that broadcasters engage with their local community groups at a rate much higher than other businesses. This reflects an industry deeply engrained in local issues, and provides a stark contrast to the picture presented in the *Notice* (at ¶ 1) of an industry that “fall[s] far short” of its obligation to serve the public. From cities across the country, civic groups, local leaders and charity organizations have praised broadcaster efforts to not only promote the public good, but to be an active participant in the community by raising hundreds of millions of dollars for needy families, local schools, hospitals and other charities. These testimonials show how broadcasters interact with their communities, and that broad knowledge of the community allows them to provide truly responsive quality programming.

Moreover, the Commission has available to it empirical evidence showing that local stations do, in fact, consistently serve their listeners and viewers. During the past two license renewal cycles, nearly 30,000 renewal applications were submitted to the Commission. Research indicates that only approximately 270 petitions to deny or informal objections were filed in response to these applications. This means that objections were filed to just 0.9% of all renewal applications, which indicates that 99.1% of all licensees served their communities so well that their license renewal applications

were unopposed.¹¹ Based on this evidence, the Commission must conclude that broadcasters as a whole are serving the public interest.

Commenters further agree with the NAB that the adoption of these rule changes would constitute an arbitrary and capricious decision by the Commission, and that several of the rule changes would infringe on the editorial discretion of broadcasters, raising serious first Amendment concerns.¹² As we explained in our initial comments in response to this *Notice*, the Commission must clear a very high evidentiary hurdle to re-impose regulations that have been previously dismissed as unnecessary and burdensome.¹³ The record does not provide the evidence that the Commission needs to support the rule changes in light of this higher legal burden. Indeed, many commenters have noted that the *Notice* itself relies on a very thin record of support, and that much of what the Commission cites as evidence to support its conclusion that broadcasters are out of touch with their local communities is anecdotal, off-subject,

¹¹ NAB further notes that of the 270 objections filed, only 10 were designated for hearing. Of those that were designated for hearing and the renewal applications denied, nine were because the stations were silent and no longer operating.

¹² See Comments of Cox Broadcasting Inc. at 48-56 (Apr. 28, 2008); Comments of Ion Media Networks at 16-21 (Apr. 28, 2008); Comments of the Buckley Broadcasting Companies at 26-39 (Apr. 28, 2008); and Comments of The Walt Disney Company at 21 (Apr. 28, 2008) (“Such a review inevitably will involve the FCC in endless questions of the quality of programming content, and raises serious questions of constitutionality”).

¹³ See NAB Initial Comments at 3 (Apr. 28, 2008), citing *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (“[A]n 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.”). 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).

and/or very limited in scope.¹⁴ It would be impossible and disingenuous to draw from the current record a conclusion that the broadcast industry as a whole needs the type of reforms proposed in the *Notice*. To the extent that the Commission is concerned about a limited number of “bad actors” within the industry – no examples of which are identified in the *Notice* – commenters agree that this Commission should not penalize the entire industry with burdensome regulations that have been proven ineffective in the past.¹⁵ Without an adequate record showing unequivocally that the Commission’s current policies have resulted in a market-wide failure, the proposed regulations would constitute a decidedly overbroad reaction by the Commission that could not survive judicial scrutiny. We address the record and the commenters’ responses to the *Notice*’s various proposals in detail below.

I. The Record Overwhelmingly Demonstrates Local Broadcast Stations’ Service To Their Communities

As shown by their comments in this proceeding, broadcasters know that, to remain relevant and economically viable in today’s marketplace, they must provide a significant amount of local content to the communities they serve. With an ever-increasing number

¹⁴ See, e.g., Comments of Cox Broadcasting, Inc. at 32 (Apr. 28, 2008) (“Not only does the absence from the record in this proceeding of any evidence of a “localism problem” show that any such conclusion would be arbitrary and capricious, but the significantly increased competition faced by broadcasters since the Commission adopted its existing policies reinforces the conclusion that re-regulation is entirely unnecessary and unjustified.”); Comments of The Broadcaster Coalition at 11 (Apr. 28, 2008) (“Instead of providing concrete evidence to counter the substantial evidence that broadcasters have every incentive to and are responding to local audiences now more than ever, serving their local communities better now than ever, these parties “perceive,” “contend,” “maintain” and “claim” that broadcasters are neglecting their communities.”).

¹⁵ See, e.g., *Notice of Ex Parte*, filed on behalf of the Massachusetts Broadcasters Association and the New Hampshire Association of Broadcasters at 4 (May 23, 2008) (“As a whole, the broadcast localism proposals will end up penalizing the vast majority of broadcasters for the undefined “sins” of an unidentified few.”).

of media alternatives, competition between and among broadcasters and non-broadcast outlets for viewers and listeners is fierce. To thrive, or even survive, in this competitive market, radio and television broadcasters must provide a variety of programming responsive to local needs and interests. Broadcasters further provide additional, unique community service, including billions of dollars annually of free air time for public service announcements (“PSAs”) and monies raised for charities, other local organizations and causes, and needy individuals.

A. Radio and Television Stations Air Significant Amounts of Locally Responsive Programming

The record demonstrates that broadcasters throughout the country air programming specifically developed in response to community interests. Based on the breadth of examples submitted by broadcasters and third parties, and the dearth of substantive showings that localized programming is lacking, claims that stations fail to offer sufficient local programming are clearly unfounded. Though not an exhaustive list, the following is a representative sample of the types of local programming aired by America’s broadcasters.

i. Local Stations Offer an Array of News and Other Locally Oriented Informational Programming

- **WTVG(TV), Toledo, OH, *Conklin and Company***, offers talk with newsmakers, local and national; ***Roundtable***, invites guests with varying views (*i.e.*, local Israeli and Palestinian leaders); ***Coffee with the Fords***, former Toledo Mayor Jack Ford and wife Cynthia bring in guests including local artists and entrepreneurs.¹⁶
- **WRNO-FM, New Orleans, LA**, regularly hosts meetings of area civic groups and neighborhood associations to poll their members regarding issues and concerns. This information is then used not only to identify matters worthy of news

¹⁶ Comments of The Walt Disney Company at 14 (Apr. 28, 2008).

coverage, but also to form the basis for a unique “LOCAL update series” that is aired on the station, during which members of the community spend several minutes informing listeners about activities and the progress of rebuilding after Hurricane Katrina.¹⁷

- **WSET-TV, Lynchburg-Roanoke, VA, *Living in the Heart of Virginia***, is a locally produced program that features stories about people in Virginia. Reports have included stories about local artists and performances.¹⁸
- **WBZ-TV Boston, MA**, airs some 31 hours of local news each week, representing 18.5% of the station’s broadcast schedule. The station also airs a half-hour magazine program, ***Sunday with Liz Walker***, consisting of features about the Boston area, discussions, and special reports. Its co-located sister station, **WSBK-TV**, provides viewers in the market with a half-hour newscast at 9 p.m.¹⁹
- **WWNY-TV, Carthage, NY, *Your Turn***, provides an avenue for the viewing public to comment on issues they feel are important through a weekly segment that airs each Monday during the evening newscast.²⁰
- **KGBX-FM, KTOZ-FM, KSWF(FM), and KXUS(FM), Springfield, MO**, responded in January 2007 to a series of ice storms devastating Springfield and the surrounding area, leaving nearly 90% of the city without power for over a week. For nearly two weeks following the ice storm, the stations provided four-minute hourly news updates each day from 11:00 a.m. to 12:00 a.m. informing listeners about the state of recovery.²¹
- **WMCO(FM), New Concord, OH**, covers local events such as election programming, community litter pick-up initiatives, summer music series, village holiday celebrations, and many collegiate/village-focused activities such as homecoming, student life activities, and weekly chapel services.²²
- **WBBM-TV, Chicago, IL**, broadcasts 25 hours of local news each week as well as broadcasting a weekly, Emmy-award winning public affairs program, ***Eye on Chicago***.²³

¹⁷ Comments of Clear Channel Communications, Inc. at 62 (Apr. 28, 2008).

¹⁸ Comments of Virginia Association of Broadcasters at 50 (Apr. 28, 2008).

¹⁹ Comments of CBS Corporation at 10 (Apr. 28, 2008).

²⁰ Comments of United Communications Corporation at 5 (Apr. 28, 2008).

²¹ Comments of Clear Channel Communications, Inc. at 24 (Apr. 28, 2008).

²² Comments of WMCO, New Concord at 2 (Apr. 28, 2008).

²³ Comments of CBS Corporation at 9 (Apr. 28, 2008).

- **KPIX-TV, San Francisco, CA**, provides some 28.5 hours of weekly local news and a commonly owned station in the market, **KBCW (TV)**, broadcasts a daily half-hour news program in prime time. Additionally, KPIX broadcasts two weekly, local interview and discussion programs, and a daily prime-time program focusing on life in the Bay Area.²⁴
- **WCCO-TV, Minneapolis, MN**, provides 25.5 hours of local news each week, comprising almost 16% of its schedule.²⁵
- **WHAS(AM), Louisville, KY**, airs the **Saturday Morning Crew**, which gives listeners not only up-to-date news and weather to start their weekends, but also comprehensive information relating to weekend activities and events; **GardenTalk**, where University of Kentucky-trained horticulturalist Cindi Sullivan offers lawn, garden, growing, and household “how to” information relevant to the local Louisville climate and area; and **Moral Side of the News**, which dates back to 1946 and is the nation’s longest-running, regularly scheduled radio public affairs show. During the program, a rotating panel of Louisville-area clergy discuss news events from the preceding week from the moral and ethical vantage point of how those events impact the local Louisville community, culture, and society.²⁶
- **WZRV(FM), Winchester, VA**, airs **The Valley Today**, a local, live program featuring segments about community organizations, area tourism, education, local and regional business matters and philanthropic and charitable endeavors. Twice per month on commonly-owned **WFTR(AM)**, local high school students are invited to direct and produce their own public affairs program aimed at local high school students.²⁷
- **KOVR(TV)** together with **KMAX-TV, Sacramento, CA**, offer more than 60 hours of local news each week, including KMAX’s morning show, **Good Day, Sacramento**, which airs five hours per day on weekdays and six additional hours on weekends.²⁸
- **KCHF(TV) 11, Santa Fe, NM, A Healthier You**, offers the most current information on disease prevention and awareness.²⁹

²⁴ *Id.*

²⁵ *Id.* at 10 (Apr. 28, 2008).

²⁶ Comments of Clear Channel Communications, Inc. at 28 (Apr. 28, 2008).

²⁷ Comments of Virginia Association of Broadcasters at 27 (Apr. 28, 2008).

²⁸ Comments of CBS Corporation at 10 (Apr. 28, 2008).

²⁹ Comments of Religious Voices in Broadcasting at 5 (Apr. 28, 2008).

- **WFMZ-TV-DT, Allentown, PA, *Talk With Your Doctor***, is a live call-in show produced by and featuring expert physician hosts from St. Luke's Hospital. It covers current issues in health care, promotes overall health and wellness, and offers insights into the latest treatments and technologies.³⁰
- **KMCT-TV 39, West Monroe, LA**, airs and locally produces 50 hours of local programming each week, including ***Let God Be True***, about the preaching of area churches and highlighting the teachings of Pastor Larry Burrel, who uses graphs and visual aids to educate viewers, and ***Sacred Conversations***, which invites guests to speak about issues facing the community, including sports, health and disciplines of life.³¹
- **WJZ-TV, Baltimore, MD**, offers 35.5 hours, or 21% of its program schedule, of local news each week, and broadcasts ***On Time***, a weekly community-affairs discussion program.³²
- **WFOR-TV and WBFS-TV, Miami, FL**, have invested more than \$15 million in their local news, and together air 40 hours per week of local news. In fall 2004, WBFS added a daily two-hour morning news program. WFOR also airs ***4 Sunday Morning***, a weekly program featuring interviews and discussions concerning public affairs.³³
- **WATC(TV) 57, Atlanta, GA, *The Nightline***, allows people from the community to discuss a variety of local interests, such as current weather and crop conditions, oral histories of South Carolina, highlights of area elderly and indigent care services, as well as conversations on how issues of national significance affect South Carolinians; ***The Peggy Denny Show***, offers cooking and household tips and reviews of local arts and politics; ***Nancy's Heartbeat***, a weekly show on fitness and the latest news in medicine, and is hosted by a local chiropractor with a Master's Degree in Trauma; ***The Gravedigger Show***, hosted by a former homeless man who was rescued by the local fire department, who interviews firemen, policemen, doctors, politicians and others to inspire and provide resources, guidance and hope to those in most need and at-risk, including alcoholics, the unemployed, and the indigent.³⁴
- **KXRA-FM & KXRZ(FM), Alexandria, MN**, serve a community of less than 35,000 and provide coverage 24 hours per day of all levels of weather and other emergency situations. The stations cover all city and county commission

³⁰ Comments of Marantha Broadcasting Company, Inc. at 4 (Apr. 29, 2008).

³¹ Comments of Religious Voices in Broadcasting at 4-5 (Apr. 28, 2008).

³² Comments of CBS Corporation at 10 (Apr. 28, 2008).

³³ *Id.*

³⁴ Comments of Religious Voices in Broadcasting at 5 (Apr. 28, 2008).

meetings. They never air less than 12 local newscasts every day, and invite the City Mayor, State Senators and State Representatives for a visit every week and the School Superintendent and County Commissioners every month.³⁵

- **KTVT(TV), Dallas, TX**, airs about 25 hours of local news per week, while its sister station, **KTXA**, airs 14.³⁶
- **KCNC-TV, Denver, CO**, airs 30 hours of local news per week, representing 18.5% of the station's total programming.³⁷
- **WHAS(AM) in Louisville, KY**, spends the entire weekday morning show airing local and national news, business and weather updates, and traffic reports, including two interview segments per hour that focus on local newsmakers (such as the mayor and police chief) and in-depth coverage by news correspondents of events of particular interest to the local community; airs **Terry Meiners & Company**, a weekday afternoon drive time program, which covers a wide range of news of interest to Louisvillians, from Iraq war policy to local Girl Scout cookie sales; **Sunday Morning Talkshow**, Louisville's only locally-produced news-oriented weekend radio call-in show; **Kentucky Focus**, which focuses on political, business, social, legal, education, and health issues facing the Commonwealth of Kentucky through feature interviews with two to three local newsmakers, such as members of Kentucky's Congressional delegation, state health officials, and political candidates.³⁸
- **WCBS-TV, New York, NY**, airs 28.5 hours of local news per week, representing about 17% of its weekly programming schedule. It spends more than \$40 million annually producing its local newscasts. WCBS-TV also broadcasts **Eye on New York**, a weekly public affairs program featuring discussions on community issues including politics, religion, and culture.³⁹
- **WFLA(AM), Tampa, FL**, covered a great variety of issues of local interest in just five days in April 2008, including the local auto races, a new bill in the state legislature, the NCAA Women's Final Four, which came to town, a recently discovered organized crime ring, a new four-acre attraction opening at Busch Gardens in Tampa, various sports coverage, a videotaped teenage beating, a Tampa-area middle school teacher's sexual engagement with a 14-year old boy, news of American Airlines' cancellation of hundreds of flights for inspection,

³⁵ Comments on behalf of Dennis Lyle, President of Illinois Broadcasters Association and the National Alliance of State Broadcasters Association at 3 (May 2, 2008).

³⁶ Comments of CBS Corporation at 10 (Apr. 28, 2008).

³⁷ *Id.*

³⁸ Comments of Clear Channel Communications, Inc. at 25 (Apr. 28, 2008).

³⁹ Comments of CBS Corporation at 9 (Apr. 28, 2008).

weather information, and recent lawsuits involving unmarried domestic partners in Florida.⁴⁰

- **WQUB(FM), Quincy, IL, *Presstime***, is a weekly half-hour evening news magazine featuring state and local news, interviews and commentaries; and ***Conversations***, is a weekly half hour evening look at local issues.⁴¹
- **KPNX(TV), Mesa, AZ**, and other Arizona stations donated air time to broadcast ***Crystal Darkness***, a documentary meant to raise awareness about the dangers of crystal methamphetamine, in both English and Spanish, in reaction to recent “meth”-related deaths in the state.⁴²

ii. Local Stations Air Significant Amounts of Local Political and Public Affairs Programming

- **KTDO(TV), El Paso, TX, WWSI(TV) and WRDM-CA, Philadelphia, PA**, among other stations of 100% minority owned ZGS Communications, Inc. air ***Vota Por Tu Futuro***, a local effort to complement the Telemundo Network’s campaign for voter education, registration, and turnout that emphasizes local political races and ballot initiatives, in ***La Buena Vida***, a comprehensive health and lifestyle outreach campaign, and in ***Leer Para Vencer***, a campaign that promotes reading in the Hispanic family.⁴³
- **KNCK(AM), Concordia, KS**, is commended by Phil Gilliland, Executive Vice President of the Concordia office of the Citizens National Bank and who serves on the Concordia City Commission, for “fairly and accurately” reporting on local board meetings, a “huge commitment” of time and resources, involving 4-6 meetings per month after normal office hours.⁴⁴
- **WNNT-FM and WRAR-FM, Warsaw, VA**, air House of Delegates reports to apprise the public of the goings-on in the state legislature.⁴⁵
- **WFLA(AM), Tampa, FL**, airs an hour-long public affairs program, ***Tampa Bay Tomorrow***, covering a wide variety of community issues such as health,

⁴⁰ Comments of Clear Channel Communications, Inc. at 26-27 (Apr. 28, 2008).

⁴¹ Comments of National Public Radio, Inc. at 17 (Apr. 28, 2008).

⁴² Attachment B to NAB Initial Comments (Apr. 28, 2008).

⁴³ Comments of ZGS Communications, Inc. at 5 (Apr. 28, 2008).

⁴⁴ Comments of Phil Gilliland, Executive Vice President of the Concordia office of The Citizens National Bank and member of the Concordia City Commission at 1 (Apr. 25, 2008).

⁴⁵ Comments of Virginia Association of Broadcasters at 21 (Apr. 28, 2008).

education, crime, the environment, domestic animal control, race relations, public safety, politics, and consumer topics.⁴⁶

- **KZMV-FM, CO**, airs programs with State Senator Dan Gibbs to discuss the progress of pine beetle infestation, a serious local concern causing the destruction of pine forests.⁴⁷
- **KVAL-TV, Eugene, OR**, conducts interviews for the weekday noon newscasts that promote local non-profit community partners, and addresses topical community issues.⁴⁸
- **WDIV-TV, Detroit, MI, KPRC-TV, Houston, TX, WPLG(TV), Miami-Ft. Lauderdale, FL, WKMG-TV, Orlando, FL, KSAT-TV, San Antonio, TX, WXIX-TV, Newport, KY, WUAB(TV), Lorain, OH, WWBT(TV) and WLOX(TV), Biloxi, MS** all air community affairs programming on local issues and interests at least weekly; most of these shows have a call-in component, which allows viewers to express their views and opinions over the air.⁴⁹
- **Clear Channel Radio, Entercom Communications**, and independent station **KLCL(AM), Lake Charles, LA, and KJEF(AM), Jennings, LA** formed **United Radio Broadcasters of New Orleans**, in response to the aftermath of Hurricane Katrina. These radio groups serving New Orleans and the surrounding area came together in a joint effort as the prime source of information from August 30, 2005 until November 22, 2005. Law enforcement, civil defense and the national government used UNITED RADIO to move troops and keep their forces informed while radio personnel “offered hope to an incapacitated city.”⁵⁰
- **WMQT-FM and WZAM(AM), Ishpeming, MI**, produce the public affairs show *The Big Question*, where local community groups are interviewed about their upcoming events, and air *15 Minutes*, a program where local newsmakers and groups get expanded time to talk about their topics.⁵¹

⁴⁶ Comments of Clear Channel Communications, Inc. at 28 (Apr. 28, 2008).

⁴⁷ Comments of NRC Broadcasting Mountain Group, LLC at 6 (Apr. 28, 2008).

⁴⁸ Comments of Fisher Communications, Inc. at 4-5 (Apr. 28, 2008).

⁴⁹ Comments of Joint Television Broadcasters at 11 (Apr. 28, 2008). These commenters also cited WOIO(TV), Shaker Heights, OH, and WWBT(TV), Richmond, VA, that actively solicit viewers’ input and assess the level of interest in the issues and stories aired by the stations.

⁵⁰ See Notice of *Ex Parte* of Clear Channel Communications at 1 (May 22, 2008); Clear Channel, Radio Group Comes together to Form United Radio Broadcasters of New Orleans (Sept. 2, 2005), <http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1187>.

⁵¹ Comments of Thomas P. Mogush - Taconite Broadcasting, Inc. at 5 (Apr. 28, 2008).

- **KCHF(TV) 11, Santa Fe, NM, *Issues & Answers***, is a weekly program inviting representatives of state government agencies to discuss valuable state programs available to New Mexicans and inviting qualified guests to address concerns affecting the community.⁵²
- **WSFA(TV) Montgomery, AL, *On Tour***, is a program visiting various communities in its viewing area throughout the year, engaging in dialogues on issues important to those communities.⁵³
- **KTOK(AM), Oklahoma City, OK**, recently carried live the “State of the State” address of Governor Brad Henry, followed by an online poll during which listeners could provide comments on his speech; provided coverage of an Oklahoma City sales tax renewal that had been earmarked for improvements to the local stadium to attract an NBA team, including a call-in program featuring Mayor Mick Cornett; featured a discussion of attempts by the Oklahoma State Chamber of Commerce and Oklahomans for a Better Way to repeal a newly passed immigration reform law; broadcast segments during which listeners called in to discuss the free speech issues associated with Oklahoma State Representative Sally Kern’s public comments regarding homosexuality; and featured an interview with Gary Jones, the Chairman of the Oklahoma State Republican Party, regarding the meeting to select electoral delegates for the national convention.⁵⁴
- **WHAS(AM), Louisville, KY**, airs an interactive local talk show on weekdays that regularly features local and state political and community leaders, in addition to other newsmakers. The show features regular updates from Louisville’s Congressmen, Kentucky’s Attorney General, and the station’s state capitol correspondent.⁵⁵
- **WFMZ-TV, Allentown, PA, *Business Matters***, is hosted by Chamber of Commerce president, and talks about business leaders and their success, as well as regional public policy issues and world trends. Topics range from legislation affecting the business community, the community at large and economic development to corporate and technology news, and many of the programs address important civic issues. This program also covered the recent Pennsylvania presidential primary.⁵⁶

⁵² Comments of Religious Voices in Broadcasting at 5 (Apr. 28, 2008).

⁵³ Comments of Joint Television Broadcasters at 11-12 (Apr. 28, 2008).

⁵⁴ Comments of Clear Channel Communications, Inc. at 34 (Apr. 28, 2008).

⁵⁵ *Id.*

⁵⁶ Comments of Marantha Broadcasting Company, Inc. at 4 (Apr. 29, 2008).

- **KMCT-TV 39, West Monroe, LA**, airs 50 hours of local programming each week, including ***Fully Alive***, a live, one-hour nightly talk show which brings diverse guests from the community together, including Members of Congress, Louisiana Governors and local Mayors, to discuss topics such as health, marriage and other local concerns.⁵⁷
- **WLW(AM) and WOFX-FM, Cincinnati, OH**, broadcast the Mayor of Cincinnati's weekly update and provide a "live" line into the local council chambers during council meetings every Thursday night; report from the Hamilton County Commissioner's meeting every week; and devoted extensive attention to the Ohio primary election, assigning six reporters to report from the Hamilton County Board of Elections and the local offices of each of the candidates.⁵⁸
- **WLW(AM), Cincinnati, OH**, provides continuing coverage of the war in Iraq, focusing on the local impact, including the deaths of local soldiers. At the national level, WLW was one of six Clear Channel stations that began the election season with a \$1 million public service campaign to highlight the importance of voting in November 2006.⁵⁹
- **Belo Corp., Liberty Corporation, E.W. Scripps, Granite, and Post-Newsweek** stations have all announced offers of free air time to political candidates and other efforts to cover the 2008 elections.⁶⁰

iii. Local Stations Provide Locally-Oriented Sports and Entertainment Programming

- **WEAE(AM), Pittsburgh, PA**, airs a local two-hour high school sports recap during the fall and covers the Penn State Nittany Lions football and basketball teams.⁶¹
- **KTRK-TV, Houston, TX, *Inside the Game, Extra Points, and High School Hot Shots***, all spotlight Houston area high school athletes airing on KTRK's second digital channel; produced and broadcast four area high school football/basketball games on D2 and plans to increase production to ten this fall.⁶²

⁵⁷ Comments of Religious Voices in Broadcasting at 3 (Apr. 28, 2008).

⁵⁸ Comments of Clear Channel Communications, Inc. at 35 (Apr. 28, 2008).

⁵⁹ *Id.*

⁶⁰ Attachment B to NAB Initial Comments (Apr. 28, 2008).

⁶¹ Comments of The Walt Disney Company at 18 (Apr. 28, 2008).

⁶² *Id.*

- **KVAL-TV, Eugene, OR**, broadcasts local sports and interviews; produces and airs a weekly 15 minute sports segment once a week during the 11 PM newscast that features the activities of local high school sports programs.⁶³
- **KLEW-TV, Portland, OR, *The Sports Buzz***, covers local student athletes and coaches.⁶⁴
- **KGO-TV, San Francisco and Monterey Bay, CA, *After the Game***, offers highlights and live interviews with players after sporting events such as NBA playoffs and finals and college football including bowl games.⁶⁵
- **KVAK(AM), Valdez, AK**, offers a weekly feature for snowmobile enthusiasts, including current snow conditions, ride reports, equipment recommendations and safety tips, and another feature called the Valdez Fishing Report aired during summer months. KVAK offers play-by-play coverage of varsity basketball, football, volleyball and baseball.⁶⁶
- **WDAE(AM), WFLA(AM), and WHNZ(AM), Tampa, FL**, listeners receive coverage of all University of South Florida and University of Florida men's football and basketball games. WDAE carries live play-by-play coverage of local high school football games every Friday night during football season, in addition to broadcasting all the local college football and basketball games.⁶⁷
- **WHAS(AM) Louisville, KY, *SportsTalk 84***, is a daily interactive sports call-in show, with discussion about sports teams and games of local interest, especially the University of Louisville and the University of Kentucky; ***Great Outdoors***, is a weekly show that provides information about hunting, fishing, boating, and all outdoor activities relevant to the local area.⁶⁸
- **WFQX(FM), Front Royal, VA, *11 O'Clock News***, features new music from local and national hard rock artists.⁶⁹

⁶³ Comments of Fisher Communications, Inc. at 4-5 (Apr. 28, 2008).

⁶⁴ *Id.* at 5.

⁶⁵ Comments of The Walt Disney Company at 19 (Apr. 28, 2008).

⁶⁶ Comments on behalf of Dennis Lyle, President of Illinois Broadcasters Association and the National Alliance of State Broadcasters Association at 7 (May 2, 2008).

⁶⁷ Comments of Clear Channel Communications, Inc. at 36 (Apr. 28, 2008).

⁶⁸ Comments of Clear Channel Communications, Inc. at 36 (Apr. 28, 2008).

⁶⁹ Comments of Virginia Association of Broadcasters at 44 (Apr. 28, 2008).

