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

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| In the Matter of: | ) | |
| | ) | |
| Broadcast Localism | ) | MB Docket No. 04-233 |
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# COMMENTS OF COLLEGE BROADCASTERS, INC.

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## COMMENTS OF COLLEGE BROADCASTERS, INC.

College Broadcasters, Inc. ("CBI"), representing member stations, students, staff, and faculty and staff advisors involved in radio, television, webcasting and other related media ventures, [1] submits its comments in response to the Notice of Proposed Rulemaking in the captioned proceeding, which seeks ways to "enhance localism practices among broadcasters." [2] CBI and its members strongly support the FCC's drive toward enhancing broadcast localism and diversity. However, we are very concerned with the specifics of the Commission's proposals in the *NPRM*, a number of which appear to have been conceived without educational, noncommercial, and other small broadcasters in mind, and thus portend regulatory requirements with which it would be disproportionately costly – or worse, simply impossible – for educational broadcasters to comply. As this may have the effect of diminishing service to the public, CBI asks that the Commission reject the proposals put forward in the *NPRM*.

## I. INTRODUCTION AND SUMMARY

College and educational stations typically are the poster children when it comes to airing music and other programming responsive to the needs of local and underserved communities. CBI notes that, in its experience, many educational stations consider it their duty to play music

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[1] CBI represents hundreds of nonprofit and educational radio stations nationwide, virtually all of which are affiliated with colleges, universities, high schools, and other educational institutions.

[2] *Broadcast Localism*, 23 FCC Rcd. 1324, 1327 (2008) ("*NPRM*").

and other programming not heard on other stations in the listening area, and that stations that do so strongly feel this important aspect of their programming reflects their commitment not only to their educational missions, but to their "localism" efforts, especially to the extent these musical selections often include local artists. This programming, whether music or other, adds to the culture of the local community and thus has a local impact regardless if it produced locally or elsewhere. For instance, CBI member station KTRU at Rice University airs programming from the World Radio Network, which provides an international view on the issues of the day, an outlook not reflected by other local broadcast stations. In fact, educational broadcasting is sometimes derided by its commercial brethren for not paying more attention to the commercial viability of its programming. But most educational broadcasters' overarching mission is generally to ask, first, "how does this serve our audience," rather than "how much can I sell this audience for?" We firmly believe virtually all educational broadcasters have every interest and intent of maximizing their resources – which often are tightly limited and/or controlled – in service to their local communities, and particularly in serving unique and diverse communities often not served by other media outlets, with programming that may or may not fit within the categories prescribed by some arbitrary governmentally generated list of "local" programs.

In its comments on the Notice of Inquiry that commenced this proceeding, CBI provided an overview from the educational broadcaster perspective of the evolution and role of localism in broadcasting, and the ways educational broadcasters both serve local interests and take advantage of broadcasting's inherently localized nature to stand out in an increasingly crowded media landscape. [3] Though the focus of the *NPRM* is on ways to ensure all broadcasters are "airing

[3] *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd. 12425 (2004) ("*NOI*"), Comments of Collegiate Broadcasters, Incorporated ("CBI NOI Comments"), Nov. 1, 2004. The CBI NOI Comments are attached as an Appendix and are incorporated herein by reference.

locally oriented, community-responsive programming,"[4] we note at the outset that programming is far from the only way college stations are involved in their communities. Many college stations program events and activities off the air as well as on-air that contribute to the local community in substantial ways, and they increasingly are developing an Internet presence that serves the local community as well. *See* CBI NOI Comments at 8.

That said, if the Commission were to develop any sort of localism review of stations at license renewal time as the *NPRM* suggests,[5] the unique characteristics of college and other noncommercial stations must be considered and weighed heavily as a contribution to the local culture and needs of the community. By their nature, educational broadcast stations often are student run and/or volunteer staffed in whole or substantial part, and they face financial restraints that are different in origin, nature and scope compared to other types of broadcasters. Thus, as the burden of any new regulation will fall hardest on those who have no means to pay for compliance, CBI urges the Commission to consider the circumstances of those on which it is proposing to foist substantial new regulatory burdens. Educational broadcasters in particular, though perhaps not uniquely, have limited staffs and budgets. These budgets are often through schools and colleges that themselves have limited budgets in which there is no room for new costs associated with broadcast operations.