- **WSWV-FM, Pennington Gap, VA**, airs a locally produced four-hour bluegrass program twice per week. This program receives and plays music from local bluegrass artists and airs live, in-studio performances by local bluegrass artists.⁷⁰
- **WZRV(FM), Front Royal, VA, Valley of the Stars**, typically features one or two local artists in the country, bluegrass, or jazz genres, including the broadcast of live, in-studio performances from local artists; **Shenandoah Conservatory Presents**, is a weekly concert series featuring students and faculty from Virginia's own Shenandoah Conservatory.⁷¹
- **WSET-TV, Lynchburg-Roanoke, Virginia**, produced and aired a two-month long singing competition program open only to local artists.⁷²

iv. Local Stations Provide Programming Targeted to Underserved Audiences

- **WSNS-TV, Chicago, IL**, allows Mujeres Latinas de Acción, a nonprofit organization dedicated to providing service to adult victims of domestic violence and sexual abuse, to promote their activities on its station, as a resource on breaking news involving violence against women and many other stories which impact Latinas.⁷³
- **KBAK-TV, Bakersfield, CA**, airs locally produced programming covering issues affecting women, minorities and youth, health & safety, and local fund raising events.⁷⁴
- **WEAA(FM), Baltimore, MD**, serves primarily an African-American audience, offers many hours of Caribbean African, and "world" music programming each week.⁷⁵
- **KZEW(AM), Aurora, CO**, provides a direct voice to the community for the organizations that serve the 450,000 veterans and military families of the state. KZEW helps these organizations by airing PSAs, performing onsite broadcasts,

⁷⁰ *Id.*

⁷¹ *Id.* at 44-45.

⁷² Comments of Virginia Association of Broadcasters at 44 (Apr. 28, 2008).

⁷³ Comments of NBC Universal, Inc. and NBC Telemundo License Co. at 21 (Apr. 28, 2008).

⁷⁴ Comments of Fisher Communications, Inc. at 4-5 (Apr. 28, 2008).

⁷⁵ Comments of National Public Radio, Inc. at 14 (Apr. 28, 2008).

sponsoring and broadcasting Memorial Day and Veterans Day parades, and interviewing local veterans.⁷⁶

- **KBLR(TV), Las Vegas, NV**, supports the Las Vegas Latin Chamber of Commerce, which wrote that it “can without hesitation state that KBLR-39 Telemundo Las Vegas is a great asset to our organization and one of the leading sources of information for the Latino community.”⁷⁷
- **KSMT(FM), CO**, partners with Summit County Hispanic Chamber and airs an all-Spanish program Sunday night to discuss topics affecting the Latino population.⁷⁸
- **WQYZ(FM), Biloxi, MS**, has the only urban formatted station in the predominantly African-American community of Jackson County – recently it hosted “Martin Luther King, Jr. Day of Service,” a program aimed at encouraging people to spend the January 21, 2008 holiday volunteering in local communities, and worked with “Hands On Gulf Coast” and the City of Biloxi to host a community event in honor of Dr. King.⁷⁹
- **KTOK(AM), Oklahoma City, OK, *Well Preserved***, focuses on issues pertinent to senior citizens, such as long term care, insurance, hospice, and reviews of care providers.⁸⁰
- **WLLA(TV) 64, Kalamazoo-Grand Rapids-Battle Creek, MI**, offers 17 hours per week of a variety of family-friendly programming, including ***Transformed***, a daily show that focuses on the African-American constituency through programming that promotes racial harmony; ***Getting a Grip***, which extends to the community at large and reflect a female perspective on the Christian doctrine; and ***Mt. Zion Baptist Church***, which targets the African-American population and focuses on the needs of that community.⁸¹
- **WATC(TV) 57, Atlanta, GA, *Jewish Jewels***, focuses on the Jewish religion and those who practice the faith in the area.⁸²

⁷⁶ Attachment of Letters from Local Community Leaders to Comments of Entercom Communications (Apr. 28, 2008).

⁷⁷ Comments of Las Vegas Latin Chamber of Commerce at 1 (Apr. 25, 2008).

⁷⁸ Comments of NRC Broadcasting Mountain Group, LLC at 5 (Apr. 28, 2008).

⁷⁹ Comments of Clear Channel Communications, Inc. at 30 (Apr. 28, 2008).

⁸⁰ *Id.*

⁸¹ Comments of Religious Voices in Broadcasting at 4 (Apr. 28, 2008).

⁸² *Id.* at 5.

- **KSCE(TV) 38, El Paso, TX**, provides bilingual and local programming to the ethnic and religious groups in the region by daily airing programming in English and Spanish and providing valuable media resources for El Paso's large Hispanic community; also airs a variety of programs to the local Jewish community, like the bi-weekly showing of *The Jewish Voice* and Jewish high holy days seasonal shows.⁸³

v. Many Stations Utilize On-Air Programming to Raise Significant Funds for Local Community Organizations

- **KDKA-TV, Pittsburgh, PA**, has been a fund-raising partner of Children's Hospital of Pittsburgh for 54 years, which dispensed more than \$15 million in free care to the families of area children in 2007. Each Christmas season, KDKA produces and broadcasts a fund-raising program for the hospital, and mobilizes hundreds of volunteers to take telephone donations. KDKA's daily morning talk show also features stories about the work being done at the hospital and the people doing it. On the day of the benefit show, KDKA promotes the phone bank number starting in its 4 p.m. newscast and carries it all the way to prime time programming. In 2007, KDKA-TV helped Children's Hospital raise over \$1.4 million; the total raised over the history of the program exceeds \$50 million.⁸⁴
- **WMZQ-FM, Washington D.C.**, collected over \$858,000 in listener donations during its 2008 St. Jude Radiothon -- the station's sixteenth annual on-air marathon for the St. Jude charity, raising more than \$12 million overall.⁸⁵
- **WBMX(FM), Boston, MA**, annually conducts a Radiothon for Children's Hospital which raises over \$3.5 million in two days of live broadcasts at the hospital featuring local families.⁸⁶
- **KASH-FM, Anchorage, AK**, has raised funds for nine years for the Children's Hospital at Providence, the only children's hospital in the State of Alaska, in its "KASH 4 Kids" Radio-thon. In 2008, over \$180,000 was raised, and donations to date amount to nearly \$1 million.⁸⁷
- **WPEG(FM), Charlotte, NC**, raised more than \$30,000 to open a Men's Shelter for the Salvation Army during a 28-hour Radiothon hosted by morning show personalities.⁸⁸

⁸³ Comments of Religious Voices in Broadcasting at 5 (Apr. 28, 2008).

⁸⁴ Comments of CBS Corporation at 15 (Apr. 28, 2008).

⁸⁵ Comments of Clear Channel Communications, Inc. at 32 (Apr. 28, 2008).

⁸⁶ Comments of CBS Corporation at 15 (Apr. 28, 2008).

⁸⁷ Comments of Alaska Broadcasters Association at 6 (Apr. 28, 2008).

⁸⁸ Comments of CBS Corporation at 15 (Apr. 28, 2008).

- **KINK(FM), Portland, OR**, has released a biennial charity music CD compilation over the last decade to benefit the Oregon Food Bank, raising over \$1.5 million.⁸⁹
- **WOMC(FM), Detroit, MI**, hosted the Dick Purtan Radiothon, an all day event, to benefit the Salvation Army. In just sixteen hours in 2006, the Radiothon raised \$1.8 million for the Detroit Salvation Army Bed and Bread Club Program.⁹⁰
- **KXXY-FM, Oklahoma City, OK (and other stations serving the OKC area)**, conducted a two-day Radiothon for the local Oklahoma Children’s Hospital and the Children’s Miracle Network; participated in “St. Baldrick’s Day,” which is designed to encourage rock music fans with long hair to donate their locks to children with cancer and donate funds to cancer research. The station’s deejay talked about the effort on the air, collected donations for the organization, and shaved her head on the air for charity.⁹¹
- **KBCO(FM), Boulder, CO**, supplies the Boulder County AIDS project with 10% of its annual operating budget from the proceeds of the release of the KBCO Studio C CD each year.⁹²

As the above examples illustrate, broadcasters serve their communities with locally responsive programming and operate in the public interest without any direction or command from the Commission. New federal mandates to promote localism are unnecessary and could even be counterproductive, if inflexible and burdensome requirements divert scarce broadcaster resources away from the provision of locally desired programming and toward compliance with Commission priorities.

B. Broadcasters Provide Extensive and Unique Additional Public Service to Their Local Communities

In addition to providing a variety of locally responsive programming, broadcasters also serve their communities and local organizations by airing PSAs on innumerable

⁸⁹ Comments of CBS Corporation at 16 (Apr. 28, 2008).

⁹⁰ Comments of CBS Corporation at 16 (Apr. 28, 2008).

⁹¹ *Id.*

⁹² *Id.* at 33.

issues including adult education/literacy, AIDS, anti-crime, anti-smoking, anti-violence, women's health, children, drug abuse, drunk driving and hunger, poverty and homelessness.⁹³ Broadcasters provide a unique community service – when a radio or television station partners with a community or charitable organization, the station not only provides dollars (similar to other corporate partners), but also a public voice for those organizations. A broadcaster can help an organization make its case directly to local citizens, raise its public profile, educate the public about its issues, and cement connections within local communities. A sample of these wide-ranging community service activities is listed below.

- **KOMO-TV Seattle, WA**, turned “Seasons of Giving,” a Thanksgiving food drive, into “Flood Relief,” collecting 49,085 pounds of food and raising \$71,600 in cash after a series of devastating floods in the area. After discovering that more relief was necessary, the station organized another flood relief event where viewers brought in “enough cleaning supplies, tools, small household appliances, shoes, clothing, et cetera to fill 7 semi-trucks and donated \$60,000 cash and another \$5,000 in gift cards.”⁹⁴
- **WCCO-TV, Minneapolis, MN**, raised \$8,000 for the local Animal Humane Society in 2007; provided free or low-cost mammograms for uninsured or underinsured women; distributed 600 free NOAA weather radios and 19,000 weather radios at a significant discount; gave away 500 carbon monoxide detectors; and provided doctors to answer questions about the symptoms of heart disease in connection with its news feature “Inside A Heart Attack,” which one woman credited with saving her husband’s life by prompting them to seek treatment at a hospital emergency room.⁹⁵

⁹³ Based on a survey conducted by the Minnesota Broadcasters Association, Minnesota television stations contributed \$38,800,621 of PSAs in 2005, costing each station approximately \$2,586,708 per year. Radio in Minnesota contributed a substantial \$83,324,827 in the same year. Comments of Jim du Bois at 5-6 (Apr. 28, 2008). Overall, local radio and television stations across the country contributed about \$7 billion in air time for PSAs in 2005. 61% of the PSAs aired by the average radio station were about local issues. For the average television station, the figure was 55%. NAB, *National Report on Broadcasters’ Community Service* (June 2006).

⁹⁴ Comments of Fisher Communications, Inc. at 7-8 (Apr. 28, 2008).

⁹⁵ Comments of CBS Corporation at 15 (Apr. 28, 2008).

- **WUSL(FM), Philadelphia, PA**, received NAB’s first-ever Crystal Heritage Award, which recognizes WUSL(FM)’s long-term commitment to community service. This commitment includes a partnership with the Philadelphia School District for “Safe Night Philadelphia” and promotion of safe teen activities in 300 locations, including a “Children’s March” that drew thousands. WUSL(FM) also organized and broadcast an on-air town meeting with the Police Commissioner, the School District, the Mayor’s office, and one hundred community activists to address issues pertinent to the local community.⁹⁶
- **WWL(AM), New Orleans, LA**, airs PSAs that have allowed injured military members to find Support Our War Heroes, a non-profit organization that assists veterans. The PSAs helped the organization with its community exposure and fundraising efforts while honoring military heroes.⁹⁷
- Jim Canale, radio host on **WWDB(AM) and WPEN(AM), Philadelphia, PA**, organized a fundraiser called “Cashflow for Cops!—Helping the Families of our Fallen Heroes” for families of police officers slain in the line of duty. The event raised \$33,000 for officers’ families.⁹⁸
- **KTVT(TV)/KTXA(TV), Dallas-Fort Worth, TX**, joined with the Autism Treatment Center, the Dallas Cowboys Charities, CBS Radio, Time Warner Cable and Dallas Child magazine to host “Stephanie’s Day,” an event designed to help parents with special needs children (especially those with autism) find out more about the various therapy options, educational programs and support groups available to them. More than 1,000 people attended.⁹⁹
- **KSKE(FM), CO**, invited twenty local artists to be a part of “Boots on Broadway” in Eagle, Colorado, where artists designed and auctioned boots to support events for a country music radio station, raising over \$100,000, and giving local artists exposure on radio, TV and print.¹⁰⁰
- **WSFA(TV), Montgomery, AL**, airs numerous public service announcements each year for community groups; invites community members and groups to utilize its facilities for meetings; and hosts a yearly live auction in its studio for the Alabama Shakespeare Festival.¹⁰¹

⁹⁶ Comments of Clear Channel Communications, Inc. at 31 (Apr. 28, 2008).

⁹⁷ Attachment of Letters from Local Community Leaders to Comments of Entercom Communications (Apr. 28, 2008).

⁹⁸ Attachment B to NAB Initial Comments (Apr. 28, 2008).

⁹⁹ Comments of CBS Corporation at 15 (Apr. 28, 2008).

¹⁰⁰ Comments of NRC Broadcasting Mountain Group, LLC at 6 (Apr. 28, 2008).

¹⁰¹ Comments of Joint Television Broadcasters at 12 (Apr. 28, 2008).

- **KTVU(TV), Oakland, CA**, partners with community organizations such as San Francisco’s annual Chinese New Years parade, producing a live broadcast of the event; sponsors the Oakland Ballet, the California Independent Film Festival, and the Leshner Foundation; and produces and broadcasts live the Muscular Dystrophy Association’s annual Labor Day Telethon.¹⁰²
- **KNTV(TV)/NBC 11, San Jose, CA**, supports Junior Achievement of Silicon Valley & Monterey Bay, Inc., which wrote to praise the station for its “extensive support,” including PSAs and direct support from KNTV staff volunteering and participating in the annual Groundhog Job Shadow Day event, which provides students a first hand look at the many jobs that it takes to operate a television station.¹⁰³
- **WHDR(FM) and WFLC(FM), Miami, FL**, promote the annual Stonewall Street Festival by working with Pride of Greater Fort Lauderdale promoting positive images of gay, lesbian, and transgender people. WFLC-FM also annually participates in “Waterway Clean Up,” encouraging listeners to join station personalities to come out and clean up beaches in the Miami area.¹⁰⁴
- **KLEW-TV, Lewiston, ID**, partnered with National Prostate Cancer Coalition to bring mobile testing units to Lewiston in July of 2007; helped orchestrate \$3,000 worth of toys to give to community children during the holiday season; partnered with the local blood bank to encourage donation; co-sponsored the Idaho Senior Games to encourage seniors to be physically active; donated advertising gift certificates to numerous non-profits for use in fund-raising auctions; and co-sponsored charity golf tournaments and other fund-raising events.¹⁰⁵
- **KYW-TV/WPSG(TV), Philadelphia, PA**, is a founding sponsor of the annual Komen Philadelphia Race for the Cure, organized locally by the Breast Health Institute since 1991. The 2007 Race, which KYW covered live in its Sunday morning newscast, raised \$3.5 million in support of breast cancer research and education. Both KYW and WPSG promoted the Race in advance with public service announcements and news stories about the latest medical breakthroughs in breast cancer research and detection.¹⁰⁶

¹⁰² Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 6 (Apr. 28, 2008).

¹⁰³ Comments of Junior Achievement of Silicon Valley & Monterey Bay, Inc. at 1 (Apr. 25, 2008).

¹⁰⁴ Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 7 (Apr. 28, 2008).

¹⁰⁵ Comments of Fisher Communications, Inc. at 13 (Apr. 28, 2008).

¹⁰⁶ Comments of CBS Corporation at 13-14 (Apr. 28, 2008).

- **KXRA(AM), KX92, and KXRZ(FM), Alexandria, MN**, raised over \$100,000 during Jaycees Jingle Bells Telethon, packaged over 59,000 meals for Kids Against Hunger and raised 1,500 pounds of food for Outreach Foodshelf. These stations also provided airtime to Safe & Sober Campaigns, Local Bloodmobile, Alexandria Unity Foundation, Runestone Regional Learning Center, Habitat for Humanity, Alexandria Youth Hockey Association, Alexandria Literacy Project, Lakes Area Humane Society, Rotary, Kiwanis, Sertomas Clubs, Lakes Area United Way, and Lakes Area Groundwater Festival.¹⁰⁷
- **WRC, Washington, D.C.**, was praised by 100 Black Men of Greater Washington D.C. for its support including station mentoring, stating “WRC has been a stellar community partner with the 100 BMGWDC. They have made a difference in the lives of many of our students and their support has allowed our organization to grow and strengthen.”¹⁰⁸
- **KVAK(AM), Valdez, AK**, sponsors the KVAK Kids Club, which engages young children in activities aimed at promoting community service, assists local non-profit organizations, employs high school mentors to assist with a recording session to help with the station’s Kids Club Kudos reward program, and, in 2007, conducted and aired interviews with graduating seniors. In 2007, KVAK spent \$1,200 in airtime value to help develop awareness of Advocates for Victims of Violence, \$2,800 to help promote local shopping, and \$1,090 monthly in running a Parent Tip feature three times daily.¹⁰⁹
- **KERV(AM), Kerville, TX**, developed and popularized the Texas State Arts & Crafts fair through the Kerville Chamber of Commerce and promotion on the station.¹¹⁰
- **WKMS-FM, Murray, KY**, station staff members are active in several organizations in the region, including, but not limited to, serving on the board of Directors of the Paducah Symphony Orchestra, Murray Main Street, the Rape Crisis Center, and others. WKMS invites community leaders from education, business, government and more to come on the air and speak on behalf of their community’s use of the station.¹¹¹

¹⁰⁷ Comments of Jim du Bois at 8-9 (Apr. 28, 2008).

¹⁰⁸ Comments of 100 Black Men of Greater Washington, DC Area, Inc. at 1 (Apr. 25, 2008).

¹⁰⁹ Comments on behalf of Dennis Lyle, President of the Illinois Broadcasters Association and of the National Alliance of State Broadcasters Associations at 6-7 (filed May 2, 2008).

¹¹⁰ Comments of Thomas Joyner at 2 (Apr. 23, 2008).

¹¹¹ Comments of WKMS-FM at 1-2 (Apr. 28, 2008).

- **KFNK(FM), Eatonville, WA, KJR-FM, Seattle, WA, KHHO(AM), Tacoma, WA, KJR(AM), Seattle, WA, KNBQ(FM), Seattle, WA, KUBE(FM), Seattle, WA,** partner with the Washington State public/private partnership “Thrive by Five,” which has propelled Washington to a world leader in early education. In 2007 alone, these stations donated 2600 PSAs to local non-profit and community service organizations such as The Salvation Army and Central Area Youth Association, with an airtime value of over \$326,000. These stations have partnered with local charities and organizations such as Northwest Literacy and Northwest Harvest to help raise more than \$300,000 for the local community. For over ten years KUBE-FM has hosted an on-air toy, blanket, and clothing drive during the holiday season known as “Miracle on Elliott.”¹¹²
- **WMQT-FM and WZAM(AM), Ishpeming, MI,** is involved with many civic organizations including the Chamber of Commerce, the United States Olympic Education Center and many more. The Program Director and his wife (one of the station’s announcers) are involved in the local Historical Society, and have tracked down information of World War II veterans who were lost at war from the area. Stations raised over \$225,000 in money for the March of Dimes, and collected 600+ pints of blood each year for the local blood bank.¹¹³
- **WWNY-TV, Carthage, NY,** covered the construction of a new Veteran's Administration clinic in Carthage, and its morning news anchor participates in many local events in the village. Additionally, WWNY-TV's station manager served as a board member of the Carthage Area Hospital Foundation for a number of years and served as the Foundation's Capital Campaign Chair. Both WWNY-TV and WNYF-CA promote fundraising efforts for the hospital including its annual golf tournament. WWNY-TV also supports and acknowledges students and educators in the Carthage Central School system by awarding Athlete of the Week, Student of the Week and Educator of the Week honors to outstanding members of the school system.¹¹⁴
- **KPIX-TV/KBCW(TV), San Francisco, CA,** produced and aired public service announcements for Students Rising Above, an organization dedicated to helping low income high school students attend college by providing them with financial assistance and mentoring support. Nearly \$750,000 dollars was raised during the year. KPIX also reported on air about 12 of the 124 students currently in the program. Participants come from severely disadvantaged backgrounds, but despite these formidable challenges, eighty percent of program participants graduate, earning four year college degrees.¹¹⁵

¹¹² Comments of Clear Channel Seattle at 1 (Apr. 28, 2008).

¹¹³ Comments of Thomas P. Mogush at 2 (Apr. 28, 2008).

¹¹⁴ Comments of United Communications Corporation at 10-11 (Apr. 28, 2008).

¹¹⁵ Comments of CBS Corporation at 14 (Apr. 28, 2008).

- **WBZ-TV, Boston, MA**, “4 Kids” campaign raised more than \$90,000 for Children’s Hospital Boston. The campaign consists of public service announcements, news features, participation in an annual walk, and an interactive website with information on Children’s Hospital Boston. The station was also the media sponsor for the 2007 Miles for Miracles Walk, which raised over \$1,000,000. WBZ joined with the American Red Cross after a tanker truck carrying hazardous materials flipped over in 2007, to create a disaster relief fund to assist victims and regularly aired related information in newscasts and in public service announcements.¹¹⁶
- **KCNC-TV, Denver, CO**, teamed up with the Salvation Army for more than 25 years to collect and distribute canned and non-perishable food items. The month-long 2007 campaign collected nearly 200,000 food items. KCNC is also a partner of The Adoption Exchange that works to find permanent adoptive homes for foster children. Each Wednesday, the station airs a segment in its news broadcasts featuring a child or sibling group in need of an adoptive family. The station also participates in a special one day program in which success stories of former “Wednesday’s Children” are aired throughout the day, and viewers are introduced to more children still looking for homes. Viewers have the opportunity to make a donation online or by telephone, or to request additional information about adopting children with special needs.¹¹⁷
- **WKLS(FM) Atlanta, GA**, raised over \$96,000 during a 50-hour marathon in late 2007, matching donations up to \$25,000, in an effort to replace stolen Christmas gifts for a local charitable organization. After over \$50,000 in toys awaiting holiday distribution were stolen from the Atlanta organization during a Thanksgiving weekend burglary, WKLS(FM)’s efforts helped fulfill the Christmas wishes of area children in need.¹¹⁸
- **KLUV(FM), Dallas, TX**, sponsored Tarrant County’s Race for the Cure, which includes promotion through PSAs, email blasts, website coverage and live broadcasts for the duration of the event, helping to raise over \$150,000.¹¹⁹
- **WTLG(FM), Orlando, FL**, organizes food drives for local ministries; arranged for receipt of over 5,000 turkeys to the Destiny Food Center in Orlando for Thanksgiving; provided “Bags of Joy” to over 2000 families through Harvestime International in Sanford; works with Operation Christmas Child, run by Reverend Billy Graham’s son Franklin, to supply toys, toiletries and clothing to the needy;

¹¹⁶ Comments of CBS Corporation at 14 (Apr. 28, 2008).

¹¹⁷ Comments of CBS Corporation at 14 (Apr. 28, 2008).

¹¹⁸ Comments of Clear Channel Communications, Inc. at 31 (Apr. 28, 2008).

¹¹⁹ Comments of CBS Corporation at 16 (Apr. 28, 2008).

and participates in many other rewarding ventures.¹²⁰

- **WPGC(AM)/WPGC-FM, Washington, DC**, create and host annual AIDS awareness and education events, including recent night time testing at local venues that resulted in 1,500 people learning their HIV status.¹²¹
- **Total Living Network (TLN)**, a Chicago-based organization with a San Francisco affiliate, **KTLN-TV 68, Chicago, IL**, works with several community-based non-profits, such as Kids Around the World, Pregnancy Care Center, Noah's Ark Animal Sanctuary, Rockford Rescue Mission and Motherhouse to provide public service announcements and broadcast exposure for their causes. TLN also focuses its outreach efforts on issues to help viewers cope with addiction, physical/mental abuse, health, grief, homelessness, gangs, divorce and sexual assault.¹²²

The above is by no means an exhaustive description of broadcasters' community involvement across the nation, but rather gives brief examples of broadcasters' contributions to local charities, organizations, and causes.¹²³ The record is replete with appreciative comments from grateful viewers and listeners, charities, local associations, and organizations for local broadcasters' assistance and commitment. When combined with radio and television stations' valuable programming services, it is clear that broadcasters do not require additional government regulation to ensure that they serve their local communities. Moreover, given the breadth of these examples – from large and small markets and large and small broadcasters across the country – it is clear that the broadcast industry as a whole, and not just a limited number of “good actors,” serves the public interest.

¹²⁰ Comments of Religious Voices in Broadcasting at 6 (Apr. 28, 2008).

¹²¹ Comments of CBS Corporation at 16 (Apr. 28, 2008).

¹²² Comments of Religious Voices in Broadcasting at 8 (Apr. 28, 2008).

¹²³ For additional examples of broadcasters' community service, see Attachment B to NAB's Initial Comments in this proceeding.

II. The Record Demonstrates That Mandatory, One-Size-Fits-All Ascertainment Obligations Are Unwarranted

In the *Notice*, the Commission proposed to reverse its 25-year-old decision that federal ascertainment rules are unnecessary because marketplace incentives better ensured that broadcasters would discern the interests and attitudes of their local communities and deliver responsive programming. *Notice* at ¶¶ 12-13. The Commission tentatively concluded that additional steps are needed to improve communications among broadcasters and their local communities, and proposed that all broadcasters convene and meet regularly with a permanent community advisory board (“CAB”) to discuss locally-relevant issues that may deserve more on-air treatment. *Id.*

As NAB discussed in our initial comments, there is no evidentiary basis to support this reversal in course, as the pre-*Notice* record demonstrated extensive, industry-wide voluntary broadcaster outreach to local communities. See NAB Initial Comments at 18-20. Because broadcast stations vary widely in terms of their resources, market size and other characteristics, NAB explained that it would be hopelessly impractical to impose a one-size fits-all obligation on all broadcasters to convene and administer a permanent advisory board. *Id.* at 22-23. In fact, such a requirement would likely be counter-productive to the Commission’s expressed aim, as many broadcasters would be forced to devote their limited resources towards satisfying the mandate to administer CABs instead of proven ascertainment methods consistent with each licensee’s specific station and market. *Id.* at 23. Accordingly, NAB urged the Commission to support ascertainment options providing local broadcasters with maximum flexibility in their community outreach efforts. *Id.* at 24.

A. The Supplemented Record Reveals Little Support or Justification for Mandatory Community Advisory Boards

As Cox recounts, when the Commission eliminated the complex, burdensome ascertainment rules in the early 1980s, it specifically noted that these obligations were “never intended to be an end in and of [themselves.]” Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 36 (Apr. 28, 2008), citing 1984 *TV Deregulation Order*.¹²⁴ Instead, the Commission described ascertainment as merely a “tool to be used as an aid” in providing community-responsive programming, a tool the Commission concluded had outlived its usefulness. *Id.* Moreover, the Commission recognized that the ascertainment rules had little impact on programming because broadcasters already labored to remain aware of audience attitudes and interests for wholly independent reasons. *Id.*

Nothing in the record submitted in response to the *Notice* suggests a need to reverse this course. For instance, despite the Commission’s specific inquiry, no parties provided substantive, persuasive evidence that repeal of the ascertainment rules had somehow negatively affected programming, or that reinstatement of the rules in the form of mandatory CABs would actually improve programming.

Among the hundreds of parties that submitted comments on the Commission’s proposal to mandate CABs, only the National Association of Black Owned Broadcasters (“NABOB”) offers unconditional support. NABOB contends that elimination of the ascertainment rules in the early 1980s has been detrimental to minority interests in

¹²⁴ *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076, 1098 (1984) (“*TV Deregulation Order*”).

those markets where no NABOB member provides service.¹²⁵ NABOB states that CABs could “restore” this alleged disconnection among minority communities and non-minority owned stations, and recommends that the Commission rely on the former ascertainment procedures to guide how broadcasters must select CAB members. NABOB Comments at 5. However, NABOB does not provide specific evidence, data or even anecdotal information to support its claims. Nor does NABOB offer any evidence that minority audiences may not access responsive content.¹²⁶ Finally, NABOB does not address all the impracticalities of requiring licensees to convene CABs that satisfactorily represent all the segments of a licensee’s audience or consider alternative ways to accomplish its goal.

Interestingly, even the few commenters who advocate additional broadcast regulation in other areas offer only lukewarm support for mandatory CABs. For example, The Public Interest Public Airwaves Coalition (“*Public Interest Coalition*”), merely allows that the Commission’s proposal “merits further consideration.”¹²⁷ These organizations correctly acknowledge that, “because the needs of individual communities differ and broadcaster resources vary from station to station, it may not be feasible or desirable for the Commission to mandate a ‘one size fits all’ CAB requirement for all broadcasters.” *Id.* at 23. Thus, virtually all commenters recognize that mandatory

¹²⁵ See Comments of National Association of Black Owned Broadcasters at 5 (Apr. 28, 2008) (“NABOB”).

¹²⁶ In fact, NAB has shown that marketplace incentives have resulted in greatly increased radio service to niche audiences, including members of minority groups. See NAB Initial Comments at Attachment E, *Over-the-Air Radio Service to Diverse Audiences – An Update* (Apr. 28, 2008).

¹²⁷ See Comments of *Public Interest Coalition* at 22 (Apr. 25, 2008).

CABs are not the optimal way to promote the Commission’s goal of improved communications between licensees and the public.

As demonstrated by a review of the record, the Commission’s proposal to reinstate ascertainment obligations, such as mandatory CABs, is based on little more than conjecture.¹²⁸ However, conjecture cannot substitute for the “reasoned analysis” that is required under the Administrative Procedure Act to change a previously established policy.¹²⁹ Specifically, to reverse a long-held policy as the Commission proposes, it must supply an analysis that is supported by the record, as well as a discussion of any alternatives that were considered and why they were rejected by the Commission.¹³⁰ Neither the Commission nor any commenter offer any such analysis or discussion.

In contrast, the vast record submitted in response to the *Notice* overwhelmingly affirms the fact that additional ascertainment obligations are unnecessary because broadcasters already successfully ascertain the attitudes and interests of their local communities in the absence of federal mandates. As NBC Universal (“NBCU”) explains, the current diversity and intensity of competition faced by local stations make localism more important than ever, especially since many broadcasters “have few competitive advantages beyond their presence and relationships within their

¹²⁸ Comments of the North Carolina Association of Broadcasters at 7 (Apr. 28, 2008).

¹²⁹ See, e.g., Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 37, citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); Comments of Clear Channel Communications, Inc. at 75 (Apr. 28, 2008).

¹³⁰ North Carolina Broadcasters Comments at 6, citing *Center for Sci. in the Pub. Interest v. Dep’t of Treasury*, 797 F.2d 995, 999 (D.C. Cir 1986).

communities.”¹³¹ Localism is the “bread and butter” of local radio and television stations, and represents the primary way in which broadcasters distinguish themselves in the increasingly competitive media marketplace.¹³² In other words, broadcasters must endeavor to understand the needs and interests of their local audiences, and deliver responsive programming, as a matter of survival, regardless of the existence of federal requirements.¹³³ As Monticello Media states, “[t]here are more than enough different voices which collectively provide more than enough opportunities for the discussion of local issues and which force us to work hard every day to be locally focused so we can stay competitive in a crowded market.”¹³⁴

The record of voluntary ascertainment in response to the *Notice* is voluminous.

For instance:

- KTVU(TV), Oakland, California, participates in meetings of the Bay Area Public Affairs Directors each month at which four to six community leaders are invited to discuss issues of concern. Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 37 (Apr. 28, 2008).
- In just the first quarter of 2008, staff of NBCU's 26 television stations have interacted with more than 1000 organizations in their local markets. Comments of NBC Universal, Inc. and NBC Telemundo License Co. at 37 (Apr. 28, 2008).

¹³¹ See Comments of NBC Universal, Inc. and NBC Telemundo License Co. at 37 (Apr. 28, 2008).

¹³² Comments of Cross Texas Media, Inc. at 7 (Apr. 28, 2008).

¹³³ See, e.g., Comments of Prettyman Broadcasting Company at 2 (Apr. 28, 2008); Comments of Dean Spencer of Mitchell Broadcasting Co., Inc. at 4 (Apr. 28, 2008); Comments of Mountain Valley Broadcasting, Inc. at 2 (Apr. 28, 2008); Comments of Wagonwheel Communications Corporation at 2-3 (Apr. 25, 2008); Comments of Taconite Broadcasting, Inc. at 3 (Apr. 28, 2008); Comments of Ad-Venture Media, Inc. at 4 (Apr. 21, 2008); Comments of Withers Broadcasting at 4-5 (Apr. 28, 2008).

¹³⁴ Comments of Monticello Media at 2 (Apr. 28, 2008); see also Comments of Platte River Radio, Inc. at 2 (Apr. 25, 2008).

- WWWC(AM), Wilkesboro, North Carolina, reviews the message boards and meeting agendas for local organizations. See Comments of North Carolina Broadcasters at 10.
- WITN-TV sends out community issues questionnaires to members of the community. *Id.*
- Every Clear Channel station provides contact information to the public, such as direct phone lines, designated station contacts, studio addresses and/or email addresses. Clear Channel Comments at 61.
- WWPR(FM), New York, New York, has a website that includes a dedicated text line for texting music requests from cellphones. *Id.* at 62.
- KABC(TV), Los Angeles, California, conducts town hall public meetings and staff members participate on community boards and advisory groups. Disney Comments at 12.
- KGO “ABC7 Listens” consists of monthly public meetings in various cities within the station’s coverage area at which community stakeholders are invited to speak on any topic to news management, news anchors or reporters. Disney Comments at 11.
- Every six weeks, Moody Bible Institute of Chicago conducts an online survey with a large national “listener advisory board,” designed to solicit the needs and interest of listeners. Comments of Broadcaster Moody Bible Institute of Chicago at 11 (Apr. 25, 2008).
- Nine months out of the year, WVEC-TV, Hampton, Virginia, holds Community Roundtables at which dozens or more leaders from a particular community segment are invited to the station to discuss issues facing them. This past month, WVEC personnel met with representatives of 14 agencies that advocate on behalf of the community’s senior citizens. Comments of Belo Corp. at 7 (Apr. 28, 2008).
- Belo also uses the Internet and other interactive resources to reach out to local viewers, including through interactive web-sites and portions of web sites dedicated to local neighborhood bulletin boards and news forums where viewers can interact with each other and the station. *Id.* at 10.
- GAPWEST Broadcasting’s radio stations provide a forum for local talk shows, local college and high school sporting events, and countless community events. GAPWEST encourages its listeners to notify it of a charity or community function so it can be shared with others, including putting such local information on GAPWEST’s websites. On GAPWEST’s music stations, they use data from their listeners to help determine what

songs they want to hear, which along with other feedback is a major factor in programming each station to suit its listener base. Comments of GAPWEST Broadcasting, Inc. at 1-2 (Apr. 22, 2008).

These are but a few representative examples of licensees' efforts to ascertain the needs and interests of their local communities in the absence of federal regulation. The record submitted in response to the *Notice* contain many more, all of which demonstrate that federal intervention is unnecessary and would in fact be arbitrary.¹³⁵

B. Mandatory Community Advisory Boards Will Raise a Myriad of Problems, Both Predictable and Unforeseen

The Commission's proposal to mandate CABs appears to be little more than a solution in search of a problem and, unfortunately, a solution that is not suitable to the unique circumstances of broadcasters in widely differing markets. A federal obligation to convene and administer mandatory community boards will raise several readily apparent, as well as unforeseen, problems.

First, from a practical standpoint, the Commission has failed to consider the obstacles that broadcasters would face in simply identifying board members and persuading them to serve, particularly in small markets. As Small Broadcasters explain, in small and mid-sized markets there are only so many community leaders to go around. In a market with five broadcast licensees, for example, the Commission's proposal that all licensees convene CABs that represent all segments of the community would create a situation where all five stations are pursuing many of the same

¹³⁵ A regulation "reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1997) (citation omitted); see *ALLTEL Corp. v. FCC*, 838 F.2d 551, 560 (D.C. Cir. 1988) (finding that FCC had failed to justify adoption of a rule because there was "no showing that [the] abuse" to which the rule was directed actually existed and "no showing that the rule target[ed] companies engaged in [the] abuse").

community members to serve on their respective boards, including community members who already likely serve on numerous other voluntary boards.¹³⁶ The broadcasters would have to race to secure commitments from the community leaders or, conceivably, even compete by awarding better stipends or other compensation. The result will be the creation of five CABs that consist of many of the same community members who are spread too thin to participate effectively. In the end, mandatory CABs will be an expensive and ineffective use of the time and resources of both the stations and the CAB members. *Id.* at 17.

Concerns over the composition of these CABs are not limited to small markets. For example, it remains unclear how broadcasters, especially those in larger markets, could ever compose a board that sufficiently represents all segments of its community, as the Commission proposes.¹³⁷ Even assuming there are enough community leaders willing to serve on all the boards in markets with numerous stations like New York or Los Angeles, every station's CAB would need to be quite large and therefore likely unwieldy. Clear Channel Comments at 6, citing *Notice* at ¶ 73.¹³⁸

¹³⁶ See Comments of Small Broadcasters at 20 (Apr. 28, 2008).

¹³⁷ Comments of Broadcast Licensees at 28 (Apr. 28, 2008). And what if one segment of a community is simply not interested in broadcast issues and declines to participate? Could the broadcasters in that community then be in violation of FCC rules and subject to enforcement action? See Comments of Clear Channel at 67.

¹³⁸ See *also* Comments of Florida Association of Broadcasters at 12 (Apr. 28, 2008) (Miami-Fort Lauderdale stations will be competing for community leaders to serve on 58 CABs; even in a smaller market like Tallahassee, FL there are 18 commercial radio stations and 8 television stations, so broadcasters will still need to staff 26 CABs, which will be a logistical nightmare); Comments of WCFR(AM), Amherst, Massachusetts at 10 (Apr. 28, 2008) (because there are over 40 stations operating in the region that WCFR serves and the pool of community leaders is limited, every community leader will be approached by dozens of stations but will be able to accept only a few requests; as a result, stations will find it difficult to recruit willing board members).

CABs could also place substantial burdens on community members, especially given all the other responsibilities of these local leaders. They would have to make time in their busy schedules, possibly travel to meetings, perhaps administer the boards themselves, and undertake other duties. The time commitment involved could actually diminish interaction between these local representatives and their broadcasters, because they would likely choose to devote their limited availability for broadcast-related matters to the formal CAB meetings instead of participating in other worthwhile activities, such as on-air conversations that more directly benefit the public.¹³⁹ NAB further queries that if the same limited number of community leaders serve on several stations' CABs, would these boards be likely to result in increased uniformity of broadcast service to the public? Surely that is not the Commission's goal.

Second, beyond all these issues with merely staffing CABs, the financial toll that administering mandatory CABs would take is substantial. Such burdens could include the time and expense involved in identifying and soliciting community leaders, scheduling and hosting meetings, additional insurance to cover any liability the CAB members may incur, stipends to board members, recordkeeping and record retention, travel and other expense reimbursements, handling of proprietary information, and other unforeseen expenses.¹⁴⁰

¹³⁹ See Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 39 (Apr. 28, 2008)

¹⁴⁰ Comments of NBC Universal, Inc. and NBC Telemundo License Co. at 38 (Apr. 28, 2008); Comments of Michigan Ass'n of Broadcasters at 4-5 (Apr. 7, 2008); Comments of Clear Channel Communications, Inc. at 68 (Apr. 28, 2008); Comments of Crossroads Communications LLC at 2 (Apr. 21, 2008).

For small broadcasters, the Commission's proposal would be especially problematic. Station WJCV(AM), Jacksonville, North Carolina, which offers a southern gospel music format, states: "This extra work and time could cost WJCV radio heavily financially and put us in a financial crisis. Some small stations like ours, the owners like myself or managers do approximately 80% to 95% of the sales in the station. We may not have excessive money to fund this extra work."¹⁴¹ Clearly, mandatory CABs would be inappropriate for the thousands of smaller licensees that face similar obstacles.

Third, mandatory CABs would be extremely difficult to compose and administer in a manner that satisfies all of the interested constituencies. The level of influence a CAB could or would have over programming matters is most troubling. By law, the licensee has always been responsible for all programming aired by a station. Would CABs somehow alter this? Who would be the ultimate decider on what programming ideas must be adopted – the board or the broadcaster?

As ADX Communications explains, it is inevitable that a CAB "composed of multiple constituencies may never agree on a format or content that meets their individual, competing needs; and it is easy to see how the creation of such a Board could create unreasonable expectations on the part of the special interest groups or constituencies. The broadcaster is thrust into the role of mediator, and it is easy to see how communications relations may in fact *suffer from and not improve* from the creation of such a Board."¹⁴² Some CAB members might have little appreciation for a station's choice of format, its target audience or operating budget, which would lead to board

¹⁴¹ Comments of the North Carolina Ass'n of Broadcasters at 9 (Apr. 28, 2008).

¹⁴² ADX Comments at 7. See also Comments of Small Broadcasters at 1-3 (Apr. 28, 2008); Comments of Saga Communications at 15 (Apr. 28, 2008).

complaints that the licensee is not adopting enough of their programming ideas.¹⁴³

Commenters even expressed concern that they would face increased risk of license renewal challenges if they declined to air material favored by certain CBA members.

See Small Broadcasters Comments at 19-20.

The Commission's proposal further envisions the mandatory involvement of local "officials" on CABs, as well as other local leaders, which is troubling since this suggests that local government officials should have a role in deciding which segments of a community merit broadcasters' attention and which content should be aired.¹⁴⁴ Such a suggestion appears contrary to the Commission's long-held policy that, consistent with the First Amendment, content and format selection are areas left to the exclusive discretion of a broadcast station, free from government interference.¹⁴⁵ In light of all these practical, financial and even legal problems raised by the imposition of mandatory CABs, NAB urges the Commission to reconsider this proposal.

C. Mandatory Community Advisory Boards Will Not Promote the Commissions' Goals and Will in Fact Be Counterproductive

Given all the administrative burdens and financial costs associated with mandatory CABs, it is inevitable that CABs will be counter-productive to the Commission's underlying goal of enhancing localism because broadcasters will devote

¹⁴³ Comments of Calvary Chapel of Twin Falls, Inc. at 3 (Apr. 25, 2008).

¹⁴⁴ See Comments of CBS Corporation at 36 (Apr. 28, 2008); Comments of Clear Channel Communications, Inc. at 66 (Apr. 28, 2008); Comments of Holston Valley Broadcasting Corporation at 1-2 (Apr. 29, 2008); Comments of Holy Family Communications, *et al.* at 13-15 (Apr. 28, 2008); Small Broadcasters Comments at 19-20.

¹⁴⁵ See *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); see also Comments of Calvary Chapel of Twin Falls, Inc. at 3 (Apr. 25, 2008); Comments of Marantha Broadcasting Company, Inc. at 1-3 (Apr. 29, 2008).

increased time and resources to complying with the Commission's rules, instead of pursuing proven and cost-effective ascertainment options, as well as other valuable community activities.¹⁴⁶ Gray Television states that “[b]roadcasters should not be required to divert limited resources away from proven, effective methods of communication with their local communities to fund a mandatory CAB, which would be a cumbersome and ineffective method of determining community needs today, as other formal ascertainment requirements were two decades ago.”¹⁴⁷ Another broadcaster states that some “stations may come to regard board meetings (whether or not effective) as the centerpiece of their local community obligations,” regardless of their ultimate effectiveness, thereby inhibiting other station outreach efforts.¹⁴⁸

More importantly, the record demonstrates that the financial burdens of convening and administering mandatory CABs will compel many licensees to find cost savings elsewhere. In eliminating the ascertainment rules for television in 1984, the Commission determined that the “resources which the licensee is forced to expend to satisfy procedural requirements are lost from other potentially beneficial activities, such as program production in response to determined needs.” *TV Deregulation Order*, 98 FCC 2d at 1100. A return to ascertainment in the form of mandatory CABs will turn this conclusion on its head, leaving many licensees with a Hobson's choice between fulfilling the Commission's mandate to administer CABs or engaging in other community-

¹⁴⁶ See, e.g., ADX Comments at 7-8; Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 38; Robinson Corporation Comments at 5.

¹⁴⁷ Comments of Gray Television at 16 (Apr. 28, 2008).

¹⁴⁸ Comments of KJLA(TV), Los Angeles, California at 6 (Apr. 28, 2008).

oriented activities, including programming development.¹⁴⁹ As a result, it is conceivable that the Commission's proposal to require mandatory CABs will directly undermine the underlying purpose of the proposal, namely, to enhance coverage of locally-relevant issues. Clear Channel Comments at 68.

The ultimate potential cost of mandatory CABs would be a loss of service. As one small local broadcaster explains, the Commission's proposal to mandate CABs will hit small broadcasters the hardest: "The unintended effect of such re-regulation is to force such broadcasters to pare back or abandon operations altogether. The end result is that the FCC will unwittingly cause a diminishment of service to the very constituencies to which they pledge to protect and serve. In short, the FCC's proposed localism rules will make it more difficult for radio stations to serve the public interest."¹⁵⁰

In light of all of these consequences of mandatory CABs identified by commenters (and likely unforeseen ones as well), the Commission should reconsider this proposal. Instead, NAB encourages the Commission to provide licensees with the flexibility to undertake a range of ascertainment activities, consistent with the characteristics of their stations and markets.

NAB does not dispute that CABs may be an effective means of ascertainment for some licensees. Certain Clear Channel stations, for example, use what they call "Local Advisory Boards" to help identify community interests. These stations invite community members to participate, and according to Clear Channel, these boards have been

¹⁴⁹ Comments of WONB(FM), Ohio Northern University, Ada, Ohio at 1 (Apr. 28, 2008); Comments of Michigan Association of Broadcasters at 4-5 (Apr. 28, 2008); Comments of Georgia Public Telecommunications Commission at 5 (Apr. 28, 2008).

¹⁵⁰ Comments of ADX Communications at 2 (Apr. 28, 2008); Comments of Calvary Chapel of Twin Falls, Inc. at 3 (Apr. 28, 2008).

largely successful in assisting the stations in identifying significant local issues. Clear Channel Comments at 63.

However, the fact that CABs may be effective and efficient for the largest radio group in the nation to administer at some of its stations is hardly evidence that such boards are suitable for all stations in all markets, especially if these boards are subject to federally imposed structural requirements. As described above, broadcasters utilize a variety of ascertainment methods depending on their specific situations including both formal and informal efforts such as serving on the boards of community organizations, informal meetings with community members, working with organizations on charity events, on-air and off-air interviews and conversations with local public officials, and soliciting input from audience members by email and telephone. See, e.g., Comments of Cox at 38. In small, close-knit communities, localism might be better served through station participation in community organizations, informal focus groups, or town hall meetings. See, e.g., Clear Channel Comments at 72.

Mandating CABs will create incentives for broadcasters to forego these other more suitable efforts in favor of devoting their limited resources to fulfilling the Commission's regulations. As LIN Television states, the "flexibility afforded by the current environment allowed our station to tailor their efforts to their unique communities – the true meaning of localism – and significant resources that would otherwise have been squandered on assuring compliance with rote and rigid requirements have been spent on improving our service to the community."¹⁵¹

¹⁵¹ Comments of LIN Television Corporation at 5 (Apr. 28, 2008); see also Comments of Belo Corp. at 3 (Apr. 28, 2008) (Mandatory CABs would "thwart the flexibility that

Moreover, as Blakeney Communications discusses, mandatory CABs would be “horse & buggy” compared with the lightning speed of today’s technology which Blakeney and other broadcasters use to keep in constant contact with their community leaders and listeners.¹⁵² Almost all stations administer Web sites and actively and publicly solicit input from the community. Stations receive numerous emails from the public, which can directly impact their programming decisions. Indeed, communication from the public to broadcasters has probably never been as prolific as today, due in large part to the Internet. The Commission should not devalue the technology-based efforts of broadcasters to communicate with their audiences as a whole in favor of administratively burdensome in-person meetings with a select few community leaders.

Accordingly, the best approach for the Commission is the one it endorsed over 25 years ago, namely, to allow licensees the flexibility to undertake the ascertainment activities that best suit their particular circumstances. The record submitted in response to the Notice offers no support for reversing course. To the contrary, the record demonstrates an industry-wide pattern of interaction between broadcasters and their local communities, through both formal and informal means as circumstances dictate. Imposing a one-size-fits-all federal mandate is inconsistent with the evidence in the record, fails to take account of rapid changes in communications technologies, and would likely undermine the Commission’s expressed goal of fostering localism by diverting broadcasters’ limited resources away from proven methods of community

stations need to best serve their markets”); Comments of MMTC at 7 (Apr. 28, 2008) (Broadcasters should have “some flexibility in determining their outreach efforts”).

¹⁵² Comments of Blakeney Communications at 5 (Apr. 28, 2008).

interaction and service. Such a change in course would constitute arbitrary and capricious rulemaking. See, e.g., *State Farm*, 463 U.S. at 42.

III. License Renewal Processing Guidelines Are Unnecessary And Contrary To Law

In the *Notice*, the Commission tentatively concluded that it should re-instate license renewal processing guidelines that would effectively require broadcast stations, regardless of format, to air a set amount and even type of local programming, such as local news, political and public affairs. *Notice* at ¶ 40, ¶ 124. NAB opposed this proposal in its initial comments, noting that the Commission had abandoned these same kinds of programming quotas in the early 1980s as being unnecessary, ineffective and a likely violation of the First Amendment.

A. Those Supporting Restrictions on Broadcasters Can Offer No Evidentiary Basis to Warrant Reimposition of Content-Based Programming Requirements

There appears to be little or nothing filed in response to the *Notice* supporting claims that the current license renewal process is ineffective or that the Commission cannot properly scrutinize licensees' performance. Few, if any, commenters provide any evidence to dispute NAB's showing that the "post-card" renewal is a myth.¹⁵³ The record as a whole thus provides no evidentiary basis for the Commission to reimpose

¹⁵³ See NAB Initial Comments, Attachment A, Fletcher, Heald & Hildreth, *Busting the Broadcast "Postcard" License Renewal Application Urban Legend* (demonstrating that the current license renewal process is rigorous and thorough). And as NAB explained in its initial comments (at 26-27), the very few commenters referenced in the *Notice* similarly provided no data or evidence supporting claims that the license renewal process is incapable of providing an effective review of broadcaster performance.

outmoded and legally suspect programming quotas due to unsubstantiated claims about the existing license renewal process.

Suggestions that a new set of processing guidelines will provide broadcasters a more expedited license renewal process are specious.¹⁵⁴ Content-based programming rules likely would result in disputes as to whether the programming reported by broadcast stations properly fulfilled their quotas or fit the FCC's definitions of the required programming, and thus an even slower license renewal process.¹⁵⁵ Given this likely result, other commenters have suggested that the Commission should be hesitant to increase its administrative burdens when it appears that the current license renewal process has already taxed the agency's resources. The Walt Disney Company, for example, notes that recent press reports indicate that it "is simply not prudent for the FCC to increase its burden at a time when there are significant backlogs."¹⁵⁶ NAB agrees.

Beyond illogical suggestions that greatly increased regulatory burdens would somehow expedite license renewals, the *Public Interest Coalition* also offers a host of new public interest obligations to be imposed on the broadcast industry.¹⁵⁷ Their "wish list" of new obligations, includes, but is not limited to, specific mandates that every station, regardless of format or target audience, air programs that cover local elections.

¹⁵⁴ See Comments of Public Interest Public Airwaves Coalition at 4 (Apr. 28, 2008) ("*Public Interest Coalition*").

¹⁵⁵ NAB also notes that programming quotas would inevitably increase the burden of the license renewal process with even more demanding record-keeping and lengthy reporting forms.

¹⁵⁶ Comments of the Walt Disney Company at 21 (Apr. 28, 2008) (citing "License Renewal Logjam Persists at FCC," *Television A.M.*, Feb. 8, 2007, *available at* 2007 WLNR 2861094) ("*Disney Comments*").

¹⁵⁷ See Comments of *Public Interest Coalition* at 2-3.

These new proposed mandates are more content-specific and burdensome than the license renewal obligations the Commission eliminated in the early 1980s, which required broadcasters to air a set amount of non-entertainment programming generally.¹⁵⁸ In light of today's increasingly competitive media marketplace – one far more competitive and diverse than in the 1980s -- the *Public Interest Coalition* cannot demonstrate any evidentiary or legal basis for reimposing programming quotas more intrusive and burdensome than the rules previously eliminated by the FCC as imposing significant costs on licensees and unnecessary to meeting its regulatory objectives.¹⁵⁹

The *Public Interest Coalition* and a few others suggest, without any corroborating evidence or citation, that the record shows broadcasters have fallen far short of their duty to provide public service.¹⁶⁰ In reality, as we note above and in our previous filings,

¹⁵⁸ One commenter, Withers Broadcasting, suggests that the Commission might consider a framework akin to the FCC's Equal Employment Opportunity regulations. While not fully fleshed out, under this proposal the agency would identify certain local initiatives such as broadcasting local news, local weather, or local college sporting events that would emphasize the kind of service the broadcaster is providing to its community. The Commission would not specify any minimum percentage of such programming, but the licensee would be free to choose some of these initiatives to highlight in their renewal applications. Withers emphasized that "a specific minimum percentage of news, public affairs and other non-entertainment programs would be counterproductive." Comments of Withers Broadcasting at 3-4 (Apr. 28, 2008).

¹⁵⁹ *TV Deregulation Order*, 98 FCC 2d, at 1088-89. As noted by CBS, nothing in the record supports a conclusion that television stations are today providing less than the amount of community responsive non-entertainment programming that the FCC found sufficient to warrant deregulation in 1984. See Comments of CBS Corp. at 24 (Apr. 28, 2008). Indeed, the FCC itself has found that the number of hours of news and public interest programming aired on television stations has increased over time. See *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13664-65 (2003) (comparing the number of hours of this type of programming in 1960, 1980 and 2003 in different markets).

¹⁶⁰ See, e.g., Comments of Capitol Broadcasting Company, Inc. at 2-3 (Apr. 28, 2008). Capitol's comments appear to follow the same flawed logic as the *Notice*, which suggests that despite hundreds of comments from broadcasters across the country demonstrating a clear and consistent record of public service, there remains a subset of

the record shows that broadcast stations are dedicated to public service, offer vast amounts of local programming, make significant investments in news and weather technology, and are fully connected to their local communities. It would be arbitrary and capricious to adopt these rule changes on mere conjecture from media critics that have failed to provide data or even anecdotal evidence to counteract the substantial evidence submitted by broadcasters and third-party groups.