CBI accordingly opposes the *NPRM*'s proposals that would, as over 100 Members of the Congress characterized it in a recent letter to Chairman Martin, "turn back the clock on decades of deregulatory progress by imposing a series of new and burdensome regulations on

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[4] *NPRM*, 23 FCC Rcd. at 1330. *See also id.* at 1338-40, 1346, 1357. Significantly, the FCC never defines "localism" in the *NPRM*, and its descriptions of matter it believes are relevant to "localism" are limited in scope.

[5] *NPRM*, 23 FCC Rcd. at 1336-45.

broadcasters." [6] The proposals that are most troubling in this regard, though by no means the only problematic potential changes the *NPRM* suggests, are as follows: First, the *NPRM* offers a proposal that can be viewed only as a return of formal ascertainment obligations, despite efforts to characterize the proposal otherwise. [7] Next, the *NPRM* proposes to establish detailed reporting requirements, mandatory disclosure of how playlists are compiled, and processing guidelines geared to "public interest" programming, all of which carry implicit obligations to provide specific types of content. *NPRM*, 23 FCC Rcd. at 1335-36, 1345, 1361, 1374-75, 1378-79. Finally, the *NPRM* considers reinstatement of the "main studio rule" for all stations. *Id.* at 1338-39, 1345-46, 1364-65. These proposed changes are at odds not only with an easily charted FCC course away from such requirements, but also broadcasters' First Amendment rights.

As set forth in detail in these comments, the noncommercial broadcasters represented by CBI simply do not have the resources to comply with these detailed regulatory obligations. A survey that CBI opened to all FCC-licensed student-operated radio stations, the results of which are reported in these comments, show that the *NPRM*'s proposals will actually impede rather than promote the public interest. For these reasons, CBI respectfully requests that the Commission forego the proposals it has advanced in this proceeding.

## II. BACKGROUND

A majority of the *NPRM*'s proposals are supposedly advanced to increase "localism," a vaguely defined term that can mean far different things to different people. The Commission's proposals entail extensive recordkeeping, paperwork, and operational requirements that are a

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[6] Letter from Reps. Mike Ross, Marsha Blackburn, *et al.*, to Hon. Kevin J. Martin, in MB Docket No. 04-233, April 15, 2008 at 1.

[7] *NPRM*, 23 FCC Rcd. at 1335, 1338, 1346, 1359, 1361; *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd. 1274, 1275, 1287, 1292 (2008) ("*Enhanced Disclosure Order*").

particular burden to educational broadcasters. As a threshold matter, these proposals are a marked departure from FCC initiatives dating back nearly three decades that:

> (i) eliminated the need for stations to keep program logs to conduct formal ascertainment of community issues, to follow non-entertainment program requirements, and to limit their commercial time, [8]
>
> (ii) simplified the renewal process, eliminated detailed program-related questions and detailed inquiries into the ascertainment process in favor of quarterly reports (*i.e.*, "issues/programs lists") of programs comprising a station's most significant treatment of community issues, with only brief narratives describing what issues were given significant treatment and which programs addressed particular needs, [9] and
>
> (iii) permitted broadcasters to locate their main studios outside their communities of license anywhere in their city contour, eliminated the station program origination rule, [10] and authorized unattended station operation and greater allowances to control and monitor operations remotely. [11]

Alleviation of these requirements was significant, as they were quite burdensome, especially for educational broadcasters, small stations, and stations in small markets with limited staffs where, rather than spending time on broadcast operations, stations had to ensure they met programming standards reflecting an arbitrary set of government-imposed standards as to what was good for the station's audience. Indeed, as the *NOI* recounted, "the Commission deregulated ... in the 1980s," because it "found that market forces, in an increasingly competitive environment,"

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[8] *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *aff'd in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The FCC similarly deregulated TV in 1984. *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1076 (1984) ("*Commercial TV Deregulation Order*").

[9] *See, e.g., Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983).

[10] *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, 3 FCC Rcd. 5024 (1988).