B. Broadcasters Have Shown That Reimposing Programming Quotas Is Legally Unjustifiable and Contrary to the Public Interest

NAB explained in detail in our initial comments that the Commission does not have the authority to re-impose license renewal guidelines.¹⁶¹ Nearly every broadcaster that commented on the subject agreed with our assessment that the First Amendment also likely bars the Commission from imposing content-based programming quotas on broadcasters.¹⁶² Many broadcasters have suggested that they would likely air

“bad actors,” the existence of which somehow justifies the imposition of burdensome and constitutionally questionable regulations on even the vast majority of “good” broadcasters. This line of argument is illogical, contrary to law, and inconsistent with the facts. If there were indeed any significant numbers of broadcasters failing to provide adequate public service, then the past two license renewal cycles would surely have generated more than a mere handful of petitions to deny and objections. See Introduction, *supra*.

¹⁶¹ See NAB Initial Comments at 41-45. NAB demonstrated that the Commission lacks the statutory authority to make license renewals dependent on the broadcast of particular content. See *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 802-803 (D.C. Cir. 2002).

¹⁶² See Comments of Belo Corp. at 21-23 (Apr. 28, 2008); Comments of NBC Universal at 26 (Apr. 28, 2008); Comments of Cox Broadcasting and Cox Radio Inc., at 48-56 (Apr. 28, 2008) (It is not enough for the Commission to “merely state that its regulations are designed to serve a laudable goal such as localism – the Commission must show that absent regulation there is in fact some imminent threat to government interest.”); Comments of ION Media Networks at 16-21 (Apr. 28, 2008); Comments of the Florida Association of Broadcasters at 3 (Apr. 28, 2008) (“Ultimately, editorial decisions – which are acts of speech and protected under the First Amendment – should be made by a

programming they would not otherwise air to comply with the government mandate.¹⁶³

Many commenters take exception to what they have described as a “raised eyebrow” approach to regulation. The message sent by the Commission through this type of regulation is clear – broadcasters that do not air enough of the kinds of programming determined to be “good” or “better” will face a much more difficult and risky license renewal than broadcasters who comply with the government’s “guidelines.”¹⁶⁴

Commenters are in near universal agreement that content-based renewal guidelines “clearly place the FCC in the business of program regulation.”¹⁶⁵

Some commenters have suggested that because the Commission would not be mandating specific types of programs, the rule does not violate the First Amendment.¹⁶⁶

This misreads the FCC’s proposal, and represents a fundamental misunderstanding of First Amendment jurisprudence. A rule requiring broadcasters to air *local* programming,

station’s editorial staff, not by officials in Washington.”); Comments of The Walt Disney Company at 21 (Apr. 28, 2008) (“Such a review inevitably will involve the FCC in endless questions of the quality of programming content, and raises serious questions of constitutionality”).

¹⁶³ See Comments of Blakeney Communications Inc., at 8 (Apr. 28, 2008) (“Whether, consciously or subconsciously, broadcast licensees will alter their programming and music selection or free speech decisions to meet whatever these implied programming expectations may be in order to stay out of trouble.”).

¹⁶⁴ See Comments of Alabama Association of Broadcasters, Alaska Association of Broadcasters, *et al.*, at 53-54 (Apr. 28, 2008) (“It’s like a teacher threatening to send the misbehaving student to the principal’s office. The raised eyebrow effectively communicates the unmistakable threat of dire consequences should the licensee fall short of the minimum levels required by the rules.”).

¹⁶⁵ See Comments of The Buckley Broadcasting Companies, *et al.* at 38 (Apr. 28, 2008).

¹⁶⁶ See Comments of Capitol Broadcasting at 3 (Apr. 28, 2008). These comments do not even address the question of the FCC’s *statutory* authority to adopt program-based renewal guidelines. NAB also notes that the most vocal proponents of programming quotas, the *Public Interest Coalition*, does not even attempt to demonstrate such quotas are consistent with the First Amendment.

a specific type of programming defined by the Commission, represents a constitutionally-questionable infringement on broadcasters' editorial discretion. In fact, in eliminating its previous quotas for general "non-entertainment" programming, the Commission found that this requirement "raise[d] potential First Amendment concerns."¹⁶⁷ The Commission, moreover, inquires whether these new "local" programming requirements should cover very specific types of programming, including local news, political, public affairs and entertainment. See *Notice* at ¶ 124. A requirement that stations air set amounts of local political programming could hardly be more specific and, thus, constitutionally suspect.¹⁶⁸ Furthermore, as we noted in our initial comments, the *Notice* fails to adequately provide a definition for local or "locally-oriented" programming. This difficulty in even defining the type of programming that would be the basis of new programming rules additionally demonstrates the serious constitutional problems (including vagueness and overbreadth) inherent in any such rules. And to the extent that the Commission adopts content-based regulations applicable to all broadcast licensees in all markets, it raises constitutional concerns for failing to employ the least restrictive alternative to further its interest in promoting local service.¹⁶⁹

Similarly, suggestions that the Commission should mandate that broadcasters air a set amount of "locally-produced" programming should be rejected.¹⁷⁰ As explained in

¹⁶⁷ *TV Deregulation Order*, 98 FCC 2d at 1088-89.

¹⁶⁸ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650, 652 (1994) ("*Turner I*"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998).

¹⁶⁹ See Comments of Clear Channel Communications, Inc., at 12 (Apr. 28, 2008).

¹⁷⁰ See *Public Interest Coalition* at 15.

our initial comments, it “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.”¹⁷¹ Commenters agree that a “locally-produced” requirement is unnecessary, and fails to consider the differences between stations that serve small and large communities.¹⁷²

Some media critics also suggest that any measurement of broadcaster programming should include, in addition to a quantitative measurement, some ability to weigh the “quality” of programming.¹⁷³ In fact, both qualitative and quantitative measurements of programming have significant drawbacks for assessing the service of local stations. As NAB and others noted in their initial comments, any attempt by the Commission to regulate the “quality” of broadcaster programming would be hopelessly subjective and would clearly run afoul of constitutional restrictions. See NAB Initial Comments at 35, *see also infra* Section VII. Other commenters note that the determination of what qualifies as local will invariably “involve the FCC in endless questions of the quality of programming content.” See Disney Comments at 21. With

¹⁷¹ See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12431 (2004) (“*Localism NOI*”). See also *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983).

¹⁷² See Joint Comments of Television Broadcasters at 19 (Apr. 28, 2008) (“National, regional and state-wide news coverage often addresses issues of local concern. A Chicago television station’s coverage of the Illinois governor’s speech on a new jobs program before the state legislature in Springfield or a network newsmagazine’s story on teen pregnancy aired in Luna County, New Mexico, where birth rates are among the highest in the country unquestionably deals effectively with issues of interest to local communities, and should therefore be included in the category of locally responsive programming.”).

¹⁷³ See Comments of National Association of Telecommunications Officers and Advisors at 6 (June 2, 2008) (“[W]e believe that any guidelines imposed should include a “quality” component to help ensure that such local programming is indeed responsive to the unique needs and interests of the community.”).

regard to a quantitative approach, the Commission noticed “the lack of a direct nexus” between such an approach “and licensee performance” when eliminating its previous television program guidelines in 1984. *TV Deregulation Order*, 98 FCC 2d at 1089. As some commenters now explain, quantitative renewal processing guidelines might provide an inaccurate picture of how broadcasters are serving their community.¹⁷⁴ Indeed, these guidelines may in fact reduce the overall responsiveness of local programming, as broadcasters adjust their programming efforts to satisfying the minimum requirements of the quota.¹⁷⁵

Beyond these serious statutory and constitutional concerns, commenters have made it very clear that programming quotas are unnecessary and burdensome. Several broadcasters noted that the new rules would require them to hire a “compliance officer” or shift personnel away from other positions.¹⁷⁶ Blakeney Communications, for

¹⁷⁴ See Comments of Moody Bible Institute of Chicago at 14 (Apr. 25, 2008) (“Any guidelines will become merely superficial numerical ‘goals’ to be met by licensees without regard for truly and substantively serving the problems, needs and interests of its listeners.”).

¹⁷⁵ See Comments of Findlay Publishing Company of Findlay, Ohio at 8 (Apr. 25, 2008) (“The conditioning of a license renewal on the airing of certain *quantities* of programming artificially restricts, and can actually reduce, the effectiveness of a local broadcast licensee in providing programming that meets ascertained needs of the community.”). See also *Nat’l Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978) (finding that quantitative program standards for comparative renewals “would do more to subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission”).

¹⁷⁶ See Comments of WKMS-FM at 3 (Apr. 28, 2008) (“... any further reporting or new license renewal processing guidelines would increase our administrative costs. We want to put all available resources into programming, not administration.”); Consolidated Comments of 34 Licensees and Permittees Operating 112 Stations at 13 (Apr. 28, 2008) (“Stations that are already struggling financially do not have the funds necessary to hire additional personnel to monitor and document local programming.”); Comments of New Media Broadcasters at 3 (Apr. 25, 2008) (“It now appears the commission wants us to hire a compliance officer to document all of our programming efforts in the form of

example, estimates that it will have to hire an additional full-time employee to handle the extra paperwork and filing duties.¹⁷⁷ The real world ramifications of these rule changes cannot be ignored by the Commission. Rules that require broadcasters to hire new administrative employees or dedicate more managerial efforts toward satisfaction of government mandates will have a cumulative negative effect on the overall quality of broadcast programming, and thus, are contrary to the public interest. The Commission should refrain from adopting intrusive and legally suspect regulations that will have these adverse unintended effects.

IV. The Record Demonstrates That There Is No Legally Sustainable Justification For Re-Imposing A Ban On Unattended Operations

An overwhelming majority of commenters oppose the reinstatement of a prohibition on unattended station operations. They assert that the current rule has served the public well by facilitating many more hours of service on stations that used to be off the air overnight. Commenters are concerned that re-imposing the ban would divert resources from programming and services for the public to overnight staffing. They also are concerned that the talent and skill level of the personnel who could be recruited for overnight staffing positions would be a poor substitute for the current system in which expert station staff are “on call” to address emergency, disaster, or severe weather situations. Comments in the record show that the Commission’s rationale for eliminating the ban on unattended operations has only been strengthened by technological developments that make remote or unattended operations even more

new Renewal Program Guide rules. The adverse economic impact of these regulations is crushing and oppressive to a small group of radio stations.”).

¹⁷⁷ See Comments of Blakeney Communications Inc. at 8 (Apr. 28, 2008).

sophisticated. Re-imposing the ban when there is no countervailing public interest benefit or other reasoned explanation would be arbitrary and capricious.

A. The Public Has Been Well Served by the Elimination of the Ban

Several commenters assert that efficiencies arising from the ability to operate on a remote or unattended basis have permitted them to improve and expand service to the public. The Alaska Broadcasters Association reports that the current rules have allowed member stations to “reallocate funds to better serve our community on a consistent daily basis.”¹⁷⁸ Another commenter states that operating unattended for portions of operating hours allows “production staff to concentrate on production,” which is essential to the station’s ability to offer 70 hours per week of locally produced programming.¹⁷⁹ Commenters assert that in order for broadcasters to compete effectively with other media outlets and offer compelling content, they must be permitted to use the efficiency-enhancing technologies used by other media outlets.¹⁸⁰

In addition to expanded hours of service and efficiencies that allow broadcasters to offer better quality programming, the public benefits from access to emergency news and alerts during hours when many stations would otherwise be off the air. The record demonstrates that a combination of modern equipment, prior planning, and collaboration with local public safety officials ensures that local broadcasters are well-prepared to respond to emergencies. The Commission should continue to allow the

¹⁷⁸ Comments of Alaska Broadcasters Association at 2 (Apr. 28, 2008).

¹⁷⁹ Comments of Guenter Marksteiner, Owner and Operator of Station WHDT-DT at 5 (Apr. 28, 2008). See also Comments of Saga Communications, Inc. at 24 (Apr. 28, 2008) (unattended operations allow station to afford “top personalities” in programming arena).

¹⁸⁰ Comments of Guenter Marksteiner, Owner and Operator of Station WHDT-DT at 5 (Apr. 28, 2008).

public to benefit from technological advancements that allow broadcasters to offer valuable and potentially life-saving service to their viewers and listeners.

As NAB discussed in our initial comments, broadcasters who operate remotely have detailed plans in place that allow them to respond promptly in the event of emergencies.¹⁸¹ Saga Communications, Inc. (“Saga”), for example, reports that during hours of unattended operations, full-time announcers share the responsibility of being “on call” on a rotating basis.¹⁸² When on call, the announcer is responsible for monitoring news and weather and, if necessary, going to the station’s facilities to ensure that appropriate information gets on the air, including bringing in additional support staff as needed.¹⁸³ Several other commenters observe that advance planning and use of technology permit station managers and staff to act swiftly in the event of an emergency.¹⁸⁴ Although there was a time decades ago when technology required a

¹⁸¹ See NAB Initial Comments at 47-48 and Attachment C.

¹⁸² See Comments of Saga Communications, Inc. at 20 (Apr. 28, 2008).

¹⁸³ See Comments of Saga Communications, Inc. at 20 (Apr. 28, 2008). Saga has been recognized by local public officials and others for its award-winning coverage of a tornado which occurred during unattended hours. Although there was extensive damage to property, Saga was credited with the fact that not one fatality occurred. *Id.* at 21, n. 41 (Marmaduke, Arkansas Mayor Nilean Drope credited the stations with “sav[ing] our town.”).

¹⁸⁴ See, e.g., Comments of National Religious Broadcasters Comments at 3 (Mar. 25, 2008) (emergency warnings are effectively handled by automated EAS equipment and member stations routinely keep live staff “on call”); Comments of Hernando Broadcasting Company, Inc. at 1 (Apr. 25, 2008) (unattended operation during overnight hours does not prevent station personnel from responding quickly in an emergency); Comments of Richard Underbakke, President, Cloud Community College at 1 (Apr. 25, 2008) (commenter “has personally witnessed staff at KNCK/KCKS updating [emergency] information remotely using their cell phones. If for some reason during an emergency there needs to be someone on site at the station, they are there.”); Comments of John Kennedy of Bond Broadcasting at 2 (Apr. 25, 2008) (reporting that technology allows reliable access to radio stations from a remote location and that the EAS system “automatically takes over stations immediately and broadcast alerts,”

physical presence at the transmitter during all operating hours, today's reliable technology allows station personnel to activate EAS equipment remotely, and, if necessary, interrupt regularly scheduled broadcasts from a remote location to deliver critical information.¹⁸⁵ One commenter reports that its general manager has a custom built remote pickup transmitter unit installed at his home. This system has been used to provide severe weather coverage, news of an evacuation due to a hazardous gas leak and school closing information due to inclement weather.¹⁸⁶

The record reflects that the emergency plans developed by individual licensees allow them to best utilize available technology and the expertise of station management and staff to address the unique needs of each station's particular community. Indeed,

regardless of whether stations are "manned or unmanned"); Comments of Craig J. Eckert, Executive Vice President of Platte River Radio Inc. at 2-3 (Apr. 24, 2008) (today's technology allows station manager and his staff to have Internet-mail, NOAA weather, cell phones, land lines, Associated Press "at [their] fingertips" so they can "put[] emergency news or weather information live on air day or night" within a matter of seconds); Comments of Joe Jindra, General Manager and Co-Owner of KNCK-KCKS(FM) at 4-5 (Apr. 25, 2008) (personnel share responsibility of being "on call" using a station cell phone; law enforcement personnel have the home and cell phone numbers of station programming staff; uses automated EAS alerts); Comments of Mississippi Valley Broadcasters, LLC and White Eagle Broadcasting, Inc. at 2-3 (Apr. 24, 2008) (states that stations' EAS equipment monitors National Weather Service and automatically transmits information; licensee is represented on local emergency planning committee; and station management monitors local EAS frequency from home); Comments of KLQP-FM at 1 (Mar. 19, 2008) (cites use of EAS equipment to deliver automated messages and use of a professional service to update weather automatically via file transfer protocol; additionally, "[i]f an emergency arises we come to the studios and physically staff the facility until the emergency is over."); Comments of Barry Broadcasting Co. at 2 (Apr. 24, 2008) (EAS messages, Severe Weather Bulletins and Amber Alerts are quickly forwarded to listeners; personnel live within a few miles of studio and can respond quickly to emergency situations).

¹⁸⁵ Comments of Prettyman Broadcasting Company at 7 (Apr. 28, 2008).

¹⁸⁶ See Comments of Saga Communications, Inc. at 21 (Apr. 28, 2008).

NAB knows of no comments that provided any examples of stations failing to respond to emergencies.

Continued flexibility is needed to ensure that stations can be as responsive as possible given the unique facts and circumstances of their individual communities of license. Overly restrictive measures such as the re-imposition of a ban on remote operations would present a two-fold harm to the provision of emergency news and alerts. First, as discussed further below, the cost of staffing during all broadcast hours is likely to force numerous stations to cut operating hours, and no emergency information can be relayed to the public by a station that is off the air. Second, commenters report that the relative inexperience of the staff that could be recruited to work at a station during late night hours could actually reduce the speed and quality at which emergency messages are relayed to the public.¹⁸⁷ The overnight entry-level staff

¹⁸⁷ Comments of Alaska Broadcasters Association at 2 (Apr. 28, 2008) (emergencies are best handled by managers and news professionals who can be reached via cell phone and access programming via technology, rather than an “entry level person being paid minimum wage to baby sit the studio overnight”); Comments of Priority Communications Inc. at 4 (Apr. 28, 2008) (staff working late nights and weekends would be entry level and would probably need to “call station management or the news director before acting, delaying response time”); Comments of Cheyenne Mountain Public Broadcast House, Inc. at 4 (Apr. 28, 2008) (station licensees would be entrusting the continued operation of the station to personnel with very little experience in broadcast operations); Comments of NRC Broadcasting Mountain Group, LLC at 8 (Apr. 28, 2008) (“it is difficult to get someone who can manage to do much more than operate a board for the \$10 an hour, which is about what stations can afford to pay part-time labor in these markets”); Comments of Houston Christian Broadcasters, Inc. at 13 (Apr. 28, 2008) (“Staffing a radio station does not necessarily insure a faster or better response to local emergencies... Automatic EAS responses are faster in initial notifications to the general public related to local emergencies.”); Comments of Hernando Broadcasting Company, Inc. at 1 (Apr. 25, 2008) (“a properly functioning EAS system is the quickest and best link from officials to the community”); Comments of Ohio Association of Broadcasters at 14 (Apr. 28, 2008) (“The addition of a ‘new’ requirement that station personnel be on site during all hours of operation would impose a burden with no corresponding benefit, as emergency information would be

would be ill-equipped to handle such emergency situations, which are best left to the automated service and to expert station personnel as is the case under the current system.

B. The Costs Imposed by 24/7 Staffing Would Reduce Local Programming and Service

The record contains substantial data quantifying the high costs of compliance with an unattended operations ban, and the estimated costs of compliance are staggering. According to a survey conducted by the Association of Public Television Stations (“APTS”), 94% of participating stations would have to hire at least one full-time engineer to meet the requirement.¹⁸⁸ Fox Radio Network, Inc., which operates six small market stations, reports that staffing during current operating hours would cost \$4,468.60 per station. If these costs are combined with the costs of compliance with the main studio rule, the licensee would spend an estimated \$411,447.20 during the first year of compliance—which is more than four times its current after-tax profit.¹⁸⁹ LeSEA Broadcasting Corporation reports that staffing its stations will cost a prohibitive \$60,000 per station per year.¹⁹⁰ Christian Family Network Television, Inc. anticipates spending \$16,000 per year to comply—a figure that would represent 20-25% of its annual budget.¹⁹¹ NRC Broadcasting Mountain Group, LLC estimates that, if it can find

disseminated in precisely the same (automated) manner as it is under the current regulations”).

¹⁸⁸ Comments of the Association of Public Television Stations and the Public Broadcasting Service at 19 (Apr. 28, 2008).

¹⁸⁹ Comments of Fox Radio Network at Attachment 1 ¶ 2 (Apr. 28, 2008).

¹⁹⁰ Comments of LeSEA Broadcasting Corporation at 6 (Apr. 28, 2008) (“Measured against the lack of benefits from such a requirement, that cost is prohibitive for LeSEA and many other broadcasters.”).

¹⁹¹ Comments of Christian Family Network Television, Inc. at 7 (Apr. 28, 2008).

employees to staff stations at night, the cost of compliance at its 13 stations would be \$375,648.¹⁹² A noncommercial broadcaster that operates a statewide public television network of 11 stations estimates that it would need to hire 66 new employees at a cost of \$3 million in payroll expenses alone, not including additional infrastructure.¹⁹³ Another licensee reports that it would be “devastat[ed]” by adoption of a ban on unattended operations, which would cost an estimated 15% of its annual revenue.¹⁹⁴ Georgia Eagle Broadcasting, Inc. states that because of “enormous economic changes in difficult economic times,” it would not exist but for the ability to use automation.¹⁹⁵ De La Hunt Broadcasting Corp. reports that one of its stations garners monthly sales revenue of just \$2,600, and that full time staffing would “likely force it to terminate its operation of the facility.”¹⁹⁶ Other commenters cite problems unrelated to the cost of staffing, noting that many stations are operated remotely out of necessity due to the isolated location of their facilities: “Requiring these stations to have an around-the-clock physical presence is not only potentially costly, but also potentially dangerous.”¹⁹⁷

¹⁹² Comments of NRC Broadcasting Mountain Group, LLC at 9 (Apr. 28, 2008).

¹⁹³ Comments of UNC Center for Public Television at 4 (Apr. 25, 2008).

¹⁹⁴ Comments of Fannin County Broadcasting Co., Inc. at 21 (Apr. 28, 2008).

¹⁹⁵ Comments of Georgia Eagle Broadcasting, Inc. at 14 (Apr. 28, 2008).

¹⁹⁶ Comments of De La Hunt Broadcasting Corp. at 20 (Apr. 28, 2008).

¹⁹⁷ Comments of The Broadcaster Coalition at 32 (Apr. 28, 2008) (in very remote areas, “station personnel required to fill shifts late at night or early in the morning could be isolated and difficult to reach in cases of medical or weather emergencies. More likely than not, station managers would elect to go dark during these periods of the day rather than put their employees at risk.”). See also Comments of the Association of Public Television Stations and the Public Broadcasting Service at 20 (Apr. 28, 2008) (one member station has a transmission site located in an environmentally controlled state park with no road access; the station would have to transport its engineers by helicopter (in winter) or snowcat (in fall and spring) every 48 hours); Comments of Cheyenne Mountain Public Broadcast House, Inc. at 4 (Apr. 28, 2008) (rule would force stations to

Unfortunately, the only way for many licensees to recover the costs of compliance will be to reduce or terminate the very services that make their stations a valuable resource for the public. Commenters urge the Commission consider carefully the fact that “around the clock staffing would have serious adverse financial consequences and could make the difference between continuing service and no service at all.”¹⁹⁸ Stations responding to the APTS survey state that to comply with the requirement, they would reduce operating hours by at least five and as much as 10 hours per day, reduce local production by as much as half, reduce staff in other areas, and, in some cases, discontinue service entirely.¹⁹⁹ The record is replete with comments echoing these concerns.²⁰⁰

hire personnel to sit through “graveyard shifts” at studios that are not always located in well-lit or well-populated areas, especially between midnight and 7 AM).

¹⁹⁸ Consolidated Comments of 34 Licensees and Permittees at 7 (Apr. 28, 2008).

¹⁹⁹ Comments of the Association of Public Television Stations and the Public Broadcasting Service at 21-22 (Apr. 28, 2008).

²⁰⁰ See, e.g., Comments of Four Seasons Media, Inc. at 4 (Apr. 28, 2008) (resources presently spent on local news gathering and other public affairs programming would have to be diverted to paying for staffing); Comments of Guenter Marksteiner, Owner and Operator of Station WHDT-DT at 5 (Apr. 28, 2008) (“The cost of adding staff to sit at the station during all broadcast hours would require a reduction of the budget for ‘on location’ shooting in the community since other costs are fixed.”); Comments of Evelyn Massaro of Station WNMU-FM at 3 (Apr. 28, 2008) (station would be forced to reduce hours of operation or some local program productions “which is the most expensive programming to produce”); Comments of NRC Broadcasting Mountain Group, LLC at 9 (Apr. 28, 2008) (licensee would be forced to exclusively use satellite programming); Comments of Alaska Broadcasters Association at 1 (Apr. 28, 2008) (some member stations surveyed would have to go off air overnight; most reported that they would have to reallocate staff currently working on news and other community projects, thereby harming localism); Comments of Stony Creek Broadcasting, LLC at 2 (Apr. 28, 2008) (estimates that it would have to reduce on-air hours by approximately 30%); Comments of Alleycat Communications at 1 (Apr. 28, 2008) (“costs incurred would be so great that most small locally owned stations would simply choose to shut down at night, resulting in less, not more, service to the public”); Comments of MonsterMedia at 4 (Apr. 30, 2008) (if ban is eliminated, commenter “would have to consider going dark at a certain

Such service reductions would only reduce the amount of programming available to the public. Instead of multiple sources of emergency information from several stations during late night, overnight, and early morning hours, emergency management agencies seeking to get their messages to the public would have to hope that viewers and listeners are tuned in to whatever options may remain in their markets. Several commenters expressed concerns about the ability of viewers and listeners to access critical information, including one commenter who noted that “Many people still do not have [National Oceanic and Atmospheric Administration] weather radios and rely completely on the automated EAS at their local radio station to alert them.” If stations are forced to scale back hours as a result of a rule change, a “tragically unnecessary loss of life could result from the lack of dissemination of tornado warnings,” particularly in areas where severe weather often strikes at night.²⁰¹

C. Given the Potential Public Interest Harms of a Ban on Unattended Operations and a Lack of Countervailing Benefits, the Current Rule Should Be Retained

Of the thousands of comments filed in this proceeding, less than a handful favor limitations on unattended operations.²⁰² The National Association of

time each evening because of the staffing issue”); Comments of WDAC Radio Company at 7 (Apr. 28, 2008) (increasing barriers to entry through such requirements as staffing during all broadcast hours is detrimental to prospective broadcasters and those that serve niche audiences).

²⁰¹ Comments of Alleycat Communications at 1-2 (Apr. 28, 2008).

²⁰² Reply Comments of the National Association of Telecommunications Officers and Advisors at 5-6 (May 20, 2008); Comments of Adam Rivers at 1 (Apr. 28, 2008). Mr. Rivers, who states that he is employed by two radio stations, asserts that revisions to the unattended operations rules will “create more jobs” and “lead to more talent and the revitalization of our industry.” He proposes a tiered system under which markets of various sizes would have differing obligations to staff their stations for a certain number of hours (*i.e.*, ranging from 24/7 staffing in markets 1-100 to 4 hours/day of staffing for

Telecommunications Officers and Advisors asserts that because the “vitality of PEG stations [is] in question,” all broadcast stations must be staffed in order to ensure public access to public safety information.²⁰³ To the contrary and as demonstrated above, reimposition of the ban on remote station operations will *reduce*, not increase, the availability of emergency information to the public, and NATOA presents absolutely no evidence or information in support of its claims.²⁰⁴ NATOA’s citation to a quotation from a newspaper article for the proposition that installation of EAS-compatible equipment is “voluntary” does nothing to contradict what is plainly stated in rules promulgated by the Commission—which mandate the installation of such equipment when stations are operated remotely.²⁰⁵ The record is *overflowing* with examples of cooperation between broadcasters and public safety agencies and personnel. Yet, even though the localism docket has been open for nearly four years (during which time transcripts from multiple

AM stations in markets smaller than 250 or unrated areas). Mr. Rivers does not explain why the changes he proposes are necessary to meet Commission goals, why the specific tiering system proposed is necessary or appropriate, or how the changes he advocates could increase “talent” or “vitality” in radio broadcasting. Mr. Rivers also does not discuss how the stations where he works—or any other broadcast stations—would be able to afford expanded staffing requirements. As discussed at length above, record evidence demonstrates that a staffing requirement would divert human and financial resources away from the high-quality programming viewers and listeners seek, which will only direct talented staff away from production of programming and detract from the overall vitality of broadcasting.