[11] *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Unattended Operation of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, 10 FCC Rcd. 11479 (1995).

would encourage broadcasters to serve their local communities, making such rules "no longer necessary." *NOI*, 19 FCC Rcd. at 12425; *accord*, *NPRM*, 23 FCC Rcd. at 1329.

The *NPRM* proposes to reinvigorate this long-dismantled heavily regulatory approach by suggesting measures that would subject broadcasters' editorial decisions to heightened governmental scrutiny and re-impose significant operating costs on stations, especially small stations like CBI's members. For example, though the Commission admits it is not "feasible" to reinstate formal ascertainment with "specific and detailed formal procedures" for "licensees ... to consult with community leaders to determine local needs and problems and propose programming to meet those issues," [12] it proposes to require that "each licensee [ ] convene a permanent advisory board ... of officials and other leaders from the service area of its broadcast station." *Id.* at 1337. In conjunction, the Commission further notes that concurrently with the *NPRM* it adopted new FCC Form 355 for TV licensees "to report [their] efforts to identify the programming needs of various segments of their communities, and ... detailed information about [their] community responsive programming by category," and proposes to extend that obligation to radio. [13] To comply with this requirement, every day's programming will need to be timed, classified, and recorded to facilitate computation of weekly averages to report to the FCC. *See Enhanced Disclosure Order*, App. B. The new form also requires licensees to file highly detailed information regarding the editorial choices behind the station's airing of the foregoing types of programming, including a description of how the licensee determined it met community needs. *Id.*

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[12] *NPRM*, 23 FCC Rcd. at 1333; *see also id.* at 1337 (same).

[13] *See, e.g., id.* at 1361 (describing form adopted in *Enhanced Disclosure Order*). The *NPRM* describes the form as simply requiring "detailed information for each such program, including title, dates and times of broadcast, length, and whether it was locally-produced," *id.*, but the *Enhanced Disclosure Order* reveals that it further requires detailing programming in minute detail in order to report the average number of hours devoted each week to nearly a dozen

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The *NPRM* also seeks comment on ways to essentially require carriage of other programming the Commission considers worthy – or even required – of broadcasters. For example, the *NPRM* suggests the FCC could require broadcasters to report "data regarding their airing of music and other performances of local artists and how they compile their stations' playlists." *NPRM*, 23 FCC Rcd. at 1375. This, the *NPRM* states, would be used, to "evaluat[e] overall station performance under localism" in "consider[ing] renewal[s]," which the *NPRM* ominously calls "perhaps the most significant mechanism available to the Commission ... to ensure that licensees" carry out their public interest duties in a manner the FCC demands. *Id.* In addition, the Commission tentatively concludes it should "reintroduce specific [ ] guidelines for the processing of renewal applications based on their localism programming performance," and seeks comment on just what the contours of that obligation should be. *Id.* at 1379. Stations that fail to meet these minimum quantitative "guidelines" would be subjected to further scrutiny at renewal.

Finally, the *NPRM* also notes that the Commission is "considering" requiring licensees to maintain a physical presence at each broadcasting facility during all hours of operation, based upon a presumption – for which the *NPRM* cites no evidence – that doing so "can only increase the ability of the station to provide information of a local nature," and upon further speculation that it "may increase the likelihood" of "relaying critical life-saving information to the public." *NPRM*, 23 FCC Rcd. at 1339. It further seeks comment on whether the Commission "should revert to our pre-1987 main studio rule in order to encourage broadcasters to produce locally originated programming ... and on whether accessibility of the main studio increases interaction between the broadcast station and the community of service." *Id.* at 1346.

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categories, including national news, local news, civic affairs, local elections, independently produced programming, and PSAs. *Enhanced Disclosure Order*, App. B.