²⁰³ Reply Comments of the National Association of Telecommunications Officers and Advisors at 5 (May 20, 2008).

²⁰⁴ NATOA does not even attempt to demonstrate that its underlying premise—that PEG is in jeopardy—has some factual basis. Indeed, the only citations in NATOA’s entire pleading, aside from citations to the *Notice* and NAB’s initial comments, are to news stories and to NATOA’s own testimony concerning the Commission’s video franchising rulemaking proceeding. In any event, if there are some problems with PEG channels on cable systems, then those concerns should be addressed directly, rather than imposing unrelated and counterproductive restrictions on broadcast stations.

²⁰⁵ Reply Comments of NATOA at 5-6.

hearings have been entered into the record and three rounds of formal comment have been filed), NATOA still can identify no record evidence or real world examples suggesting that the current unattended operation rules do not serve the public interest. Simply stated, that is because there *is* no such evidence. Commenters make clear that the Commission's proposal to improve stations' emergency response capabilities by requiring staffing during all hours of broadcast operation is unnecessary, and will likely reduce, rather than increase, public access to programming, news and information about severe weather, disasters, and other emergencies. It would constitute arbitrary and capricious rulemaking to enact this proposal.

V. The Record Fully Documents The Public Interest Harm That Would Result From A More Restrictive Main Studio Rule

The vast majority of commenters contend that returning to a more restrictive main studio rule is not legally sustainable. Comments in the record show that the rationales for the Commission's previous relaxation of the rule apply with even greater force today, and at the same time, there is no evidence of any public interest benefit that would result from reverting to an outmoded rule. As one commenter stated, the Commission "already has an extensive record establishing that a governmental mandate that main studios must be located within certain political boundaries does not benefit the listener, and nothing in the way of new factual evidence suggests that this well-supported finding should be revisited or revised."²⁰⁶

A. The Proposed Rule Change Has No Relationship to the Commission's Stated Goals

²⁰⁶ Comments of CBS Corporation at 42 (Apr. 28, 2008).

Comments filed in this proceeding demonstrate that reverting to the pre-1987 main studio rule would not promote the Commission's stated goals of increasing interaction between stations and their communities of license or increasing the amount of programming originated within the community.²⁰⁷ The record overflows with examples of the ease with which the public can communicate with their local stations today, and means of communication are expanding and becoming more sophisticated every day.²⁰⁸ Indeed, NAB knows of no initial comments that complained of difficulty in accessing stations' studios. Commenters also assert that there is no relationship between a station's studio location and the responsiveness of its programming to community needs.²⁰⁹ Rather, the record demonstrates that it is the station's ability to

²⁰⁷ *Notice* at ¶ 41.

²⁰⁸ See, e.g., Comments of Airen Broadcasting *et al* at 9 (Apr. 28, 2008) (communication occurs primarily via mail, phone, fax or Internet); Comments of North Carolina Association of Broadcasters at 29 (Apr. 28, 2008) (interaction is encouraged and is made easier by communications technology); Comments of Small Broadcasters at 6 (Apr. 28, 2008) (rationale for relaxation of rule is even more compelling now due to interaction via Internet); Comments of Holston Valley Broadcasting Corporation at 3 (Apr. 28, 2008) (establishing and staffing multiple studios in this age of instant communication is "wastefully duplicative"); Comments of Qantum Communications Corporation at 4 (Apr. 28, 2008) (email has become the public's "preferred means of communication" with stations); Comments of Gray Television, Inc. at 22 (Apr. 28, 2008) (overwhelming majority of viewer communication is via Internet, especially email, blogs and bulletin boards); Comments of Clear Channel Communications, Inc. at 99-100 (Apr. 28, 2008) (the average American is no longer tied to a single community but is "more mobile than ever and actively participate[s] in multiple communities").

²⁰⁹ See, e.g., Comments of Slone Broadcasting, LLC at 4 (Apr. 17, 2008) ("mandating a particular [studio] location does not necessarily create local programming as the Commission envisions"); Comments of Gray Television, Inc. at 19 (Apr. 28, 2008) (in Gray's experience, "there is no connection between the amount and quality of local programming provided by stations physically located within their community of license and those stations located outside their community of license"); Comments of Qantum Communications Corporation at 5 (Apr. 28, 2008) (the Commission assumes that there is "a necessary correlation between a licensee's responsiveness to community issues and the location of its main studio in the community of license" but fails to provide any evidence of such a correlation because "[i]n fact, there is none"); Comments of Named

devote time, personnel, and other resources to maintaining a relationship with the community that make stations successful.²¹⁰ Commenters provide numerous examples of how co-located studios have enabled them to better serve their listeners and viewers.²¹¹ Cox, for example, reports that shared main studios permits the scheduling of on-air interviews with community leaders on multiple stations, facilitating long form discussions on Cox stations with news/talk formats and shorter form interviews with a targeted focus suitable for Cox music stations.²¹² Shared main studios also allow Cox to provide the best possible service to their communities in the event of a natural disaster or other emergency.²¹³ As one commenter explained, to survive in today's competitive marketplace, broadcasters "must remain close to the heart and soul of their

State Broadcasters Associations at 8 (Apr. 28, 2008) (although the record in this proceeding is "voluminous," it "contains *no* evidence that reverting to the pre-1987 main studio rule would have any effect on local origination of programming").

²¹⁰ See, e.g., Comments of The Walt Disney Company at 23 (Apr. 28, 2008) ("it is the local actions of the station management and not the location of the studio that affects how the station interacts with the community").

²¹¹ See, e.g., Comments of Mississippi Valley Broadcasters, LLC and White Eagle Broadcasting, Inc. at 2 (Apr. 24, 2008) (economies of scale arising from co-located studios allowed them to reduce satellite feeds and increase local programming); Comments of Legend Communications of Wyoming, LLC at 2 (Apr. 24, 2008) (operating multiple stations from one main studio enabled owner to "afford the vibrant news, sports and community presence that we have maintained for many years"); Comments of AGM California *et al* at 9-10 (Apr. 28, 2008) (rule has provided station groups, especially those in smaller markets, with "additional resources to provide more and better programming responsive to the needs and interests of their listenership").

²¹² Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 41-42 (Apr. 28, 2008). Cox states that community leaders and other guests often visit its Orlando, FL studio to participate in a lengthy interview with news/talk format Station WDBO(AM), Orlando, FL, followed by a shorter form interview for Station WPYO(FM), Maitland, FL, which has a dance music format. *Id.*

²¹³ *Id.* at 42-43. In Hawaii, a single telephone call allows civil defense and emergency management agencies to get a message out to all six Cox stations, "reaching the diverse audiences of those stations as quickly and effectively as possible." But if the rule were revised, Cox would have to operate from four separate studios. *Id.*

business—their viewers and advertisers ... [i]f a station is located outside its community of license, it is because that location allows it to be *more* responsive to its viewers' needs, *not less*.”²¹⁴ The record shows that the existing rule permits broadcasters some flexibility in locating their studios while permitting easy interaction with viewers, listeners, and local newsmakers.

B. Expenses and Lost Efficiencies Resulting from the Rule Change Would Necessitate Reductions in the Amount and Quality of Service to the Public

In addition to demonstrating that a rule change would fail to accomplish the Commission's stated goals, commenters identify a myriad of ways in which a more restrictive rule would *harm* broadcasters' ability to offer programming and services that meet the needs of their communities. Such harm would result primarily from the overwhelming financial burden that a rule change would impose upon broadcasters large and small, diverting resources from service to the public, hindering investment in the industry, and threatening the viability of numerous stations. In addition to the costs of relocating and paying higher rents,²¹⁵ commenters report that relocation would force

²¹⁴ Comments of Gray Television, Inc. at 25 (Apr. 28, 2008) (emphasis added).

²¹⁵ See, e.g., Comments of LeSEA Broadcasting Corporation at 2 (Apr. 28, 2008) (to comply, would have to relocate a television station at a cost of up to \$600,000 and a radio station at a cost of \$100,000 and spend an additional \$144,000 per year in annual operating expenses); Comments of Saga Communications, Inc. at 25, fn. 3-4 (Apr. 28, 2008) (to comply with a pre-1987 main studio rule and a ban on unattended operations, Saga would have to relocate and staff three studios at a total estimated cost of \$600,000 per year, not including the one-time relocation costs); Comments of NRC Broadcasting Mountain Group, LLC at 11 (Apr. 28, 2008) (currently spends \$737,000 per year for programming, rent, and utilities but estimates costs would increase to \$2,085,000 per year if forced to relocate); Comments of Blakeney Communications, Inc. at 2 (Apr. 28, 2008) (licensee is “doubtful that any bank would loan us the \$800,000 to \$1 million that would be required to relocate four separate studios from our centrally located, state of the art facilities” and “double or triple the size of our staff and build four

them to break leases²¹⁶ and lose the value of major improvements made to their facilities in reliance on the Commission's rules.²¹⁷ Commenters report that if the rule is revised, compliance will, at a minimum, divert resources away from the provision of

new STL towers"); Comments of The Walt Disney Company at 24 (Apr. 28, 2008) (26 of the 41 Disney radio stations are located outside their respective communities of license and changes would have "severe practical and financial impacts on these stations"); Georgia Public Telecommunications Commission at 8 (Apr. 28, 2008) (if the Commission no longer permits main studio waivers, commenter would have to relocate 23 studios at a cost of \$200,000 per year and \$80,000 in capital costs); Comments of Horizon Broadcasting Group, LLC at 2-3 (Mar. 17, 2008) (moving would involve a one-time cost of \$375,000 plus annual costs of \$233,800); Comments of Clear Channel Communications, Inc. at 102 (if forced to relocate existing studios, Clear Channel would have to establish 84 new main studios at a total cost of between \$67 and \$168 million, excluding costs of moving and additional overhead); Comments of Named State Broadcasters Associations at 9 (Apr. 28, 2008) (station WKNR(FM), Williamstown, KY would have to spend \$200,000 to move only one mile into its community of license, even though it has never received any complaints in any form from members of the public stating they are inconvenienced or ill-served by the location of the station's main studio); Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 44 (Apr. 28, 2008) (in the Birmingham, Alabama market, Cox would have to construct five new studios at an estimated cost of \$500,000 to \$750,000 not including land acquisition or leasing costs, additional staffing costs, and other ongoing operating expenses); Comments of ION Media Networks, Inc. at 23, 26 (Apr. 28, 2008) (compliance would cost more than \$50 million plus another \$6 million if required to maintain a constant physical presence).

²¹⁶ Comments of Morris Broadcasting Company of New Jersey, Inc. at 1 (Apr. 28, 2008) (proposed main studio rule change "would have a devastating effect on many independently owned stations such as WIMG-AM, which are locked into long term studio leases (or, in some instances, own their studio buildings), the location of which is outside of their actual community of license"); Comments of KJLA, LLC at 5 (Apr. 28, 2008) (requiring stations to give up owned or leased property represents a "significant expense"); Comments of Forever Broadcasting at 9 (Apr. 28, 2008) (forcing stations to break leases will cause legal problems and monetary penalties).

²¹⁷ See, e.g., Comments of The Walt Disney Company at 23 (Apr. 28, 2008) (spent more than a hundred million dollars on improvements to the facilities of a new studio for Station KABC in Glendale, just outside the community of license); Comments of Stony Creek Broadcasting, LLC at 1 (Apr. 28, 2008) ("we invested approximately \$100,000 of our mom-and-pop money into leasehold improvements, believing that we could operate from this very accessible location forever ... how could we now tear this down, throw the improvements away, and start over at a new studio location?"); Comments of Gray Television, Inc. at 23 (made an investment of \$8 million in main studio for Station WCTV-TV which would be lost if forced to relocate).

quality programming to stations' viewers and listeners.²¹⁸ Many commenters predict far worse consequences and anticipate that a rule change will result in stations going dark.²¹⁹ Reduced programming, the loss of independent voices, or the complete loss of

²¹⁸ See, e.g., Comments of Horizon Broadcasting Group, LLC (Mar. 17, 2008) (if rule is changed, “[w]e will be forced to put radio stations back on satellite and sacrifice the locally-produced programming content”); Comments of Mary Patricia Leurck, CEO Starboard Media Foundation, Inc. at 5 (Apr. 14, 2008) (“[a] requirement to again relocate back inside the community boundaries would divert valuable programming dollars to relocation efforts”); Comments of Joe Jindra, General Manager of Stations KNCK(FM) and KCKS(FM) at 4 (Apr. 25, 2008) (rule change could have “the unintended consequence of less localism and not more” because “the expense of acquiring, maintaining, and operating additional studio locations could very well come from reduction of personnel” responsible for generating local content); Comments of Center for Regulatory Effectiveness at 11 (Apr. 25, 2008) (reversion to old rule “will result in limited resources (financial and management) that could have been used for programming and meeting community needs (such as public service broadcasts) instead being wasted on duplicative overhead costs such as real estate, information systems and other equipment. The result harms the ability of broadcasters to serve their local communities.”); Comments of AGM California *et al* at 9-10 (Apr. 28, 2008) (expenses associated with rule change would “necessarily require the AGM companies to reduce the total amount of news and non-entertainment programming”); Comments of Georgia Public Telecommunications Commission at 8 (Apr. 28, 2008) (the “cost and diversion of resources from programming” that would be required by a rule change “cannot be justified, particularly when there are reasonable, and substantially less expensive, means of facilitating local community input”); Comments of Alleycat Communications at 1 (Apr. 28, 2008) (“increased operating costs of real estate, utilities, and other essential goods and services encountered in relocating a studio to a more upscale suburb may reduce the funds available for locally produced content”); Comments of Nexstar Broadcasting, Inc. at 2 (Apr. 28, 2008) (only by co-locating multiple station studios can Nexstar afford to produce and broadcast local news for viewers in the Champaign-Springfield-Decatur DMA).

²¹⁹ See, e.g., Comments of Montana Public Radio at 4 (Apr. 18, 2008) (operator of six noncommercial stations reaching one-half the population of Montana would “be forced to cease operation of four of the six transmitters” if the pre-1987 rule is reinstated); Comments of Dean Spencer of Mitchell Broadcasting Co., Inc. at 6 (Apr. 24, 2008) (owner of two co-located Indiana stations already tried unsuccessfully to operate the stations from separate studios and concludes that a relocation “would only lead to shutting down the station, and leaving the community without a local radio service”); Comments of New Media Broadcasters at 2 (Apr. 25, 2008) (current owner of three stations in northern Montana is able to operate profitably when “the previous owners could not” because of reduced operating expenses. If station must be operated from a separate facility “it will probably go dark again...this time permanently”).

a broadcast voice due to a station going dark are all contrary to the Commission's longstanding policy goals of localism, diversity, and competition. These cannot be the results the Commission intends, but they are certainly the results that will ensue if the main studio rule is tightened.

The financial impact of a reversion to the pre-1987 rule extends beyond costs to existing broadcasters to the very value of broadcast stations and incentives to invest in the broadcasting industry. For example, if existing operations are left intact, but studios had to be split up when licenses are assigned or transferred, the consequences could be ruinous. As one commenter explained: "Even if we are 'grandfathered in' to maintain our studios where they currently are, such a mandate would devalue our properties and their salability, as a prospective owner could not assume our studios."²²⁰ Other commenters note that they were awarded licenses through auctions and that their bids reflected their reliance on the existing regulatory regime, including "the assumption that clusters could operate out of one main studio facility."²²¹ A post-auction change that so significantly impacts permittee expenses certainly raises questions of fundamental fairness for the winning bidder, but it also has the potential to result in undervaluation of construction permits and the reduction of interest in, and revenue generated by, future broadcast auctions.²²²

²²⁰ See Comments of Midwestern Broadcasting Company (Apr. 14, 2008). See also Comments of Michigan Association of Broadcasters at 2 (Apr. 7, 2008) (stations' "resale value would be diminished").

²²¹ Comments of Legend Communications of Wyoming, LLC at 3 (Apr. 24, 2008).

²²² Regulatory certainty is critical to generating marketplace interest in spectrum auctions. See, e.g. *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150; *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, Second Further Notice of Proposed Rulemaking, FCC 08-128 (rel. May 14, 2008) at Separate Statement of

Beyond the high expense of relocation, commenters have identified technical and other practical implementation problems resulting from proposed changes to the main studio rule. One commenter reported that it relocated its studio to a larger community because of “technical issues encountered in getting the signal from [the former studio in the community of license] to the tower” because the station’s community of license is in a valley, terrain-shielded from the station’s transmitter site.²²³ Thus, flexibility in studio location is sometimes necessary to overcome technical hurdles. The proposed changes also could adversely affect stations’ ability to attract or retain qualified personnel.²²⁴ Commenters further report that requiring relocation to the community of license would, in many cases, make it *more difficult* for stations to interact with the

Chairman Martin (further notice seeks to “ensure the commercial viability of [the 700 MHz public-private partnership] by providing greater certainty to all parties involved”).

²²³ Comments of Cheyenne Mountain Public Broadcast House, Inc. at 2 (Apr. 28, 2008). See also Comments of Nevada County Broadcasters, Inc. at 2-3 (Apr. 28, 2008) (due to terrain issues, only 10% of available office space in the station’s community of license meets line of sight needs, as compared with 90% of office space in neighboring community).

²²⁴ See Comments of NRC Broadcasting Mountain Group, LLC at 11 (Apr. 28, 2008) (location change would impose “difficulties on employees”); Comments of Stony Creek Broadcasting, LLC at 1-2 (Apr. 28, 2008) (move would affect staff commutes, child care, and ability to get to station in adverse weather); Comments of Alleycat Communications at 1 (Apr. 28, 2008) (“a forced relocation of the studio to an impoverished area lacking educational opportunities could make it difficult to attract talented and experienced staff, essential for creating informative programming” so “station management should retain the flexibility to make this decision [about studio location] based on their knowledge of the unique pros and cons that apply to each station and specific needs and resources of the community”); Comments of Pollack Broadcasting, Inc. at 4 (Apr. 29, 2008) (“Broadcasters must also consider the employment pools from which they must draw their staff and commuting patterns when picking a location for their main studio.”); Comments of Midwestern Broadcasting Company (Apr. 14, 2008) (relocation would impose more transportation costs on employees).

community and vice versa.²²⁵ For example, one broadcast commenter reports that station personnel are more likely to run into community leaders at restaurants, meetings, community events and shops in the community where its studio is located than in its community of license because that is where more activity takes place.²²⁶ Clearly, the proposed rule change will adversely affect service to the viewing and listening public in innumerable ways.

C. The Rule Will Disproportionately Impact Small, Niche and Minority-Owned Stations

Several commenters share NAB's concerns about the disproportionate impact of further restrictions on main studio location on "new broadcast entrants, stations with lower operating power, and stations that serve niche or rural audiences."²²⁷ In our initial comments, we observed that such stations and smaller stations generally "would have the fewest resources to bear the costs of a more restrictive main studio rule," and urged

²²⁵ See, e.g., Comments of Cox Broadcasting, Inc. and Cox Radio, Inc. at 41-42 (Apr. 28, 2008); Comments of Blakeney Communications, Inc. at 3-4 (Apr. 28, 2008); Comments of Stony Creek Broadcasting, LLC at 1-2 (Apr. 28, 2008); Comments of Lucky Kidd, News Director for Ad Astra per Aspera Broadcasting, Inc. (Apr. 28, 2008); Comments of Thomas P. Mogush of Taconite Broadcasting at 4 (Apr. 28, 2008).

²²⁶ Comments of Blakeney Communications, Inc. at 3-4 (Apr. 28, 2008). See also Comments of Stony Creek Broadcasting, LLC at 1-2 (Apr. 28, 2008) ("[m]any stations' main studios have naturally been located in their service area's population center, allowing for convenient access by most of the public that it serves"); Comments of Lucky Kidd, News Director for Ad Astra per Aspera Broadcasting, Inc. at 1-2 (Apr. 28, 2008) (Commission fails to account for "the overlap in community interests that is often seen in rural areas," citing, for example, that one station's community of license is part of four different school districts and three counties); Comments of Thomas P. Mogush of Taconite Broadcasting at 4 (Apr. 28, 2008) (over 50% of the people who live in the city of license work in the city where station's studio is located; building serves as a central location for local civic groups who use the studio's conference room for meetings); Comments of Voice for Christ Ministries at 1 (Apr. 14, 2008) (current studio is close to three major state highways; relocating studio to community of license would make studio less accessible).

²²⁷ See NAB Initial Comments at 66-67.

the Commission to “carefully consider the disproportionate impact of its proposed rule changes on smaller broadcasters and their audiences.”²²⁸ The record developed in this proceeding shows that smaller and weaker stations will be disproportionately affected by a rule change for two reasons: In addition to having fewer resources, these stations also are more likely to be forced to relocate their studios than their larger, more established counterparts.

MMTC and ISBA explain that reversion to the pre-1987 rule would “impose a greater disadvantage on broadcasters who entered the industry later and were unable to assemble clusters of stations which shared the same community of license.”²²⁹ Because minority broadcasters and those who broadcast in languages other than English did not begin to receive radio licenses until the 1950s or television licenses until the 1970s, they “generally had to accept stations with weaker signals licensed to suburban communities,” and they “frequently have had to assemble clusters of stations licensed in several separate, suburban communities of license.”²³⁰ As one example, MMTC and ISBA cite the Los Angeles radio market, where a reversion to the rule would cause Clear Channel to set up two studios for nine stations, while Hispanic-owned Liberman Broadcasting would require five main studios for its six stations.²³¹ MMTC and ISBA observe that a company required to construct more studios will be unable to

²²⁸ *Id.*

²²⁹ Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association at 8-9 (Apr. 28, 2008).

²³⁰ Supplemental Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association at 4 (May 8, 2008).

²³¹ Supplemental Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association at 4 (May 8, 2008). MMTC and ISBA commissioned a study of how the rule would affect minority-owned broadcasters. See *Id.* at Appendices A-D.

offer investors the same returns on investment as competitors who have to spend less.²³² And because “capital goes where it’s welcome,” broadcasters saddled with more studio construction expense would face even greater difficulties in attracting capital.²³³

This concern also is shared by NBC Universal (“NBCU”), which states that “studio relocation costs are likely to fall disproportionately on smaller, weaker, newer and less established stations, because these stations have been allotted more frequently to smaller communities within a market.” As an example, NBCU notes that of its 10 NBC affiliates, only one is licensed to a smaller community other than the major market hub.²³⁴ By contrast, seven of NBCU’s 14 Telemundo affiliates are licensed to smaller communities outside of their markets’ major cities.²³⁵ As these commenters have demonstrated, a main studio rule change would not only impose financial burdens on stations that are in the worst position to shoulder them—it also will impose such burdens on a disproportionate number of these stations as compared to other broadcasters. The record thus demonstrates that the proposed rule change would disserve the Commission’s longstanding goals of promoting diversity and new entrants.

D. Imposing a More Restrictive Rule Would be Arbitrary and Capricious

Although hundreds of commenters identified public interest harms that would result from a more restrictive rule, only a mere handful of commenters support the proposed rule change, and they offer no legal arguments, empirical evidence, or public

²³² Supplemental Comments of the Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association at 6 (May 8, 2008).

²³³ *Id.*

²³⁴ Comments of NBC Universal at 35 (Apr. 28, 2008).

²³⁵ *Id.*

interest rationale to support their proposals. Accordingly, the Commission should reject these proposals and retain the current rule.

Without pointing to any evidence, NATOA claims that changes to the cable franchising regime have caused reductions in support for public, educational and governmental (PEG) access programming.²³⁶ To remedy this problem, NATOA urges the Commission to reinstate the pre-1987 main studio rule because “*any* initiative that *may* result in broadcasters being more responsive to local needs and concerns must be encouraged.”²³⁷ Even if there has been such a decline in PEG support, the remedy for this problem certainly cannot be found in a change to the main studio rule. As explained above, studio location has no relationship to the responsiveness of station programming to the local community, and a tighter rule will actually reduce the provision of locally responsive content. Moreover, alteration of a rule affecting free over-the-air radio and television *broadcast* stations would do nothing to address a perceived problem with lack of support for PEG channels on locally franchised *cable* systems. Finally, NATOA’s suggestion that the Commission could mandate “any initiative” because it “may” achieve a particular result—without a careful balancing of the public

²³⁶ Reply Comments of the National Association of Telecommunications Officers and Advisors (“NATOA”) at 7 (Jun. 2, 2008). NATOA also asserts that the mere fact that comments are being sought or filed concerning the main studio rule means that relaxation of the rule in 1998 was “ill-advised.” *Id.* at 6. By this reasoning, there would be no need for any notice-and-comment rulemaking proceedings; the Commission’s very decision to seek views and data on a subject would be sufficient to warrant some form of regulatory change.

²³⁷ *Id.* at 7 (emphasis added).

interest harms and benefits of that initiative—flies in the face of the Communications Act, the Administrative Procedure Act, and Commission and court precedent.²³⁸

Similarly, commenter James Costello urges the Commission to “limit or end studio waivers” and to allow groups to “challenge studio-waived broadcasters if those broadcasters cannot provide programming that deals with local issues.”²³⁹ Rule waivers are granted or denied based on the Commission’s evaluation of the particular facts and circumstances of the request, on a case-by-case basis. Blanket eradication of all waivers is inconsistent with longstanding Commission policy, and Mr. Costello does not demonstrate that this change is necessary or appropriate.²⁴⁰ Mr. Costello’s request for

²³⁸ See, e.g., *ALLTEL Corp. v. FCC*, 838 F.2d 551, 560 (D.C. Cir. 1988) (FCC’s modification of cost accounting rules for local exchange carriers was found arbitrary and capricious, as the FCC did not show that its elimination of the “possibility of some unknown amount of suspected abuse” under the old rule “outweighs the other disadvantages” of the FCC’s new rule); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (rules restricting eligibility of certain cellular entities to bid on new wireless licenses were found arbitrary because FCC failed to show “documentary support for its asserted fears” that the market for new wireless services would be detrimentally affected if these cellular providers became wireless licensees).

²³⁹ Comments of James Costello at 3 (Apr. 28, 2008). Mr. Costello states that his filing is on behalf of the board of the Modesto Peace Life Center.

²⁴⁰ Mr. Costello appears to favor a regime in which members of the public have unfettered use of broadcast stations and their facilities to air whatever programming content they select. Comments of James Costello at 3 (Apr. 28, 2008) (broadcasters should provide “certain hours access for the community to use”). Broadcasters are not common carriers, and have never been required to allow members of the public access to their stations. Indeed, the Communications Act and Commission precedent require a licensee to maintain control of the station. See 47 U.S.C. 310(d) (“No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”). Control is generally determined by who controls a station’s programming, personnel, and finances. See *WGPR, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 8140, 8142-46 (1995), *vacated on other grounds sub nom, Serafyn v. F.C.C.*, 149 F.3d 1213 (D.C. Cir. 1998);

authorization to “challenge” broadcasters requires no relief. When studio waivers are requested, the Commission seeks and considers public comment on those requests, and members of the public may oppose waiver grant. In addition, like any individual or organization, Mr. Costello is free to contact any station to share his views on whether it serves the public interest, and he may also file comments or a petition to deny a station’s application for license modification, renewal, transfer or assignment.²⁴¹

Finally, the National Federation of Community Broadcasters (“NFCB”) expressed support for waivers of the main studio rule but proposed that “any station operating under a main studio rule [sic] should be required to provide evidence that the station is responsive to the needs of the community of license.”²⁴² NFCB suggests that stations with a main studio waiver could satisfy its proposed new evidentiary showing by airing a certain number of hours of programming originating in the community of license; holding a board meeting in the community of license; or by having board members who live there.²⁴³ NFCB’s proposals will not contribute to greater station responsiveness, and should not be adopted in connection with a waiver standard or other main studio rule or policy. First, the record in this proceeding demonstrates the lack of any connection

Choctaw Broadcasting Corporation, Memorandum Opinion and Order, 12 FCC Rcd 8534, 8538-39 (1997).

²⁴¹ 47 U.S.C. § 309(d).

²⁴² See Letter from Parul P. Desai, Media Access Project, on behalf of the National Federation of Community Broadcasters to Marlene H. Dortch, FCC Secretary at 1 (filed May 22, 2008 in MB Docket No. 04-233).

²⁴³ It is unclear whether NFCB seeks application of its proposal only to their noncommercial members or to all broadcast stations generally. NFCB states that its suggestions were intended to “minimize any burden community broadcasters could face.” See Letter from Parul P. Desai, Media Access Project, on behalf of the National Federation of Community Broadcasters to Marlene H. Dortch, FCC Secretary at 1 (filed May 22, 2008 in MB Docket No. 04-233).

between a station's main studio and its responsiveness to community needs. Thus, there is no basis to impose arbitrarily a new evidentiary showing on stations that appropriately choose to locate their studios outside their communities of license. Moreover, none of the criteria for responsiveness identified by NFCB would foster meaningful interaction between stations and their communities or demonstrate station responsiveness to community needs. As the Commission has previously held, the fact that programming *originates* in a community does not necessarily mean it is responsive to that community.²⁴⁴ NFCB also offers no explanation of how holding board meetings in a particular location would demonstrate responsiveness to a station's community of license.²⁴⁵ In reality, a station's local managers and personnel are well-positioned to determine the needs and interests of the station's listeners and viewers, regardless of where licensee board meetings take place.²⁴⁶ NFCB's third suggestion, to prove a station's responsiveness by identifying board members who reside in the community of license, is strikingly similar to the "local integration preference" for broadcast comparative hearings which was invalidated by a court fifteen years ago because the Commission was unable to demonstrate that it improved licensees' ability to meet

²⁴⁴ See NAB Initial Comments at 8-9, 57-60, 64-65 (discussing the Commission's elimination of program origination requirements).

²⁴⁵ Numerous broadcast licensees are small limited liability companies, partnerships or sole proprietorships which have no boards, so it is not clear how this showing would even apply to them. Even for broadcast licensees with boards of directors, it is not clear what relationship a board meeting location could have to station responsiveness. Board business is not public, so the suggestion does not appear to present any opportunity for interaction with viewers or listeners.

²⁴⁶ In Section II above, NAB has described the myriad ways station licensees and managers ascertain the needs and interests of their local communities.

community needs.²⁴⁷ Requests for waiver of the main studio rule should continue to be evaluated by the Commission on a case-by-case basis, without evaluative criteria that have been rejected in the past.

The Commission can only conclude from the record in this proceeding that the main studio rule continues to strike the appropriate balance between permitting needed flexibility and ensuring continued community interaction. No “reasoned analysis” for adopting a more restrictive rule can be supplied based on the record herein.²⁴⁸

VI. The Record Shows No Support For Proposals To Regulate The Airing Of Local Artists, Compilation Of Play Lists Or Use Of Voice Tracking

The record submitted in response to the *Notice* largely affirms NAB’s initial comments concerning the Commission’s proposed regulation of stations’ use of voice tracking, methods of playlist compilation or airing of local artists. Of the broadcasters who responded on these issues, most state that they make limited use of voice tracking, and air a significant amount of local artist material. Our review of the record found no commenters supporting government regulation in these areas.

Voice tracking is essentially the pre-recording by local talent of certain portions of programming for airplay at a later time, typically the same day, to free-up time for other studio assignments.²⁴⁹ Thus, the practice of voice tracking in the radio marketplace differs from the Commission’s conception, which equates voice tracking with the “importation” of foreign market personalities. *Notice* at ¶ 101. The Commission further

²⁴⁷ See *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (FCC’s local integration 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”).

²⁴⁸ *State Farm*, 463 U.S. at 42.

²⁴⁹ Comments of Broadcast Licensees at 24 (Apr. 28, 2008).

claims that the use of voice tracking reduces the presence of licensees in their communities and impairs a station's ability to discern the needs and interests of its local audience. *Id.* However, the record indicates that the broadcasting industry's use of voice tracking technology is decidedly limited and does not have these deleterious effects. Clear Channel, for example, approximates that only 8% of dayparts on all of its stations are voice tracked. Clear Channel Comments at 78. Their stations typically only use voice tracking during overnight hours and on weekends, and such technology is never completely relied upon because many stations' staff members live nearby. *Id.*

The record further indicates that voice tracking in fact benefits both broadcasters and their listeners. This is particularly true for minority broadcasters, who believe that voice tracking is a "necessary, costsaving means of providing high-quality programming."²⁵⁰ The cost efficiencies of voice tracking allow broadcasters to better afford the production of community-responsive programming, including local news and public affairs. Stations leverage the economies of voice tracking to devote their scarce resources towards creating more listener responsive programming. See NAB Initial Comments at 40. Additionally, voice tracking enables broadcasters to focus their personnel resources into serving their local communities by participating in community board and town council meetings, and other community events. Clear Channel Comments at 79-80.

The record demonstrates that voice tracking also enables broadcasters to expose their local audiences to on-air talent who sometimes reside out of town. *Id.* at

²⁵⁰ Comments of Minority Media and Telecommunications Council and the Independent Spanish Broadcasters Association at 6 (filed Apr. 28, 2008).

79. The voice tracked material is moreover localized as recorded personalities, whether residing in the community or out-of-town, typically familiarize themselves with the markets in which they will be heard, allowing them to discuss local issues and events that serve the interests of community listeners. *Id.* Thus, there is no evidentiary basis for restricting the use of voice tracking to promote localism.

Intervention in the marketplace to regulate the airing of local artists is also unnecessary. Any claims that radio playlists are “devoid”²⁵¹ of local artists are unfounded. In fact, some commenters cite that 86% of stations surveyed currently air music from local artists,²⁵² even though there is no research to conclude whether local listeners actually prefer to listen to local artists.²⁵³ In fact, some veteran broadcasters claim that they have never seen any research suggesting that local audiences wish or prefer that radio stations play more local artists, and that listener requests of such local music is “extremely rare.”²⁵⁴ Radio stations must play what listeners most want to hear, whether local, national or international.²⁵⁵ Moreover, the Commission offers no guidance on what would constitute a “local” artist, since an artist’s locale does not have any bearing on the quality of the music or any factors that may relate to the variety and diversity of members of a local community.²⁵⁶ Defining which artists are “local” would

²⁵¹ Comments of Common Frequency at 48 (Apr. 28, 2008).

²⁵² Comments of Alaska Broadcasters Association at 2 (Apr. 28, 2008).

²⁵³ Comments of Priority Communications at 11 (Apr. 28, 2008).

²⁵⁴ Comments of Jay Martin Philippon, President of Priority Communications (30 years experience in the broadcasting industry) at 10 (Apr. 28, 2008).

²⁵⁵ *Id.* at 11.

²⁵⁶ Comments of Moody Bible Institute of Chicago at 13-14 (Apr. 25, 2008).

be difficult, if not impossible, since even internationally-known artists have a connection to some local community.²⁵⁷

Finally, the record shows no basis for requiring stations to report on how they compile their playlists. *See Notice* at ¶ 52. Requiring submission of explanations and data as to playlist formulation presumes that stations have formalized procedures in place for keeping such lists,²⁵⁸ or for that matter, that radio stations use so-called playlists at all, neither of which is shown in the record. Moreover, a Commission mandate to submit such lists could undermine competition by forcing stations to divulge their “secret recipe” for attracting listeners.²⁵⁹ Overall, the proposal to collect playlist information might cause more harm than good to broadcast programming and the competitive marketplace. The proposal also raises concerns that the Commission is overreaching and intervening into broadcasters’ discretion and editorial judgment, contrary to the First Amendment.²⁶⁰ The monitoring of local artist airtime or the methods for selecting songs and artists for consideration during review of a station’s license renewal would most certainly place significant pressure on the station to air the kinds of programming satisfying the Commission’s concerns, not the needs and interests of local listeners.

²⁵⁷ Comments of Ohio Association of Broadcasters at 27 (Apr. 28, 2008). *See also* NAB Initial Comments at 83-84.

²⁵⁸ Comments of Clear Channel at 90.

²⁵⁹ Comments of Peter F. Tanz, Market Manager of Midwest Communications, Inc. at 5 (Apr. 28, 2008); Comments of Clear Channel Communications, Inc. at 91 (Apr. 28, 2008).

²⁶⁰ Comments of Michigan Association of Broadcasters at 6-7 (Apr. 07, 2008). *See also* NAB Initial Comments at 81-84.

The broadcasting industry urges the Commission not to adopt restrictions on use of voice tracking, compilation of playlists, or airing of local artists. No evidence suggests that broadcasters' utilization of voice tracking programs is excessive or otherwise harmful to the public interest. Governmental involvement in radio stations' selection and airing of music programming is unwarranted, given the lack of any evidence showing that radio broadcasters are not responsive to the needs and interests of local audiences, and also raises constitutional concerns.

VII. Studies Referenced In The Localism Report Provide No Basis For Intrusive, Burdensome And Constitutionally Suspect Regulation

The *Localism Report* cited a number of studies pertaining to broadcast localism generally and to political programming specifically. NAB's review of these studies, however, shows that they do not provide a sufficient basis to justify the regulations proposed in this proceeding.

A. The Localism Studies Do Not Justify the Adoption of Extensive Regulation in this Proceeding

The three localism studies discussed in the *Localism Report* (at ¶¶ 37 and 38) do not support the adoption of unnecessary, burdensome and legally questionable regulation to promote localism. One of these studies conducted a further analysis of earlier FCC data, which had found that network affiliated television stations co-owned with newspapers aired more and higher quality local news than other network affiliates.²⁶¹ This study confirmed the positive relationship between the provision of local news programming and newspaper ownership, but found "the size of the market in

²⁶¹ See FCC, Thomas C. Spavins, Loretta Denison, Scott Roberts and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs* (2002).

which a station operates” to be of even “greater importance.”²⁶² Specifically, the *Television Ownership Study* found that stations in “larger markets tend to provide more local news programming than stations in smaller markets,” likely due to the “greater revenue potential for stations in larger markets.” *Id.* at 119. With regard to local public affairs programming, “only station revenue emerge[d] as an important explanatory factor,” as “stations in better financial standing are more inclined to incur the expense of providing local public affairs programming.” *Id.*

As NAB noted in the FCC’s recent quadrennial ownership review proceeding, these findings only confirmed earlier studies establishing connections between station profitability and the provision of news and other non-entertainment programming.²⁶³ In light of this demonstrated connection between stations’ revenues and the provision of resource intensive programming, especially news and public affairs, the Commission must, in this proceeding, avoid the imposition of burdensome and unnecessary regulations that would sap stations’ limited resources and have the unintended consequence of reducing valuable programming and services. Certainly the *Television Ownership Study* does not provide a basis for the imposition of costly regulatory

²⁶² Philip M. Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, 6 *Info: The Journal of Policy, Regulation, and Strategy for Telecommunications, Information, and Media* 112, 119 (2004) (“*Television Ownership Study*”).

²⁶³ See NAB Reply Comments in MB Docket No. 06-121 at 49-50 (Jan. 16, 2007) (citing 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)). See also FCC, Daniel Shiman, *The Impact of Ownership Structure on Television Stations’ News and Public Affairs Programming* at I-21 (July 24, 2007) (linking television station revenues and the provision of news programming); Gregory Crawford, *Television Station Ownership Structure and the Quantity and Quality of TV Programming* at 23 (July 23, 2007) (finding that larger markets devote a greater share of programming minutes to local news).

requirements such as those proposed in the *Notice* that would particularly burden smaller market stations with more limited revenue potential.

NAB discussed another of the “localism” studies referenced in the *Localism Report* in its comments in the quadrennial ownership review proceeding.²⁶⁴ The *Market Structure Paper* attempted to show that there is an insufficient amount of local public affairs programming, and asserted that ownership by one of the networks decreased a television station’s probability of offering any such local programming. However, the statistical analysis in the *Market Structure Paper* is flawed due to the nature of the data. Simply put, to determine the effect of one explanatory variable (e.g., ownership by a major network) on the amount of local public affairs programming, that explanatory variable must be independent of the other explanatory variables (e.g., VHF station or group ownership). In this case, there is no such independence and, in fact, many of the explanatory variables are highly correlated with one another, making the results highly questionable. Ironically, this paper also found that affiliation with a major network had a significant *positive* relationship on a station’s likelihood of carrying public affairs programming (local or national) and on the total amount of public affairs programming aired by a station.

The *Market Structure Paper* further lauds noncommercial stations for airing more local public affairs programming than commercial stations, and argues that commercial stations should therefore be explicitly required by government to air more of this “essential” programming, regardless of marketplace demand. See *id.*, Conclusion

²⁶⁴ See NAB Reply Comments in MB Docket No. 06-121 at 74-75 (Jan. 16, 2007), discussing Michael Yan & Philip M. Napoli, *Market Structure, Station Ownership, and Local Public Affairs Programming on Local Broadcast Television*, Working Paper, The Donald McGannon Communication Research Center (2004) (“*Market Structure Paper*”).

Section. As NAB explains in more detail below, the government cannot base constitutionally sound broadcast regulation on opinions about the worth or merit of particular programming. Moreover, the Commission cannot ignore the essential differences between noncommercial and commercial television stations in this regard. Commercial stations must provide a variety of both entertainment and informational programming to attract audiences and vital advertising revenues, and thus remain financially viable.²⁶⁵ Noncommercial stations are not reliant on earning advertising revenues, and may therefore offer a more narrow range of programming that interests a more limited number of viewers. Simply put, commercial stations cannot be subject to intrusive and legally questionable regulation just because they do not carry the same amount of the same types of programming as noncommercial stations. Pursuing such a regulatory policy would ignore the basic business model of commercial broadcasting and essentially assume that all stations should be more like noncommercial ones. For these reasons, the *Market Structure Paper* provides no sound basis for the imposition of new obligations compelling stations to air government determined amounts of local public affairs programming.

The third localism study examined a single market (Binghamton, New York) and claimed, *inter alia*, that broadcast stations in this market overstated the amount of locally oriented news programming that they offer and that little locally produced public

²⁶⁵ The Commission has documented in several proceedings the financial challenges, including declining revenues and actual losses, experienced by many broadcast television stations, especially those in smaller markets and those not affiliated with major networks in markets of all sizes. See, e.g., *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order, 22 FCC Rcd 21064, 21092 ft. 192 (2007); *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13698 (2003).

affairs programming is aired.²⁶⁶ As detailed below, this study should be disregarded, as it suffers from a number of serious methodological problems and obvious biases.

As an initial matter, the study – although it purportedly surveys the amount of local news and public affairs programming for all full power stations in the Binghamton market – fails entirely to count a number of radio stations in the market.²⁶⁷

Undercounting the number of stations in the market certainly results in undercounting the total amount of local news and public affairs offered to consumers in the market.²⁶⁸

The study also significantly undercounts the amount of local news provided by discounting news in a number of categories, including weather, sports and entertainment, and by discounting “recycled content” that is aired on multiple newscasts.²⁶⁹ It is inappropriate to discount “recycled content” in this manner, as consumers increasingly watch and listen to news at different times of the day and repeating certain content – especially that of the highest interest – enables greater

²⁶⁶ See NY/PA Media Action and Binghamton Independent Media Center, *Localism in Broadcasting and Cable for Binghamton, NY* (Dec. 30, 2004) (“*Binghamton Market Study*”).

²⁶⁷ The Binghamton study counts 16 total FM and AM stations, while, according to BIA Financial Network, 23 radio stations serve the Binghamton market. Moreover, the study does not include low power television (“LPTV”), even LPTV stations such as WBPN-LP (carrying MyNetwork TV) with cable carriage and a significant presence in the market.

²⁶⁸ As NAB has stressed, the issue for the Commission in this proceeding is not the actions of any particular station, but whether the needs of the public are being served in local markets. If local and national news, public affairs programming and other public interest programming is being provided in a local market by broadcast stations and other media, that should satisfy the FCC’s concerns, regardless of whether one or more stations airs less than others.

²⁶⁹ See *Binghamton Market Study*, Section II.B., D. & F and Section V.C. (not counting recycled content and content in certain categories, such as weather, entertainment and sports, as “original” local news).

numbers of consumers to receive it.²⁷⁰ It is also highly inappropriate to discount entire categories of local news, such as weather, that many viewers and listeners value.²⁷¹ A recent study by the Pew Research Center for the People & the Press examining the news preferences of Americans over two decades found that weather consistently ranked as the second most interesting of all news categories.²⁷²

Indeed, even a cursory review of the *Binghamton Market Study* shows that its dissatisfaction with broadcast stations derives from the fact that the author of this study simply does not like certain content aired by both commercial and noncommercial stations and would prefer other content. For example, the study repeatedly complains that local news on commercial stations is “highly sensational,” focuses on crime, fires and car crashes, and neglects “in-depth reporting necessary to inform the public about important matters of the day.”²⁷³ While these parties are certainly entitled to their

²⁷⁰ The *Binghamton Market Study* similarly discounts public affairs programming by discounting recycled content and by its categorization of programming. For example, the study notes that three specific radio programs are a mix of news and public affairs, so the study (for reasons unexplained) counts only one as a public affairs show and counts the other two as news programs. *Id.* at Table 4, Note 3. This reveals a problem with the undercounting of public affairs programming generally, as only specific, separate public affairs programs are counted and the public affairs-oriented stories or segments in local or national news programs are not.

²⁷¹ See, e.g., Letter from Jim Tozzi, Center for Regulatory Effectiveness to FCC, MB Docket No. 06-121 at 11-12 (May 3, 2007) (calling the exclusion of weather and sports from a study of local news to be “arbitrary,” and noting that local news broadcasts “compete heavily based on their coverage of weather and sports” and that local stations often cover high school and other teams of local interest that receive little or no national attention).

²⁷² See Michael J. Robinson, Pew Research Center for the People & the Press, *The News Interest Index, 1986-2007: Two Decades of American News Preferences* at 13 (2007) (“*Pew News Interest Study*”).

²⁷³ *Binghamton Market Study*, Section II.C. and Section V.C. This study also criticizes the music and the news programming on two noncommercial stations in the market. For example, according to this study, the music aired is either “narrowly defined

opinions about broadcast programming, their personal judgments about the specific content of news programs or the perceived worthiness of that programming are not relevant to this proceeding. The Commission obviously cannot respond to the opinions of commenters by adopting regulations requiring all local news to be “in-depth” or “non-sensational,” or by preventing local newscasts from including more than a certain limited number of stories devoted to weather, sports, entertainment, crime or other disfavored categories. “No regulation can make local news harder and better,” and demands for “better” or different programming often stem from the “belief that it is the right of elites to dictate tastes to viewers and listeners.”²⁷⁴ In fact, the *Pew News Interest Study* shows that the public as a whole is more interested in the types of news content deemed inferior by the *Binghamton Market Study* than in the types of news programming evidently preferred by the study.²⁷⁵

‘classical’ (non-experimental orchestral music from 18th-19th century European composers)” or “similarly narrowly defined ‘jazz’ (non-experimental ‘elevator jazz,’ which has had all passion excluded upon recommendation of focus groups).” The public affairs programming provided by services like NPR is “bland, unchallenging, and centrist, *at best*,” and “[a]t worst,” has “strong conservative biases (pro-business, pro-military, anti-environmental, anti-labor).” *Id.* at Section IV.E (emphasis in original). These critiques of the broadcast programming offered in the Binghamton market reveal much more about the personal preferences and political biases of the author and sponsors of this study than about the actual content of the programming.

²⁷⁴ T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 311, 315 (1994).

²⁷⁵ For instance, the five categories of news that attracted above-average attention from the public over a two-decade period (1986-2006) were U.S.-related war and terrorism; bad weather; man-made disasters; natural disasters; and money (*i.e.*, employment, inflation and prices, especially gasoline prices). *Pew News Interest Study* at 13. According to Pew, weather news “trump[ed] political news . . . by a ratio of nearly two to one.” *Id.* at 17. All five types of political reporting surveyed (domestic policy; campaigns and elections; Washington politics; political scandals; and other politics) fell “below – or well below – the overall average” level of interest. *Id.* at 20. Although not in the top five categories of news interest, crime and social violence were also of greater interest to the public than any of the categories of political news. *Id.* at 21.

Rational and legally sustainable localism regulation simply cannot be based on the personal judgments of a few parties about the lack of value of specific programming content, especially when such content is clearly valued by viewers and listeners generally. And the Commission cannot satisfy those commenters criticizing the types of stories or, particularly, viewpoints (e.g., too much weather, sports and crime and not enough “progressive voices” speaking “against power, or against the corporate agenda”) in local informational programming without venturing into highly specific – and very likely unconstitutional – content mandates.²⁷⁶

NAB furthermore observes that the *Binghamton Market Study* appears biased on its face in its discussion of commercial broadcast media and the free marketplace in general, and misunderstands how the broadcast industry operates and the financial challenges it faces. For instance, this study repetitively references “well-funded corporate broadcast conglomerates,” “media corporations concerned only with profit” and a “market of Hyper-Commercialism.” *Id.* at Section XII. A.2. & C.1. It criticizes media companies’ “[q]uest for high ratings and thus higher advertising revenue.” *Id.* at Section XII.B.1. As NAB previously discussed, in an advertiser-supported media environment, ratings and revenue are absolutely essential for all broadcast stations – whether locally-owned standalone stations or stations part of a larger corporate group – to survive, let alone be able to offer the kind of resource intensive programming, such

²⁷⁶ *Binghamton Market Study* at Section XII.B.1. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (government cannot base its rules on “private notions of what the public ought to hear”); *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress “has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities,” and any “Commission requirements mandating particular program categories would raise very serious First Amendment concerns”).

as local news and public affairs, that these media critics want. See NAB Initial Comments at 39.²⁷⁷

The study further erroneously asserts that the “operational costs of television and radio broadcasters” are low, margins are high, and thus, media companies are accumulating “excessive” capital and power. *Binghamton Market Study* at XII.B.3. This statement is completely contrary to the economic reality of the broadcast industry in the modern media marketplace, where many television stations (especially smaller market ones and lower-rated stations that provide important diversity) are struggling, television broadcasters continue to lose viewers and advertisers to multichannel providers, and the majority of radio stations were losing money in the 1990s and needed significant regulatory relief to achieve financial stability.²⁷⁸ Binghamton is the 157th DMA, and previous NAB research has shown the difficulties experienced by television stations in this DMA range (151-175). From 1997-2005, the network compensation received by the average major network affiliate in DMAs 151-175 declined 63.7%, while at the same time news expenses rose 31.4%. The pre-tax profits of the average low-rated major network affiliate in markets 151-175 declined 117% from 1997 to 2005, such that the

²⁷⁷ Many of the *Binghamton Market Study*'s criticisms are of “big media” generically, not broadcast stations specifically and not the local broadcasters in the Binghamton market. See, e.g., Section XII. A.4. (“vertical integration . . . narrows the scope of information presented to that which benefits these [media] corporations and their stockholders” and the “interests of these elites” are “quite likely in opposition to local interests”). Such empirically unsupported general attacks on “big media” can be given no decisional weight in this proceeding.

²⁷⁸ See, e.g., *Carriage of Digital Broadcast Television Signals*, 22 FCC Rcd at 21087, 21092; *2002 Biennial Regulatory Review*, 18 FCC Rcd at 13698; *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2760 (1992).

average low-rated affiliate suffered losses of nearly \$95,000 in 2005.²⁷⁹ The annual NAB/BCFM Television Financial Surveys similarly showed that the lower 25% of all television stations in markets 151-175 suffered on average yearly losses of nearly \$110,000 for the 10-year period 1996-2005.²⁸⁰

The policy recommendations based on these mistaken premises about the excessive capital and power accumulated by local broadcast stations and their “quest” for high ratings and revenues are truly nonsensical. For example, the *Binghamton Market Study* advocates a ban on advertising during news, public affairs and children’s programming and a ban on all political advertising. If advertising is prohibited during programming that is costly to produce, such as news and public affairs, then what revenues are supposed to support the production of any such programming?²⁸¹ As to the recommendation to the Commission to ban political advertising, that would violate federal statute as well as the Constitution. See 47 U.S.C. § 315.

To promote localism this study also recommends that all media outlets be locally owned because “[d]istant owners are not concerned about the community of operation,” and “distant ownership and stockholders” of “any for-profit business (including media operations)” remove “local wealth to distant cities.” *Binghamton Market Study* at II.A. &

²⁷⁹ Attachment B, NAB *Ex Parte* in MB Docket No. 06-121 (Sept. 25, 2007), *The Declining Financial Position of Television Stations in Medium and Small Markets* at 10 (Sept. 2007).

²⁸⁰ See Attachment A, NAB *Ex Parte* in MB Docket No. 06-121 (Nov. 1, 2007), *Annual Television Financial Surveys*.

²⁸¹ Indeed, the revenues earned by a station’s news operations are extremely important for the overall viability of the station itself. RTNDA reports that, on average for all market sizes, 42.8% of television station revenues are produced by news, and that percentage is higher in smaller markets. For instance, in markets 101-150, 47.1% of station revenues are produced by news. Bob Papper, *News, Staffing and Profitability Survey*, Communicator at 36 (Oct. 2005).

XII.A.1. Forcing broadcast stations to be owned only by locally-based persons or entities would spell economic disaster for an industry competing against national entities such as cable and satellite and, increasingly, Internet companies for consumers' time and attention, advertising revenues and investment capital. The Binghamton study presented no evidence whatsoever that local ownership is necessary for stations to serve their communities or, indeed, any better at all than non-local ownership, especially if the management and personnel of stations reside and work in the local market.²⁸² Ironically, despite these vociferous criticisms of distant corporate media, this study compliments Citadel for its locally produced news and public affairs programs (see *id.* at Section VIII.F.), even though Citadel is based out-of-market and is one of the largest radio groups in the country. Obviously, Citadel is capable of well serving the Binghamton market, and, as the D.C. Circuit Court of Appeals found, the Commission has never established that local owners are in any way measurably better than other owners.²⁸³

²⁸² The study does not explain how distant ownership removes wealth from local communities. A broadcast station, like any local business, generates economic activity in the community where it is located. For example, all employees of a station earn and spend their wages and salaries in the local community, thereby supporting other local businesses. These other local businesses advertise on local stations, thereby increasing their own sales and supporting those stations. Stations purchase all manner of equipment, supplies and materials from local businesses as well.

²⁸³ See *Bechtel v. FCC*, 10 F.3d 875, 879-80 (D.C. Cir. 1993) (court invalidated FCC's licensing policy favoring owners that participated in station management/operations, despite FCC's assertion that these "integrated" owners were more likely to respond to community needs and were better able than absentee owners to gather information about satisfying community needs, because FCC had no evidence showing that its policy actually achieved these benefits).