## III. THE RULE CHANGES THAT THE *NPRM* PROPOSES ARE COUNTER-PRODUCTIVE AND WOULD IMPOSE UNDUE BURDENS ON EDUCATIONAL BROADCASTERS

The increased administrative costs of the *NPRM*'s proposals make them infeasible for educational broadcasters. As noted above and in the CBI NOI Comments, educational broadcasters already go to great lengths to integrate into their communities and to offer diverse programming reflective of local needs, and in particular formats and other often overlooked offerings commercial radio tends not to offer. By doing so, each educational broadcaster serves the public by providing programming unique to its community, and information to the students of the institution with which it is affiliated. CBI opposes the return to ascertainment requirements, no matter how the Commission characterizes them or tries to distinguish what the *NPRM* is proposing from the requirements it abolished in the 1980s. If the Commission nevertheless does pursue the more formal procedures the *NPRM* proposes, there should be exemptions for non-commercial educational stations with fewer than 5 full-time employees.

CBI also opposes operational requirements that are inconsistent with the inherent challenges educational broadcasters face running their educational stations. In a survey conducted among FCC-licensed student stations in order to comment on the *NPRM*, [14] CBI found that nearly nine out of ten stations responding had budgets under $200,000. CBI believes that more than 90 percent of its member stations have two or fewer full-time employees, with many having no full-time employees dedicated solely to radio station operations. Despite what appear to be small budgets and minimal staffs, college stations are being shuttered with increasing – and alarming – frequency as schools seek to cut costs and are unwilling to fund stations kept on very

[14] CBI received survey responses from approximately a quarter of the estimated universe of approximately 350 student stations.

limited budgets. [15] The stations CBI represents are largely run by volunteers. [16] More than 90 percent of stations responding to CBI's survey reported that new FCC rules requiring "enhanced disclosure forms" in place of the current quarterly issues/programs list, and/or documentation of efforts to gauge community concerns, present unreasonable burdens on the station. Significantly, the proportion of stations that reported such rules are not likely to increase the amount of "local" programming they provide also was 90 percent.

In addition, more than 70 percent of stations reported they do not have the resources to report their playlists and how they are determined. Many college stations have on-air talent who select their own music as they program their shows, in many cases literally grabbing a CD off the shelf just in time (and some times not in time) to segue with the previous song. Having each member of the on-air staff dissect his or her decision-making process is simply not feasible.

What is most troubling, however, is that nearly 80 percent of responding stations indicated they are likely to reduce operating hours if the Commission adopts the rules proposed in the *NPRM*. A few stations even indicated that they would surrender their licenses in the event of enactment of either the new enhanced disclosure form/community-outreach documentation rule, or the proposal to require a "physical presence" at all stations whenever they are on the air. CBI expects in the long term that, in the face of increased operating costs imposed by the regulatory burdens that would arise from the new rules, more stations would be forced to cease their operations as well.

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[15] *See, e.g.*, www.reporternews.com/news/2008/apr/17/hpu-shutting-down-radio-station-cutting-courses.

[16] Some stations provide a stipend or honorarium to students holding management positions, but this is not a salary or other wage for work done on behalf of the stations.

The possibility that the Commission could adopt the rules proposed and suggested in the *NPRM* garnered virtually uniform responses from survey respondents. One station noted that "[a]ny additional regulations will place a tremendous burden on us, largely given that we are student-operated." Another concurred that the "new localism proposals cannot be met without the addition of staff" which "is nowhere in the budget of a small, liberal arts college station." Even online options taken for granted by larger businesses were met with concern by our survey respondents, one of which reported that "[w]e don't have adequate staffing to maintain a web presence," while another stated that not only did it "lack the resources," but also "support from the university's IT department, to digitize our public file." While educational stations present a unique and valuable service to their communities, this service could be compromised by unreasonable regulatory mandates.

### A. Ascertainment and Programming Requirements

The *NPRM*'s advisory board and reporting proposals would be unduly costly and burdensome for educational broadcasters, and are likely to be counter-productive as a result. Enhanced disclosure forms, formation and meetings of a permanent advisory board, reporting of music data and selection criteria (along with online posting of the public file and of renewal application pre- and post-filing announcements) all will *reduce* educational broadcasters' ability to produce programming of the sort envisioned by the *NPRM*, due the amount of resources they would have to dedicate to producing the documents and reports. [17] Significantly, the responsibility for such