Finally, the *Binghamton Market Study* provides no support for its conclusion that “[l]ocalism thrives in commercial markets through regulation, not competition.” *Id.* at Section XII.B.2. Not only is this conclusion contrary to decades of consistent Commission policy, it is unsupported by available evidence and even logic. Assuming that the regulatory decisions of a government agency in Washington, D.C. would produce programming more responsive to local consumers than would the market-based decisions of broadcasters who are actually operating in communities throughout the country and who must attract local audiences to survive is inherently illogical. And the Binghamton study offers no evidence whatsoever that the “result of the deregulation of the media over the last 20 years has been the death of localism.” *Id.* Not only does this study improperly discount the local informational programming offered by local stations in a number of ways, the study makes no attempt to compare the local informational programming available on a market basis today with 20 years ago. The record in this proceeding is furthermore replete with evidence about the extensive service provided by radio and television stations throughout the country. For all these reasons, the Commission should disregard the conclusions and the recommendations in the *Binghamton Market Study*.

B. The Studies Focusing on Political Programming Provide No Justification for the Adoption of Legally Questionable Regulation of Program Content

The *Localism Report* (at ¶¶ 62-63) cites three studies critical of commercial media’s journalistic practices generally and coverage of political issues specifically. These studies, however, do not justify intrusive regulation of the content of local

broadcast programming, such as renewal processing rules compelling stations to provide certain amounts of local political or other specific types of programming.

One study relied upon by the Commission surveyed the nightly news broadcasts of the four major network affiliates in 11 markets (a total of 44 television stations) during the period October 4-November 1, 2004.²⁸⁴ The *Lear Study* criticizes the amounts of coverage given to local political races by these stations, as well as the type of election stories aired. According to this study, 64% of the 4,333 broadcasts captured contained at least one election story, and 55% of the broadcasts captured contained a presidential story. *Lear Study* at 3. However, just 8% of those broadcasts contained a story about a local candidate race (e.g., campaigns for U.S. House, state senate or assembly, mayor or city council seat, judgeship, law enforcement posts, regional and county offices, etc.). *Id.* As shown below, the *Lear Study* cannot be relied upon as justification for constitutionally suspect regulation of stations' political programming, especially in light of this study's methodological shortcomings.

For a variety of reasons, this study grossly underestimates the amounts of political coverage aired by local television stations individually and available in these 11 markets as a whole. For example, the *Lear Study* examined only the evening newscasts of 44 major network affiliates and did not examine the weekday morning and mid-day newscasts of these stations. In addition, television stations often air politically-oriented public affairs programs on Sunday mornings (local as well as network shows). This survey focusing only on evening newscasts failed to count such programming. Also, only affiliates of the four major networks were surveyed, and at least in certain of

²⁸⁴ The Lear Center Local News Archive, *Local News Coverage of the 2004 Campaigns: An Analysis of Nightly Broadcasts in 11 Markets* (Feb. 15, 2005) ("*Lear Study*").

the markets examined, additional broadcast television stations carry local news.²⁸⁵

Thus, consumers in the 11 local markets examined had access to greater amounts of national and local election-oriented programming than the *Lear Study* suggests.

There further appears to be a serious undercount of the special public affairs programming about the election that stations aired outside of regular news broadcasts, such as town hall meetings, debates and free air time. Although the study (at 20-22) includes a fairly lengthy list of such programming, it is clear from the comments of Belo Corp. that the *Lear Study* did not successfully capture these types of programs.²⁸⁶ Belo points out that the *Lear Study* failed to account for a gubernatorial debate and a number of other political programs on its two stations (including stories on state initiatives, local “Ad-Watch” stories and stories on state judges and attorney general elections). Belo Supplemental Comments at 3. Perhaps most significantly, the *Lear Study* failed to count accurately the free air time given to candidates outside of regular news broadcasts. The study’s sample contained a total of only 23 minutes of free air time for political candidates that aired outside of local news broadcasts for *all 44 stations surveyed*. *Lear Study* at 21. However, between September 21 and election day in 2004, the two Belo affiliates included in the study *alone* gave away 180 minutes of free air time to 36 political candidates. Belo Supplemental Comments at 3. Given that a number of television broadcasters make pledges during election years to provide free

²⁸⁵ A number of these markets are also served by local and regional cable news channels, which provide additional political news coverage. And of course other media outlets, including radio stations, daily and weekly newspapers, and the Internet are all valuable sources of news and information about politics and campaigns.

²⁸⁶ See Supplemental Comments of Belo Corp. in Response to the Lear Center Study, MB Docket No. 04-233 (Apr. 19, 2005) (“Belo Supplemental Comments”). Two Belo stations (WFAA in Dallas and KING in Seattle) were included in the *Lear Study*.

air time for candidates,²⁸⁷ it is likely that the *Lear Study* failed to account for the free air time provided by a number of other stations in its survey.²⁸⁸

The *Lear Study* also appears critical of the types of campaign coverage aired and the comparative amount of coverage given to non-political news. For instance, the study notes that more coverage focused on “campaign strategy and the horserace” than on “campaign issues” or “substance.” *Id.* at 12-13. It additionally asserts that a typical half-hour of local news during the survey period devoted more time to weather and sports than to election coverage. *Id.* at 12.

As discussed above, the Commission cannot properly consider, as a basis for regulation, commenters’ opinions about the value or worthiness of the content of different types of political or other news stories. Not only would such governmental judgments be legally questionable,²⁸⁹ these judgments would also likely be contrary to the value that actual viewers and listeners place on different types of programming content.²⁹⁰ Beyond giving greater value to categories of news other than political, some consumers may also prefer political news that is “softer” or more entertainment-oriented

²⁸⁷ In fact, the *Lear Study* states that 20 of the 44 stations in its sample made a public commitment to provide candidates with free air time. *Id.* at 17.

²⁸⁸ The *Lear Study*’s assertion that the amount of news air time given to presidential coverage was only “roughly equivalent” to the amount of presidential advertising time is questionable. *Id.* at 4, 18. In making this determination, the study apparently disregarded three markets (New York, Los Angeles, Dallas) where no presidential advertisements were aired. Clearly, the overt removal of these markets skewed these figures; if all 11 markets had been included, there would have been more news minutes than political advertising.

²⁸⁹ See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content” are not countenanced by the First Amendment).

²⁹⁰ See *Pew’s News Interest Study* at 13, 20-21 (finding that U.S.-related war/terrorism, weather, disaster, money and crime news had greater interest for members of the public than political news over a 20-year period).

than certain commenters in this proceeding would personally prefer or think valuable. Recent empirical research has in fact suggested that “soft” news, such as talk shows, may in fact be “more efficient than traditional, hard news” in enabling less politically attentive “citizens to determine which candidate best fits their own preferences.”²⁹¹ Other political and media writers have furthermore specifically defended the value of horse-race coverage of political campaigns.²⁹² For all these reasons, rational and sustainable localism policies cannot be based on a few parties’ dislike of certain kinds of news content, such as the “wrong” kinds of political stories.

NAB further observes that surveys taken during the 2004 and 2006 election seasons found that close to 90% of Americans believe that local broadcasters are providing “the right amount” or “too much” time covering the elections. A November 2006 poll conducted by APCO Insight found that 50% of adults believed that local broadcasters provided “too much time” covering the elections, while 37% said that local stations provided “about the right amount” of coverage. Only 10% of those surveyed thought broadcasters provided “too little time” covering elections.²⁹³ Similarly, in an

²⁹¹ Matthew A. Baum and Angela S. Jamison, *The Oprah Effect: How Soft News Helps Inattentive Citizens Vote Consistently*, 68 *The Journal of Politics* 946 (Nov. 2006) (using data from 2000 election, researchers found that politically inattentive individuals who consumed soft news such as daytime talk shows were more likely than their non-consuming, inattentive counterparts to vote for the candidate who best represented their self-described preferences, suggesting that soft news can facilitate voting “competence” at least among some citizens).

²⁹² See, e.g., Jack Shafer, *In Praise of Horse-Race Coverage*, slate.com (Jan. 24, 2008) (asserting that horse-race coverage is not the invention of the television age, but, according to other scholars, dates back to the 19th century and has “many pluses,” including “increas[ing] voter interest in campaigns”).

²⁹³ See

<http://www.nab.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=7289>

October 2004 survey conducted by Wirthlin Worldwide, 42% of adults believed that local broadcasters provided “too much time” covering the elections, while 47% said local stations were providing “about the right amount” of coverage. Only 10% thought broadcasters provided “too little time” covering elections.²⁹⁴ The vast majority of citizens apparently do not agree with those commenters who claim that broadcasters are failing to provide the amounts or types of political information needed by the public.²⁹⁵

In short, the Lear Center study provides no sound evidentiary basis for the Commission to adopt intrusive new regulations, such as renewal processing rules compelling stations to offer set amounts of political or other specific types of local programming. Moreover, in the absence of explicit authorization from Congress, the

²⁹⁴ See

<http://www.nab.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2640> Both surveys also found that consumers viewed local broadcast coverage of elections as the most helpful factor in selecting a candidate, when compared to cable television news coverage or newspaper coverage.

²⁹⁵ Perhaps consumers are satisfied with political coverage because stations do cover those campaigns that matter most to viewers. For example, the *Lear Study* noted that television stations provide more coverage of competitive races. *Id.* at 10, 15. Obviously, there is less need for and interest in coverage of candidates running unopposed or with nominal opposition. Moreover, stations cannot realistically cover all the local races that the *Lear Study* apparently expects. See *id.* at 1 (criticizing stations for limited coverage of races for U.S. House, state senate/assembly, mayor/city council, judgeships, law enforcement posts, education-related offices and regional and county offices). Coverage of such races, especially in major metropolitan areas, would mean covering races in which the vast majority of stations’ viewing audience lacks interest. For example, coverage of a school board race (or any other local race) in Arlington, VA would have no interest for the vast majority of the viewing audience of the television stations serving the Washington, D.C. market.

Commission's authority to regulate in this area is lacking,²⁹⁶ and any such regulation would raise profound constitutional concerns. See, e.g., *Turner*, 512 U.S. at 642, 650.

The two final studies referenced in the *Localism Report* were submitted by Consumer Federation of America/Consumers Union ("CFA/CU") and are, in reality, advocacy position papers that lack empirical bases for their conclusions and should be treated as opinion, not science. Both papers focus on generic criticisms of commercial mass media and the alleged pernicious influence of "big" media on society and the U.S. political system. Both papers also fail to recognize the realities of today's competitive media markets and have little, if any, specific relevance to the debate about local radio and television stations and their service to local markets.

The first CFA/CU study reviews the results of a survey conducted in January 2004 about the media sources consumers rely on for news and information about national and local events.²⁹⁷ The results of this survey – that citizens rely on newspapers and television for local and national news and information – provide no support for the paper's sweeping criticisms of all commercial media, the alleged deleterious effect of profit-seeking media on journalism and the political process, and the need for intrusive regulation to "significantly expand the non-commercial arena for democratic discourse in the broadcast media." *Political Discourse Paper* at 24. This survey found that "television" was the most important source for *national* news, but reached that conclusion by combining the responses for both cable and broadcast

²⁹⁶ See *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

²⁹⁷ CFA/CU, *Television and Political Discourse: Usage Patterns, Social Processes and Public Support for Broadcaster Responsibilities to Promote Localism and Diversity* ("Political Discourse Paper").

television. See *id.* at 4-5, 7, Exhibit 3. With regard to local news, consumers cited daily newspapers as the most often used and most important media source. *Id.*, Exhibit 3. Daily newspapers ranked well ahead of broadcast television as a source of local news and, in fact, weekly newspapers nearly equaled broadcast television as a frequent and important source of local news and information. *Id.*

Moreover, because this survey was conducted in January 2004, it understates the role of the Internet in today's media marketplace, especially as a source of political news and information. For example, according to a January 2008 survey by the Pew Research Center for the People & the Press, the "internet is living up to its potential as a major source for news about the presidential campaign," with "nearly a quarter of Americans (24%) say[ing] that they regularly learn something about the campaign from the internet, almost double the percentage from a comparable point in the 2004 campaign (13%)" and nearly triple (9%) since 2000.²⁹⁸ For young people ages 18 to 29, 42% "say they regularly learn about the campaign from the internet, the highest percentage for any news source." *Pew 2008 Internet Campaign Survey* at 1.²⁹⁹ Thus, CFA/CU's own survey does not provide support for its claims about the alleged

²⁹⁸ The Pew Research Center for the People & the Press, *Internet's Broader Role in Campaign 2008: Social Networking and Online Videos Take Off* at 1 (Jan. 11, 2008) ("*Pew 2008 Internet Campaign Survey*").

²⁹⁹ NAB has discussed in detail the growing importance of the Internet as a source for news and information generally in other FCC proceedings. See, e.g., NAB *Ex Parte* in MB Docket No. 06-121 at 13-19 (Nov. 1, 2007); NAB Reply Comments in MB Docket No. 06-121 at 20-30 (Jan. 16, 2007). Obtaining news and information (along with sending or receiving e-mail) are the most popular on-line activities. As of early 2007, 72% of all Internet users report that they "get news" online, with 37% of all Internet users reporting that they got news "yesterday" online. Pew Internet & American Life Project, *Home Broadband Adoption 2007* at 11-12 (June 2007).

“dominant role of television” (particularly just *broadcast* television alone) in political discourse and setting the public policy agenda. *Political Discourse Paper* at 12-13.³⁰⁰

Even assuming that CFA/CU’s broad statements about the supposed dominance of television generally were true, these statements do not automatically justify increased regulation of local radio and television stations and their programming. The Supreme Court has expressly rejected the suggestion that government may restrict the speech of powerful or influential entities or persons because such speech may be deemed “too” persuasive or dominate public debate.³⁰¹ Certainly CFA/CU’s highly generalized and very vague assertions about the purported influence of visual images (including news images) say nothing remotely specific enough to be relevant as policy prescriptions in this proceeding.³⁰²

³⁰⁰ And certainly the various articles cited by CFA/CU do not establish this proposition either, especially in today’s media marketplace. Academic articles dating as far back as 1972, with most from the 1990s predating the emergence of the Internet as a mass phenomenon, say little of relevance about the media environment in the digital age.

³⁰¹ See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-91 (1978) (invalidating, under First Amendment, statute restricting business corporations from making contributions or expenditures to influence vote on referendum proposals, noting that the fact speech is persuasive “is hardly a reason to suppress it”); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (explaining that “the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”).

³⁰² For example, the paper quotes an article on the power of visual images as follows: “Findings suggest that visual news images (a) influence people’s information processing in ways that can be understood only by taking into account individual’s predispositions and values, and (b) at the same time appear to have a particular ability to trigger consideration that spread through one’s mental framework to other evaluations.” *Political Discourse Paper* at 14. Similarly vague claims about the unique impact of television advertising provide no basis for regulating local radio and television broadcast stations to promote localism. See *id.* at 15 (quoting article contending that television is “unique” because it “incorporates a significant nonverbal component, which not only serve to suppress the importance of content but also requires little deliberative message processing . . .”).

Similarly, repetitive complaints about the “hypercommercialism” of the mass media generally provide no justification for any particular regulation of local radio and television stations specifically. *Political Discourse Paper* at 16. Criticizing the obvious fact that television outlets “need to attract more viewers to be profitable” (*id.* at 17) seems little more than discontent with Congress’ choice decades ago to establish a freely competitive, commercial broadcasting system in which each licensee would “survive or succumb according to his ability to make his programs attractive to the public.”³⁰³ And complaints about the poor tone or quality of the content in the commercial mass media cannot be the basis of rational and sustainable public interest regulation of local broadcast stations. For instance, the *Political Discourse Paper* is replete with subjective judgments about the decline of “journalistic values” and the commercial media’s “exaggeration and emotionalism at the expense of analysis.” *Id.* at 17-18. CFA/CU also criticize the media generally for emphasizing the wrong kind of news, especially political news (*e.g.*, “horse race” news about who is winning or losing, rather “than the complexity of what is at stake” or “[v]erbal duels and loud, often one-sided, arguments” instead of “reasoned, balanced debates”). *Id.* at 18. As discussed above in relation to the *Binghamton Market Study*, no government regulation can make news, whether electronic or print, “harder and better,” or less “emotional” and “exaggerated” and more “analytical” or “reasoned.” If the Commission were to attempt to regulate the content of broadcast programming, particularly the types of political or

³⁰³ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940).

other news stories to present or not, then the agency would inevitably fall afoul of the First Amendment.³⁰⁴

Finally, NAB observes that CFA/CU's considerable dissatisfaction evidenced in this paper about the various perceived ills of the U.S. political system and alleged declines in journalistic standards cannot justify imposition of new and intrusive regulation on radio and television broadcasters. Certainly hyperbolic and unsupported statements of opinion about how "[p]oliticians conform and cater to the demands of the media . . . in a Faustian bargain," and how the "mass media's pursuit of big headlines and profits have undercut politicians' ability to realize legitimate political agendas," *id.* at 19-20, do little to inform the discussion of local broadcast outlets' service to their viewers and listeners. The Commission is neither designed nor equipped – nor possesses the authority – to address perceived shortcomings in the profession of journalism. CFA/CU's sweeping statements not only unrealistically blame "the media" for all apparent inadequacies in our political system,³⁰⁵ but also greatly exaggerate the

³⁰⁴ In *CBS, Inc. v. DNC*, 412 U.S. 94, 125-126 (1973), the Supreme Court found that "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" was inherently too great in a requirement that broadcasters "accept some editorial advertising." This "risk of an enlargement of Government control" would be exponentially greater if the FCC were to adopt CFA/CU's calls for obligations to air political programming such that "a more thoughtful [political] discourse can be conducted." *Political Discourse Paper* at 24. Guidelines requiring specific amounts of particular types of programming (such as local political) would inevitably involve the FCC in "oversee[ing] far more of the day-to-day operations of broadcasters' conduct," and would "tend to draw it into a continuing case-by-case determination" of whether the programming aired by broadcasters did or did not fit the regulatory definition of the favored programming. *CBS*, 412 U.S. at 127.

³⁰⁵ See, e.g., *Political Discourse Paper* at 19 ("[p]olitical entities submit to the media's dictatorship over the depiction of parties and personalities"); *id.* at 19-20 (due to decline of "journalistic values" and "traditional standards of reporting," political "[d]iscourse degenerates into a stream of stage-managed, entertainment-oriented, and issueless politics").

extent to which “the media” can control public debate and political discourse. Even before the development of digital technologies and the Internet, the claim that “TV and radio have become so powerful and exert such an influence on the public mind that they must be controlled by Government” had been soundly rejected. *CBS v. DNC*, 412 U.S. at 152 (Douglas, J., concurring). Justice Douglas, for one, found the “implication” of this theory -- that “the people of this country” are “mere unthinking automatons manipulated by the media” – to be “quite maddening,” and he warned against “such hysterical overestimation of media power and underestimation of the good sense of the American public.” *Id.* at fn. 3.

Today, given the emergence of the Internet and a plethora of digital technologies, the number of available outlets for opinion and information, including locally-oriented content, is far greater than at any point in history. There is unprecedented opportunity for individual citizens and small groups, including minority and non-mainstream groups, to both obtain and to offer information and opinion to the world at large. The Internet can, moreover, directly connect citizens and news makers, such as political leaders and government officials, without the involvement of “the media” at all.³⁰⁶ Because technology has “endow[ed] the individual with more responsibility and command over how he or she consumes information,” the “press,” according to the Project for Excellence in Journalism, “is no longer the gatekeeper over what the public knows.”³⁰⁷ Certainly in today’s digital, multichannel environment, local

³⁰⁶ For example, citizens can access the websites of political candidates and their elected representatives to find out about their positions on various issues, rather than learning about these positions through a traditional media outlet.

³⁰⁷ Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Overview/Introduction* (2007). Factors and individuals

radio and television stations have no special power to “control” their audiences, constrict consumer choice or somehow artificially restrict public debate. The Commission cannot impose new and intrusive regulation on local stations on these spurious grounds.

In sum, CFA/CU’s advocacy paper about perceived ills in the U.S. political system does not inform the localism discussion relevant to this proceeding. Highly generalized, exaggerated and largely out-of-date assertions about “the media” as a whole, and their alleged control over political discourse, provide no basis for this paper’s conclusions calling for new, significant regulation to “limit the purely commercial inclinations” of local broadcast stations and the implementation of “additional policies” to “expand the noncommercial arena for democratic discourse in the broadcast media.”

Political Discourse Paper at 24.

CFA/CU’s second advocacy paper makes similar complaints about profit-driven media “conglomerates” and the low quality content they provide, as well as additional unsupportable claims about “monopolistic” media markets and pervasive market failures, which are completely at odds with the realities of today’s competitive

other than “the media” play important roles in the diffusion, acceptance and rejection of ideas and viewpoints by citizens, a fact that CFA/CU fail to recognize in their zeal to attribute vast power to all media outlets. Mass communications scholars have long pointed out that interpersonal communications with “opinion leaders” greatly influence the diffusion and acceptance of ideas among people as a whole. See Elihu Katz & Paul Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communications* (1955). The Internet, of course, tremendously enhances interpersonal communications and thus greatly affects the diffusion and acceptance of ideas. More recent thinkers have similarly focused on the influential roles played by small numbers of certain types of people (“connectors” with wide social circles or especially knowledgeable “mavens”) in the spread of social phenomena. See Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (2000).

environment.³⁰⁸ Such vague and generic criticisms about “commercial media” and theoretical discussions of “the media’s” role in promoting “pluralist democracy” cannot constitute the evidentiary basis for the adoption of new restrictions on local radio and television stations specifically.³⁰⁹ As in their previous paper, CFA/CU are again making sweeping statements blaming “the media” for a variety of perceived societal ills, such as the inadequate functioning of democracy in America, and erroneously assuming their relevance to this proceeding.

The *Media Market Paper* also reflects a fundamental dislike and distrust of unregulated markets. According to this paper, for instance, the “unrestrained” marketplace produces “fewer watchdog activities” (such as “investigative journalism”), and “market forces” fail to provide “adequate incentives to produce high quality media product[s]” but instead “seek a lowest common denominator.” *Id.* at 5, 13-14; 16. NAB initially observes that the Commission rejected this anti-market position over two decades ago when it determined that broadcast stations would in fact provide an “appropriate mix” of programming (including non-entertainment) in response to market forces.³¹⁰

³⁰⁸ See CFA/CU, *Market Failures of Commercial Mass Media to Meet Society’s Need for Localism and Diversity* at 5-8; 10-11; 16 (“*Media Market Paper*”).

³⁰⁹ *Media Market Paper* at 7 (criticizing “the commercial media” for underserving “the less powerful in society” and quoting academic works on what “the media” should do to advance “pluralist democracy”).

³¹⁰ *TV Deregulation Order*, 98 FCC 2d at 1087. In eliminating the broadcast programming guidelines for radio in the early 1980s, the FCC even suggested that “it 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.” *Deregulation of Radio Order*, Report and Order, 84 FCC 2d 968, 1064 (emphasis added).

But even assuming for the sake of argument that market forces do at times fail, for example, to produce “high quality media products” or sufficient amounts of certain types of content, this paper does not establish that adoption of any proposals in the current localism proceeding will ameliorate these problems by causing the production of “better” media products or greater amounts of preferred media products (e.g., investigative journalism). Moreover, measuring the “high” or “low” quality of media products is neither easy nor an appropriate role of government.³¹¹

Even more fundamentally, NAB challenges CFA/CU’s basic assumption that there are any widespread market failures in today’s digital, multichannel marketplace that warrant intrusive new regulations on local broadcast stations. Historically, it has been argued that the media marketplace may not always maximize consumer welfare because it cannot measure the intensity of consumer demand (e.g., a limited number of viewers may strongly like a television program but it is not aired because the audience is too small, while a program only moderately liked by a larger number of viewers is shown). See *Media Market Paper* at 3-5. However, this argument has lost much of its relevance during the past several decades with the development of multichannel video and audio programming distributors, services such as video on demand, digital multicasting by television and radio broadcasters, and the myriad of Internet-related audio and video services. Clearly, with the ability to view and listen to almost unlimited audio and video content, today’s marketplace offers more diverse and targeted programming to serve the interests of a wide and growing variety of niche audiences,

³¹¹ See *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) (the Constitution says that “opinions and judgments, including esthetic and moral judgments about art and literature,” are “for the individual to make, not for the Government to decree, even with the mandate or approval of a majority”).

including members of minority groups.³¹² The *Media Market Paper*, however, fails to acknowledge the exponential increases in the video and audio programming choices available to consumers via a plethora of digital technologies and the Internet.³¹³

Willfully ignoring the dramatic changes in the media marketplace – especially the fragmentation of the viewing and listening audiences – fatally undermines CFA/CU's arguments about the need for increased regulation due to pervasive market failure.³¹⁴

The *Media Market Paper* further demonstrates a complete disconnect with the realities of the modern media marketplace with its claims about the “monopolistic media market.” *Id.* at 17. CFA/CU contend without empirical support that “weak competition” in the media marketplace “allows owners to earn monopoly profits and to use monopoly rents to pursue their personal agendas,” including “political” agendas. *Id.* The Commission should reject both CFA/CU's premises and their conclusions. Competition in today's media marketplace is more accurately characterized as relentless, rather than

³¹² For example, NAB's initial comments documented the growth of radio services (including HD multicasting services) to diverse audiences, including different demographic groups such as Spanish-language speaking audiences. See Attachment E, BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences – An Update* (Apr. 28, 2008).

³¹³ For example, the *Media Market Paper* (at 12) asserts that the “growing impact of homogenization in the TV industry . . . is unmistakable.” This contention flies in the face of the reality of the hundreds of channels of video programming available to consumers, many of them serving niche audiences with distinct interests.

³¹⁴ CFA/CU's contentions about other kinds of market failure (e.g., the alleged underprovision of particular types of journalistic “watchdog activities” such as “investigative journalism”) are based on largely theoretical discussions of “externalities,” rather than empirical evidence. *Media Market Paper* at 13-14. Again, these highly generalized critiques of journalism and “the media” provide no substantive bases justifying the adoption of new, burdensome requirements on radio and television stations in the name of localism.

“weak,” as the record in numerous FCC proceedings has clearly demonstrated.³¹⁵ NAB also disputes the claim that this supposedly weak competition allows broadcast or newspaper owners to earn “monopoly profits.” As has been well documented, increased competition, the fragmentation of audiences, and the loss of viewers, listeners, readers and advertisers to multichannel programming providers and the Internet have all combined to financially squeeze broadcasters (especially smaller market television stations) and other owners of traditional media outlets.³¹⁶ Indeed, in such a highly competitive, financially challenging marketplace, a number of media owners are struggling to make any sort of profit, let alone supposed “monopoly” profits.³¹⁷

³¹⁵ See, e.g., *Carriage of Digital Broadcast Television Signals*, 22 FCC Rcd at 21087 (documenting cable’s increased competition for viewers and advertisers in the video marketplace, at the expense of television broadcasters); *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, FCC 07-216 at ¶ 24 (rel. Feb. 4, 2008) (describing the “media marketplace today” as being “profoundly different” than in 1970s, with the emergence of competitive media technologies and outlets that did not even exist a few years ago, audience fragmentation and shifts in advertising dollars from traditional to new media).