[17] Music reporting by educational stations is the subject of much controversy before the Copyright Royalty Board ("CRB") in proceedings involving the reporting of music played by broadcasters who stream their signal on the Internet. However, there is a fundamental difference in that proceeding – if the regulations imposed by the CRB are unduly burdensome, a station can simply stop streaming, as that activity is ancillary to its primary activity. If the burden imposed by the FCC is too great, stations will have to terminate their fundamental operation, and cease all service to the public.

obligations will fall on the same students and community volunteers that produce the programming at issue, who have limited time to commit to educational station operations. Forcing such stations (and, consequently, their volunteers) to comply with the extensive requirements in the *NPRM* may well be asking them to do the impossible, as they simply lack means of complying with extensive paperwork requirements.

Gathering information for the substantially more detailed quarterly reports using new Form 355 or any similarly detailed form adopted for radio promises in particular to require a significant commitment of resources. Stations will have to monitor all programming (including all network and syndicated offerings) to determine if it contains any significant discussion of important issues of public concern. For any program segment that does, it appears, from what the *NPRM* is proposing, that the station will have to identify it, name the topic, time its duration, and note the time of broadcast. This will require minute-by-minute review of station operations, and daily updates to be able to provide the necessary reports and, consequently, a major commitment of manpower for FCC-mandated make work. While this may be insignificant, or at least absorbable, for stations with large-scale operations in major markets with scores of employees, it is simply insurmountable for educational broadcasters with paid staffs that number in the single digits – or that have no paid staff at all.

Paradoxically, the more programming a station provides of the type the *NPRM* seeks to promote, the greater the manpower burden – and thus the cost – becomes to catalog it for the FCC's benefit. The advisory board the *NPRM* proposes, especially coupled with its associated reporting requirement, is likewise a resource-intensive commitment for educational stations with limited volunteer staffs. In this regard, one thing of which the Commission must not lose sight is that these resources must be diverted from somewhere, and most educational broadcasters will have no choice but to take it from actually producing the very types of programming the *NPRM*

seeks to increase. Moreover, to the extent some educational broadcasters fill part of their day with remote or prerecorded material due to inability to obtain staffing (*e.g.*, overnight), not only does the proposed limit on unmanned operation pose problems, *see infra* at 14-16, but the need to catalog all programming reportable on Form 355 means that such programming cannot be offered during such unmanned hours. Educational broadcasters, probably more than any other class of broadcasters, rely more on human record-keeping rather than automated systems. Without someone present to make the necessary entries, such records are unlikely to be kept. [18] In short, if forced to comply with the rules proposed in the *NPRM*, some educational broadcasters may not be able to carry programming addressing community issues for which extensive documentation is required, thereby defeating the entire purpose of the *NPRM*. [19]

This would be especially unfortunate given that requirements of this nature do not have meaning for all stations, and even where they do have meaning, they do not resonate in the same ways and/or to the same degree for all stations. Some formats lend themselves to some, but not all, the programming types on the kind of "checklist" the *Enhanced Disclosure Order* adopted and the *NPRM* proposes, while others do not dovetail at all with any of the specific categories. This does not mean, however, that a station for which all the categories of "local" programming identified in the *NPRM* are not relevant somehow fails to serve its community of license, especially to the extent competitors in the market offer some or all of those categories of program-

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[18] In fact, as discussed in the next section, if there is no one present, the station will not even be able to operate if the Commission adopts the rules suggested in the *NPRM*.

[19] This was a real concern among respondents to the survey referenced above, *see supra* at 9-10, as one station noted, "It would require us to reduce regularly scheduled news coverage to allocate resources to produce longer form programming." Another flatly stated, "We do not have the resources to do more quality public affairs programming." Yet another station reported that its public affairs programming "represents a significant part of our weekly programming," while stating it would be unlikely "we'd be able to produce much more public affairs and political programming due to the limitations of being a student-staffed station."

ming. The needs and interests of all the individuals in a community of license – or, indeed, of each single individual residing therein – are multiple and varied. Some stations serve some of those needs for some of those individuals, while different stations serve others of those needs. [20]

There is no reason – or need – to elevate some categories of interests, such as news or public affairs, over sports, music, or other categories, in the name of ensuring favored types of content are available. If there is sufficient audience demand for any given type of programming, market forces will ensure it ultimately becomes available, [21] and there are in addition a wealth of noncommercial stations, such as those operated by educational broadcasters (not to mention myriad new media outlets, including online options), dedicated to fulfilling other, overlooked needs. The FCC should not seek to override these organic forces with advisory board, reporting, or quantitative program requirements, based on notions of what type of content are – or should be – preferable to members of a given community. [22]

### B. Operational Requirements

Similar counter-productive economics also plague the prospects of any requirement that licensees maintain a physical presence at their radio broadcasting facility during all hours of operation. As a threshold matter, we note the *NPRM* does not cite any *actual* deleterious impact on the provision of "local" programming due to unmanned operation, but rather only "*perceived*

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[20] Or, as one survey respondent put it, "Our audience tunes in for music, not debate."

[21] In fact, taking sports as an example, many stations, even those with primarily music formats, find broadcasts of local sports to garner the largest audiences. The Commission would be hard-pressed to argue that there is anything more "local" than a high school or college team playing games that attract a substantial local audience. To suggest that other programming of local significance, *e.g.*, a meeting of a local zoning board to take one example, should be elevated over other types of local matter such a live sports broadcasts, essentially ignores real-life demands of the local audiences that the Commission claims in the *NPRM* it is trying to serve.

[22] Nor, for that matter, may the Commission constitutionally pursue such endeavors in any case, as shown below. *See infra* Section IV.

negative impact" such operation "*may have* on licensees' ability to determine and serve local needs." *NPRM*, 23 FCC Rcd. at 1326 (emphases added). We respectfully submit the FCC ought not be in the business of imposing costly regulatory mandates on educational institutions in the name of "correcting" perceptual problems. In any event, the proposal to require that stations maintain a physical presence during all hours of operation should be abandoned because, especially for educational broadcasters, it is exceptionally contrary to the *NPRM*'s objective to "promote both localism and diversity." *NPRM*, 23 FCC Rcd. at 1326, 1337, 1399.

Many student-operated stations find the main studio staffing requirement problematic. A common "management" scenario at college broadcast stations involves a licensee, which is the college or university itself, that relies on faculty, staff and primarily students to carry out the duties of station management. In many cases, students are the only form of station management. *See also supra* at 8-9 (reporting survey responses relating to student and volunteer staff). However, many educational broadcasters lack the volunteers and fiscal resources to staff their studios during all hours of operations. Due to varied class schedules and other activities, at least some student stations already find it difficult to meet the current regulatory requirement of having a meaningful management presence *during business hours* (though overall management presence in most cases far exceeds 40 hours per week), let alone the round-the-clock staffing that the FCC now proposes for stations that have 24-hour operation (though, indeed, some later (or earlier) hours may be more convenient for many other members of the community). Yet station management often is available to the community via alternate means of communication, including such options as e-mail, voice mail, electronic messaging, and cell phones. Educational broadcasters thus rely on automation to air various types of "diverse" programming, including that the Commission might consider "local."

Simply put, requiring all stations to be staffed during all hours that they are in operation would require many educational broadcasters station to go off-air when they are unable to have someone present in the studios, thus robbing the community its serves of "local" and "diverse" programming.[23] Further, if the rules are adopted, some educational broadcasters might not be able to maintain the minimum operating hours in FCC rules necessary to avoid a shared time proposal, to which they otherwise would not have been subject. *See* 47 C.F.R. § 73.561(b). Or even worse, some might not be able to meet on-air requirements during periods of staff transition when returning from "days designated on the official school calendar as vacation or recess periods." *See id.* § 73.561(a). As one survey respondent stated, "This would cripple our organization, because we already have a very hard time recruiting students to do their own shows ... much less to babysit automation/satellite programming." Another respondent called this requirement the "single most onerous feature of the proposed rule," noting that, "[s]hould we be required to staff the station 24 hours/day, we would have about 15 hours of unique programming per week where we now have 168 hours" (as automated equipment allows unique shows to air at all hours – not just when a person is in the studio).