³¹⁶ See, e.g., *Carriage of Digital Television Stations*, 22 FCC Rcd at 21092 & ft. 192 (the economic health of many television stations, especially smaller market ones and stations affiliated with minor networks, “is particularly tenuous,” with these stations having “more restricted revenue opportunities” and experiencing “economic difficulties,” including financial losses); *2002 Biennial Regulatory Review*, 18 FCC Rcd at 13698 (“the ability of local stations to compete successfully” in the video marketplace has been “meaningfully (and negatively) affected in mid-sized and smaller markets”).

³¹⁷ See, e.g., Attachment B, NAB *Ex Parte* in MB Docket No. 06-121 (Sept. 25, 2007), *The Declining Financial Position of Television Stations in Medium and Small Markets* (Sept. 2007); Attachment A, NAB *Ex Parte* in MB Docket No. 06-121 (Nov. 1, 2007), *Annual Television Financial Surveys* (showing financial declines and actual financial losses suffered by television stations in smaller markets, especially lower rated ones). The FCC recently documented the financial struggles of the newspaper industry. See *2006 Quadrennial Regulatory Review* at ¶¶ 27-33.

NAB furthermore disputes that these alleged “monopoly profits” and “market power” are used routinely by media owners to “pursue their personal [political] agendas.” *Id.* at 17. Scholars have explained for years that media owners are constrained by marketplace pressures and economic incentives from controlling content in ways they prefer, if divergent from the preferences and opinions of viewers, listeners and readers.³¹⁸ Especially in today’s extraordinarily competitive media environment, the ability of media firms to control content in ways they, rather than consumers, prefer should be extremely limited. Recent empirical research has strongly confirmed that the viewpoint or “slant” of media outlets is driven more by the demands of the targeted markets (in other words, by consumer preferences) than by the views of any particular owner.³¹⁹ CFA/CU have provided no empirical support for their contention that media owners utilize their “monopoly profits” to control content in ways that further their own personal or political agendas, at the expense of the preferences of consumers. Accordingly, the *Media Market Paper* provides scant, if any, support for claims that increased broadcast regulations generally – or any of the proposed localism rules in

³¹⁸ See, e.g., David Haddock and Daniel Polsby, *Bright Lines, the Federal Communications Commission’s Duopoly Rule, and the Diversity of Voices*, 42 Fed. Comm. L.J. 331, 348-49 (1990) (concluding that the “great majority of those who operate broadcast stations” do not appear driven “by the desire to mold public opinion and attitudes”); Timothy J. Brennan, *Vertical Integration, Monopoly, and the First Amendment*, J. Media Econ. 57, 67-68 (Spring 1990).

³¹⁹ See, e.g., Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers* (Nat’l Bureau of Econ. Research, Working Paper No. 12707, 2006); Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (June 13, 2007). Accord David Pritchard, *A Tale of Three Cities: “Diverse and Antagonistic” Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31, 49 (2001).

particular – are warranted because media markets are seriously distorted by the exercise of ownership influence over the content of the media.³²⁰

The remainder of the *Media Market Paper* is primarily an empirically suspect attack on the alleged evils stemming from the common ownership of media outlets, which are entirely repetitive of arguments made by CFA/CU in several previous proceedings addressing the FCC’s broadcast ownership rules. In any event, NAB and other parties have addressed and refuted these arguments in a number of previous submissions, as briefly summarized below.

■ Contrary to CFA/CU’s assertion (*id.* at 18-20) that “it hardly seems necessary to defend the proposition” that media “ownership matters a great deal and is a good proxy for diversity” (however defined or undefined), a number of surveys have noted the lack of empirical evidence showing any connection between ownership and viewpoint or content diversity.³²¹ CFA/CU similarly assert that there can be no question that members of certain demographic groups (e.g., “females”) are more likely to provide content “present[ing] a female point of view.” *Id.* at 9-10. Unequivocal claims of this type are also unwarranted.³²²

³²⁰ NAB notes that CFA/CU’s claims in its *Media Market Paper* (at 17) about media owners “uniquely powerful position to influence civic discourse” resemble its exaggerated assertions in its *Political Discourse Paper* about the extent to which “the media” can control public debate and political discourse. As explained by NAB above, these spurious arguments cannot justify new and intrusive regulations on local broadcast stations.

³²¹ See, e.g., Stanley M. Besen and Leland L. Johnson, *Regulation of Media Ownership by the Federal Communications Commission: An Assessment* at 31, 52 (Dec. 1984); Benjamin Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 *Cardozo Arts & Ent. L.J.* 755, 763 (1995); Benjamin Compaine, *The Media Monopoly Myth: How New Competition Is Expanding our Sources of Information and Entertainment* at 7-11 (2005); Haddock and Polsby, *Bright Lines*, at 348-49; Mara Einstein, *The Financial Interest and Syndication Rules and Changes in Program Diversity*, 17 *J. Media Econ.* 1, 16 (2004). Even the Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC*, 373 F.3d 372, 399-400 (3rd Cir. 2004), noted the “conflicting evidence in the record on whether ownership influences viewpoint.”

³²² See *Lamprecht v. FCC*, 958 F.2d 382, 395 (D.C. Cir. 1992) (court concluded that FCC was unable to offer evidence “demonstrat[ing] a link between ownership [of broadcast outlets] by women and any type of underrepresented programming”).

■ CFA/CU argue that common ownership in media markets has a negative effect on programming diversity specifically. See *id.* at 9, 11. In fact, numerous empirical studies of different media sectors have shown that common ownership of media outlets does not inhibit and in fact promotes diversity of programming or other content.³²³

■ CFA/CU claim that diversity in prime time television programming has declined since the repeal of the Financial and Syndication rules. See *id.* at 12, 27. NAB observes that questions relating to the television networks' production of and financial interests in the programming they air has no relevance to the issues raised in this proceeding about local radio and television stations' service to their communities. In any event, empirical studies have expressly refuted CFA/CU's contentions about the effects of the repeal of the fin-syn rules.³²⁴

■ CFA/CU claim that the formation of television duopolies has adversely affected the production of news and public affairs programming. See *id.* at 31-32. Numerous studies have in fact shown that co-ownership or operation of television stations in the same market has a positive effect on the quantity of news programming and the likelihood of stations' carrying local news or public affairs programming, and

³²³ For a discussion of the diversity of content provided by commonly owned newspapers or commonly owned newspapers and television stations, see, e.g., Ronald Hicks and James Featherston, *Duplication of Newspaper Content in Contrasting Ownership Situations*, 55 Journalism Q. 549 (1978); Lisa George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets*, 29th TPRC Conference 2001, Report No. TPRC-2001-097 (2001); David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31 (2001); David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (Sept. 2002); Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (June 13, 2007). Numerous studies by several parties have shown that common ownership of radio stations leads to greater programming diversity in local markets, including a major study conducted for the FCC in 2007. See Tasneem Chity, CRA International, Inc., *Station Ownership and Programming in Radio* (June 24, 2007). At least eight additional studies conducted by a variety of parties have found that common ownership of radio stations results in the offering of more diverse and more targeted programming to local audiences. See Comments of NAB in MB Docket No. 06-121 at 21-22 (Oct. 22, 2007).

³²⁴ In fact, one study found that "as networks began owning and producing more of the programs they distributed, program diversity *increased*." Mara Einstein, *The Financial Interest and Syndication Rules and Changes in Program Diversity*, 17 J. Media Econ. 1, 14 (2004) (emphasis added). This study also concluded that the "fin-syn rules are a prime example that structural regulation of the television industry is ineffective in producing diversity." *Id.* at 16.

also improves the overall programming service offered to local viewers.³²⁵ CFA/CU's attempt to cast doubt on one of these earlier studies showing that duopolies can increase the amount of local news offered by the commonly owned stations is patently unsuccessful. See *id.* at 32.³²⁶ Interestingly, a subsequent study by CFA/CU in 2007 in fact concluded that "duopolies may lead to more local news and public affairs."³²⁷

■ CFA/CU also make sweeping claims that as "concentration grows," news and public affairs programming is reduced. *Id.* at 11. As shown above, television duopolies in fact promote the provision of this type of programming. Voluminous studies have further shown that television stations commonly owned with newspapers offer more and higher quality news programming and more local programming generally than other stations.³²⁸

³²⁵ See, e.g., FCC, Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming* at 1-21 (July 24, 2007); Michael G. Baumann and Kent W. Mikkelsen, Economists Incorporated, *Effect of Common Ownership or Operation on Television News Carriage: An Update* (Nov. 1, 2007), attached to NAB Reply Comments in MB Docket No. 06-121 (Nov. 1, 2007). An earlier version of this Economists Incorporated study reaching the same conclusion was specifically cited by the Third Circuit in *Prometheus* as supporting the FCC's finding that television duopolies can promote localism. See 373 F.3d at 415-16. Two additional studies have shown that the acquired stations in duopolies experience increases in their local audience share and revenue share following their acquisition, thereby demonstrating that the formation of duopolies enables stations to improve their overall programming service by offering programs preferred by more local viewers. See NAB Comments, MB Docket No. 06-121 at Attachment H, BIA Financial Network, *Economic Viability of Local Television Stations in Duopolies* (Oct. 23, 2006); Comments of Coalition Broadcasters, MB Docket No. 02-277 (Jan. 2, 2003), at Attachment A, BIA Financial Network, *Television Local Marketing Agreements and Local Duopolies: Do They Generate New Competition and Diversity?*

³²⁶ CFA/CU reexamined data previously provided by the broadcast networks, but their reexamination actually shows that the hours of news aired by stations in duopolies increased. See *Media Market Paper* at 32, Table 3. NAB also notes that CFA/CU's reexamination looks only at the data provided by NBC and FOX and omits the data provided by Viacom. Perhaps most importantly, CFA/CU do not dispute the principal finding of the networks' original submission – that stations in duopolies are more likely to carry local news than other stations. And despite CFA/CU's claims that duopolies harm news quality, they fail to address the networks' original finding that the quality of local news coverage by duopolies and non-duopolies, as measured by the number of news awards, was similar.

³²⁷ Further Comments of Consumers Union, Consumer Federation of America and Free Press in MB Docket No. 06-121 at 98 (Oct. 22, 2007).

³²⁸ See NAB Reply Comments in MB Docket No. 06-121 at 82-84 (Jan. 16, 2007) (describing ten studies reaching this conclusion). In addition, studies conducted by and for the FCC in 2007 demonstrated that common ownership of newspaper and broadcast

■ CFA/CU continue to ignore the dramatic changes in the media marketplace and how these changes have impacted the competitive position of broadcasters. For example, CFA/CU focus solely on “concentration” levels in broadcast television alone, apparently failing to recognize that local television stations compete for viewers and advertisers within a broader video marketplace against cable and satellite television providers, Internet video services and other emerging technologies. *Id.* at 25.³²⁹ The *Media Market Paper* also bemoans the growth of national radio groups, see *id.* at 28-29, again refusing to recognize the large numbers of independent voices remaining in radio markets and increases in competition to local radio stations by other audio providers and technologies.³³⁰

■ CFA/CU assert that local ownership should be expected to “lead to greater commitment to and greater choice to serve values other than the bottom line,” especially in comparison to “chain owners” that are “likely to be directed toward focusing on increasing profits.” *Id.* at 19. As previously discussed, the empirical validity of that assumption has never been established. See *Bechtel*, 10 F.3d at 879-80. And certainly the *Media Market Paper* fails to establish a causal link between common ownership of outlets and the alleged obsession with profits. In fact, it may be that small, stand-alone broadcast outlets may be even more concerned about profits and losses than the owner of a joint media operation because of the struggle of many smaller outlets to even

outlets benefits viewers and listeners in local markets by promoting the provision of news programming generally and local news specifically. See FCC, Daniel Shiman, *The Impact of Ownership Structure on Television Stations’ News and Public Affairs Programming* (July 24, 2007); Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (June 13, 2007); Gregory Crawford, *Television Station Ownership and the Quantity and Quality of TV Programming* (July 23, 2007).

³²⁹ NAB previously summarized the studies and other evidence showing the continued growth in competition to television broadcasters. See, e.g., NAB Comments in MB Docket No. 06-121 at 19-23 (Dec. 11, 2007). As noted above, the FCC has recognized this fact in a number of earlier proceedings.

³³⁰ See, e.g., Attachment B to NAB Comments in MB Docket No. 06-121 (Oct. 23, 2006), *Independent Radio Voices in Radio Markets* (Aug. 2006); NAB Comments in MB Docket No. 06-121 at 24-27 (Dec. 11, 2007); NAB Comments in MB Docket No. 06-121 at 18-25 (Oct. 22, 2007). CFA/CU’s claims that there are deleterious “oligopolies” in radio programming formats have been refuted, including in a study by Justice Department economists. See Charles Romeo and Andrew Dick, *The Effect of Format Changes and Ownership Concentration on Radio Station Outcomes*, 27 Rev. Ind. Org. 351, 354 (2005) (smaller radio groups and individual stations can, through format changes, “counter or defeat the potential exercise of market power by a radio group that acquires a substantial share of a particular audience demographic through merger”).

survive today, given the increasingly competitive marketplace, emergence of new technologies, and changes in consumer preferences, all factors that CFA/CU ignore.³³¹

In sum, CFA/CU's two advocacy papers have little relevance to the debate in this proceeding about broadcast localism. Generic criticisms of commercial media and exaggerated claims about their influence over the U.S. political system cannot provide the proper evidentiary basis for the adoption of new and intrusive restrictions on local radio and television stations. Similarly, repetitive and empirically suspect complaints about changes in ownership structure within the broadcast industry do not warrant wholesale changes in the public interest obligations of local stations.

CFA/CU proclaim that “[d]emocratic governance requires” media with “financial wherewithal and political independence.” *Media Market Paper* at 15. The adoption of financially crippling regulations or restrictions that compel all broadcasters to air content preferred by the government instead of local viewers and listeners would undermine, not promote, the goals of a financially viable and truly independent broadcasting system. Although CFA/CU support the adoption of “aggressive” localism policies to further the “higher goal[s]” of the First Amendment (*Media Market Paper* at 36-42), the Commission should reject such arguments.³³² The First Amendment simply is not a

³³¹ In previous submissions, NAB discussed a number of empirical studies expressly refuting claims that media groups or corporations are more concerned about profits than other media outlets or are somehow inherently inferior to small, independently-owned media. See NAB Reply Comments in MB Docket No. 02-277 at 9-12 (Feb. 3, 2003).

³³² In the past, the FCC has rejected arguments urging it to “require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than tend to abridge it.” In response to these contentions, the FCC has correctly stated that the “First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it,” and concluded that the Constitution “flatly forbids governmental interference, benign or otherwise.” *Network Programming Inquiry*, Report and Statement of Policy, 44 FCC

source of government authority to enact regulations that some parties, in their own interest, might deem desirable.³³³ As Justice Potter Stewart wrote, if First Amendment “values’ mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.” *CBS*, 412 U.S. at 146 (Stewart, J., concurring).

VIII. Conclusion

As thousands of commenters, both broadcasters and third parties, have shown, radio and television broadcasters are closely connected to their local communities and provide a wealth of community-responsive programming. The record in this proceeding clearly demonstrates that local stations acknowledge and embrace their obligation to serve the public interest. Local broadcasters offer local and national news and other informational programming, vital emergency information and entertainment to viewers and listeners 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 actively participate in their local communities – they work to understand the needs and interests of their audiences and to provide programming every day to address those needs.

Indeed, broadcasters must do so to attract audiences, retain advertisers and remain

2303, 2308 (1960). *Accord S. Christian Leadership Conference v. Supreme Court of La.*, 252 F.3d 781, 795 (5th Cir. 2001) (“[t]he fundamental purpose behind the First Amendment is to promote and protect the free expression of ideas, unfettered by government intrusion”).

³³³ See *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998) (the First Amendment protects individuals’ negative rights to be free from governmental action, but does not create positive rights or requirements that the government act).

economically viable in today's digital, multichannel marketplace. The record contains no evidence that responsive programming and other services are not widely available to viewers and listeners on a market basis.

Certainly the general, empirically unsupported assertions of small numbers of media critics that local stations should do "more" – especially offer more programming of the specific type preferred by these critics – cannot justify the imposition of new and intrusive regulation. If there were any significant numbers of radio and television stations failing to serve their local communities, then more than a mere handful of broadcast license renewal applications would generate petitions to deny or at least informal objections. However, as NAB showed above, during the last two license renewal cycles, objections were filed against only approximately 0.9% of all renewal applications, indicating that 99.1% of all licensees were serving their communities so well that their license renewal applications were unopposed. The Commission cannot disregard this concrete, numerical evidence as to viewer and listener satisfaction with their local broadcast stations, and adopt intrusive new regulation on the alleged (but unproven) existence of a small number of underperforming local stations.

In light of this record, no factual or legal basis exists to turn back the clock to reinstate regulations that the Commission found ineffective and unnecessary in the less competitive media marketplace of the 1980s. While NAB and other commenters agree that the Commission's goal of promoting broadcasters' service to their local communities is laudable, the re-imposition of burdensome and outdated restrictions is not the appropriate approach. In fact, numerous commenters explained that the proposals in the *Notice* would impair broadcasters' abilities to serve their local

communities by imposing very significant costs and diverting limited resources away from programming and services that directly serve local audiences. Small broadcasters and those in more rural areas would be particularly adversely affected in their ability to serve their local communities by the costs and burdens of new and unnecessary regulation.

Moreover, commenters almost unanimously agree that the legal basis for several of the proposals in the *Notice* appears questionable at best. The D.C. Circuit Court of Appeals has found that the Commission lacks statutory authority to adopt regulations affecting program content without express congressional directive, and any such regulation of the content aired on broadcast stations raises significant First Amendment concerns. These concerns are only heightened by the proposals to consider program content during license renewals, which would apply to all radio and television stations across the country, regardless of the level of service provided by any individual station and regardless of the level of service available to consumers across their local markets as a whole. Particularly in light of broadcasters' and other outlets' increasing service to local markets made possible by technological developments, the return to a regulatory approach from the analog era cannot be sustained.

Respectfully submitted,

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Attachment A

Summary of Comments Submitted to FCC Docket #04-233 January 1 to May 28, 2008

Since January 1, 2008, more than 36,000 comments have been submitted to the Federal Communication Commission (“FCC”) in response to its *Notice of Proposed Rulemaking* regarding localism (“*Notice*”).

Approximately 53.6% of all comments submitted oppose the proposed localism rules for various reasons. About 700 broadcasters and 895 third-party local organizations submitted comments providing evidence that broadcasters adequately respond to local needs in the absence of additional regulation. In addition, 5,570 form letters were submitted opposing the proposed localism rules; however, a majority of those included individually written comments in addition to the form comments.

The remaining 46.4% of comments submitted favor the proposed localism rules. Of those, an astounding 99.7% were identical form letters. Virtually none of those form letters included additional comments from individual persons.

Of all non-form letters submitted since January 1, 99.7% oppose the proposed localism rules. Below is a summary of the typical comments representing each group of concerned parties. At the end of this paper, Table 1 lists the quantity of comments submitted by each group.

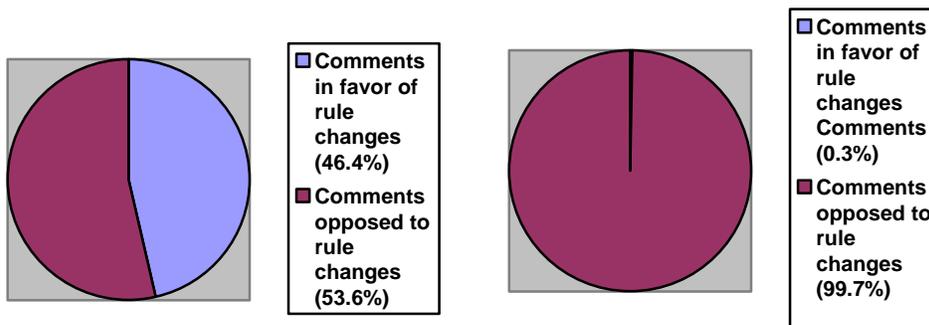


Figure 1: Total Comments, 2008

Figure 2: Non-Form Letter Comments, 2008

I. Comments Opposing the FCC’s Proposed Localism Rules

The 19,388 comments critical of some if not most of the recommendations in the *Notice* entered into the record in 2008 accounted for 53.6% of all responses and 99.7% of all non-form letter responses. These responses were diverse in origin but fell into three broad categories: (1) broadcasters; (2) third party organizations with relationships with local broadcasters; and (3) individual respondents, mostly broadcast consumers.

A. Broadcasters Comment Summary

About 700 broadcasting entities, including companies representing numerous stations, submitted comments in response to the *Notice*. Nearly all of the comments submitted listed a variety of ways each broadcaster responds to the needs of their local communities. Numerous broadcasters listed employees' participation in various community organizations; charities they advertise, provide local coverage to, and participate in. They reflect near constant interaction with community members on a daily basis. Because of those efforts, the broadcasters submit that the proposed localism rules are unnecessary to enhance localism, and would merely impose additional costs and paperwork burdens on the work they already do – a point corroborated by all of the third party organization comments received (see below).

Aside from redundancy, the primary issue raised by broadcasters is added cost to their operations. Many of the broadcasters affected by this proceeding are small, locally-owned and operated radio stations. These are the stations most likely to either curtail operations at night or shut down completely due to added costs if the proposed localism rules are passed. Numerous broadcasters, particularly college broadcasters and those in smaller communities, are concerned that they cannot afford to hire even a minimum-wage “babysitter” to watch studio operations during times when the station is not otherwise staffed. Many smaller broadcasters suggest that if the 24-hour staffing requirement is implemented, they will reduce the number of broadcasting hours. Additionally, the new paperwork requirements present in the proposed localism rules would require stations to hire additional help, if they can afford it, to complete the paperwork. Otherwise, many stations indicate that they will be forced to re-allocate labor from the production of local content to the reporting of programming content to the FCC. Finally, many broadcasters – especially educational and public broadcasters – will be unable to afford to continue operation if they are required to relocate their main studios within their communities of license. A significant number of broadcasters have specifically stated that the imposed cost of this specific rule will force them to discontinue operation.

The other main issue raised by broadcasters relates to local programming requirements. Community Advisory Boards (“CABs”) are considered unnecessary by some broadcasters and individuals, and a restraint on free speech by others. First, many stations, especially those that operate in small communities, already interact extensively with their local listeners to ascertain the needs and listening preferences of their audiences, according to the record. Also, for stations targeting a specific audience or providing a particular type of content, broadcasters see CABs as an unacceptable restraint on their ability to program as they see fit, and as their audience demands. As the table below indicates, religious broadcasters and their listeners are particularly concerned that CABs will have undue influence over their content, and that stations will be forced to air programming that may not reflect the judgments of the station owners or listeners. Religious broadcasters are not alone in this sentiment, however.

Even those few stations that equivocally approve of the idea behind CABs view the *Notice*-proposed CABs as unnecessary and inefficient. Broadcasters argue that is unlikely that a community with several broadcasters will be able to find enough community members willing to volunteer to sit on those CABs. Finally, requiring a unique CAB for each broadcaster in a community will likely result in greater uniformity among broadcasters, rather than a group of broadcasters that effectively serves the diverse needs of its community.

In the end, broadcasters feel that they adequately provide services which satisfy the needs of their local community. If they do not, they argue, other forms of content provision will force them out of the marketplace, since many broadcasters do not have the funds to compete with other content providers if they are providing similar content. In that vein, most broadcasters feel that the localism regulations proposed by the FCC are unnecessary, costly, and, in some cases, would produce the opposite result from that intended by the FCC.

B. Third Party Organizations

The 895 third party organizations responding to the NPRM in this period consisted of a broad array of charities and other public and non-profit organizations with established relationships with local broadcasters. Every single one of these organizations – without exception – provided a highly favorable view of the efforts of their local broadcast stations' efforts to provide local programming and other local service opportunities, such as telethons, charity drives and generous broadcasts of public service announcements. Most third party organization responses focused on detailing the positive nature of their local broadcasters' efforts in recent years, indicating in many instances that their events and projects would have failed without this broadcaster support and assistance. In short, every third party organization emphasized that, at least insofar as localism is concerned, local broadcasters are doing their jobs.

C. Individual Responses

The final group, individual respondents, accounted for almost 92% of comments critical of the proposed localism rules. The majority originated from concerned listeners of Christian radio or television stations, and of these the great majority (63.1%) were personal, individually generated letters or comments, either supporting religious broadcasting in general, or of the K-Love/Air 1 network (a network of over 120 stations around the U.S.) in particular. A significant number (5,570) were variations of a form letter, but of these a majority of commenters made significant personal modifications or additions. Nearly all evinced a passionate support of the necessity of religious broadcasting and a deep suspicion of the proposed localism rules as explicitly targeted at curtailing or destroying Christian radio. This group is particularly concerned that the proposed return of CABs is a possible threat to dilute the targeted religious message delivered by such stations with non-religious or non-Christian programming.

Many comments critical of the proposed localism rules had concerns broader than religious programming. More than one fifth (4,003) were individual, personalized comments or letters critical of some or all proposed localism rules as unwanted and excessive re-regulation of the broadcast industry. Like the religious broadcasting supporters, the great majority of these comments were passionate in their opposition to any new regulation, viewing it in strong terms as a dangerous extension of government power and corresponding diminution of the right of free expression. A smaller but significant number demonstrated greater familiarity with the nature of broadcast operations and expressed concern at how the proposed localism rules, if implemented, could harm small, public and educational stations the most.

II. Comments Supporting the FCC's Proposed Localism Rules

Although more than 16,000 comments were submitted in favor of the FCC's proposed localism rules since January 1, all but about 50 were form letters submitted as a quick response to an e-mail solicitation. Virtually none of the e-mails were edited from their stock form to evince any individualized grievance with local broadcaster service. This lack of individualization is starkly different from comments submitted in disagreement with the proposed localism rules; a vast majority of those letters (including a majority of form letters) were individualized to show particularized support for their local broadcasters. Of all personal letters submitted in response to the proposed localism rule, *well less than 1%* express support for localism re-regulation.

Many individual comments supporting the proposed localism rules express concern over the diversity of local programming currently available. A coalition of public interest groups, and a few other groups, stated a desire for more specific public interest obligations on broadcasters. Commenters in favor of the proposed rules expressed a general dissatisfaction with modern media, and a hope that these rules will improve the quality of programming. Few commenters address the specific proposed rule changes. In particular, comments in favor of the proposed changes to the main studio rule and the unattended operation rule, and rules regarding voice tracking and local artist playlists are virtually absent from the record.

The common form letter submitted en masse in mid-April appears to address more the new enhanced disclosure requirements than they do the localism proceeding.

Conclusion

A comprehensive view of the localism record since January 1, 2008 shows a nearly united front of broadcasters and third party organizations that oppose changes to the rules regarding localism. Broadcasters across the country, both big and small, have said that the proposed localism rule changes could have a substantial negative impact on their business, and could cause stations to divert investment away from local programming. As noted, nearly every non-form letter comment filed since the beginning of the year is opposed to the new rules. This sort of unqualified opposition is nearly

unprecedented and cannot be ignored if the Commission is to consider these proposals in a fair and equitable manner.

Table 1: Total Comments in FCC Record 04-233

| Comment Type | Total Number |
|---|---------------------|
| Broadcasters' Comments | 689 |
| Third-Party Organizations' Comments | 895 |
| K-Love or Air1 Christian Radio Listener Letters | 2983 |
| Other Religious Radio Listeners' Form Letters | 5570 |
| Other Religious Radio Listeners' Personal Letters | 5248 |
| Other Individuals' Comments Opposing NPRM | 4003 |
| Media Critic Pro-NPRM Form E-Mail Letter | 16725 |
| Individuals' Pro-NPRM Comments | 47 |