We note that, rather than the rule suggested by the *NPRM*, the Commission should actually lessen the main studio staffing requirement, particularly for educational stations. The Commission could allow a significant management presence at these stations to be defined by alternative criteria that allow the community to interact with station management outside of "business hours." In doing so, the Commission should consider the means and opportunities to interact with station management mentioned above (*i.e.*, e-mail, voice mail, electronic messag-

[23] Of course, during any such off-air hours, the community served by the station is denied all programming, including any that might be "local" or "diverse."

ing, cell phones, etc.). [24] While these alternatives will not satisfy all needs for in-person communication, they will alleviate the staffing burden and allow interested parties to coordinate a mutually agreeable meeting time with station management when a face-to-face meeting is desirable or required.

## IV. THE PROPOSED RULES WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE AND PAPERWORK REDUCTION ACTS, AND THE FIRST AMENDMENT

In its reply comments on the *NOI*, CBI agreed that "the Commission, would need an extraordinary record to adopt new regulations that would implement programming quotas, lacks the authority to reinstitute ascertainment like practices, and that dictating the content, even in broad strokes, is unwise, unwarranted, and contrary to the first amendment." [25] In addition to being overly burdensome, and counter-productive, the rules proposed in the *NPRM* would be subject to invalidation under basic Administrative Procedure Act ("APA") and/or the First Amendment legal precepts, and do not satisfy the Paperwork Reduction Act ("PRA") and Small Business Paperwork Relief Act of 2002 ("SBPRA"). *See* 44 U.S.C. § 3501 *et seq.*, 5 C.F.R. § 1320.1 *et seq*. First, such rules would suffer several APA infirmities, including that they depart from FCC precedent in ways the relevant facts do not support. While it is well-settled that "[a]gencies are of course free to revise their rules and policies" as the *NPRM* proposes, they must "give[ ] sound reasons for the change" and "provide a reasoned analysis for departing from prior

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[24] This is not, however, an endorsement of the requirement that stations put their public files online, given the lack of resources college stations have to do so and the extent to which, accordingly, it places an undue burden on stations. *See NPRM*, 23 FCC Rcd. at 1377-78. Nearly half of the stations from which we received input reported that this requirement is not reasonable. Our survey results further indicate that over 90 percent of the stations have not had a request to see the public file. More likely the rule would result in fishing expeditions by competitors.

[25] *NOI*, 19 FCC Rcd. 12425, Reply Comments of Collegiate Broadcasters, Incorporated, Jan. 3, 2005, at 2.

precedent." [26] Here, the *NPRM* does not even attempt to explain why prior reasons cited in FCC precedent for no longer imposing the kinds of rules the *NPRM* seeks to reinvigorate no longer support the prevailing hands-off approach. [27]

Even under pre-deregulation ascertainment and related rules, the Commission recognized that requirements as intrusive and burdensome as it now proposes are impermissible under the Act and First Amendment. [28] Even there, the Commission noted that for the programming types it required, broadcasters retained significant discretion and were deemed compliant so long as the stations provided some reasonable mix of programming demonstrating operation in the public interest. *See id.* This was necessary, it recognized, given "limitations imposed ... by the First Amendment ... and Section 326." *Id.* at 2306. These limitations, the Commission concluded, barred it from implementing overly specific programming requirements, [29] such that it could not "condition the grant, denial or revocation of a broadcast license upon its own subjective determination[s], as doing so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)). It found that "as a practical matter, let alone a legal matter, [its role] cannot be one of program dictation or program supervision," *id.* at 2309, and that "standards or guidelines should in no sense constitute

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[26] *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2d Cir. 2007) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)).

[27] *See Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (agency "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the [ ] requirement of reasoned decision making") (internal quotes omitted).

[28] *See generally Report and Statement of Policy re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960).

[29] *Id.* at 2308 ("With respect [arguments urging us to require licensees to present specific types of programs on the theory that such action would enhance freedom of expression rather than to abridge it,] we are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it.

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a rigid mold for station performance, nor ... considered as a Commission formula for broadcasts in the public interest." *Id.* at 2313. Yet this is exactly what the new "localism" requirements proposed in the *NPRM* would require, without so much as a mention why these prior conclusions – all made while the FCC still regulated in the manner to which it contemplates returning here – no longer preclude the kinds of programming oversight the *NPRM* proposes.

Nor does the *NPRM* explain why the reasons the FCC gave for *de*regulating broadcasters no longer support continuing to forego such intrusive oversight. The Commission correctly held at that time that regulating broadcasters so granularly was a poor substitute for market forces, and unduly intrusive into their editorial discretion. *Deregulation of Radio*, 84 F.C.C.2d at 977, 978-82. The economic incentive of potential loss of audience to competitors who better served the public was deemed enough to ensure that broadcasters acted responsibly. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 588 (1981). Meanwhile, the last twenty years have seen not only the number of radio stations grow by forty-five percent and the number of TV stations nearly doubled (taking Class A and LPTV stations into account), [30] but also the rise of many other forms of competition for audio and video services that broadcasters did not face when the FCC deregulated, and that have "transformed the [media] landscape." [31] In a world with radio

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Footnote continued from previous page

The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise.") (citation omitted).

[30] *Compare Broadcast Station Totals as of September 30, 1987*, News Release (Oct. 6, 1987), *with Broadcast Station Totals as of September 30, 2007*, News Release (Oct. 18, 2007).

[31] *See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13623 (2003). The Commission has remarked how "the modern media marketplace is far different than just a decade ago," given the ways traditional media "have greatly evolved," and "new modes of media" are "providing more choice, greater flexibility, and more control than at any other time in history." *Id.* at 13647-48. With these new outlets, all "local" markets enjoy an "extraordinary level of abundance" and realistically "expect immediate and continuous access to news, information, and entertainment." *Id.* at 13648.

and TV provided by cable, satellite and the Internet, broadcasters are forced, if for no other reason than self-interest, to address what local audiences find relevant, or that audience will abandon the station for some other medium.

This remarkable growth in recent decades directly contradicts the *NPRM*'s proposals for unnecessary FCC oversight of broadcast content in the name of promoting "localism." To the extent there have been changes since the FCC backed away from such regulations, they only have *strengthened* the reasons why such rules are unnecessary. Moreover, to the extent the changes affect the degree to which a broadcaster might consider more locally tailoring its programming, the unique manner in which over-the-air broadcasting among all competitors can most directly target local interests, serves only to *strengthen* the incentives for broadcasters to do so. Yet the *NPRM* does not explain why this evolution of the media marketplace – which cut against the types of regulation at issue here in the 1980s, and cuts even more so against it now – does not favor continued restraint. Such failures to "explain why the original reasons for adopting the rule or policy are no longer dispositive," and to provide "reasoned explanation why the new rule effectuates the statute *as well as or better than the old rule*," are fatal APA violations. *Fox Television*, 489 F.3d at 456-57 (quoting *N.Y. Council, Ass'n of Civilian Techs. v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)) (emphasis original in *Fox*).

Moreover, not only do constitutional considerations recognized a half-century ago make any action that runs counter to them an arbitrary and capricious departure from precedent, they would render such action unconstitutional in their own right. No matter what else has happened in the intervening years, the public interest standard remains the "touchstone of authority" for the FCC, *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940), and still "necessarily invites reference to First Amendment principles." *CBS, Inc. v. DNC*, 412 U.S. 94, 122 (1973). While tensions between traditional First Amendment precepts and regulations like ascertainment and reporting

mandates formerly were muted as long as the FCC approached them with sensitivity to the competing values at stake, *see supra* at 17-18, the proposals in the *NPRM* make it appear as if the FCC is now poised to abandon that restraint.

Significantly, the D.C. Circuit has observed that the notion of "diverse programming" may be "too abstract to be meaningful" while "[a]ny real content-based definition of the term may well give rise to enormous tensions with the First Amendment." *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). This is echoes the FCC conclusion – *fourteen years earlier* – that "concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance" when it comes to obligations such as those the *NPRM* proposes. [32] To be sure, the FCC must "walk a 'tightrope' to preserve the First Amendment values written into the [ ] Act," but it always must "maintain – no matter how difficult the task – essentially private broadcast journalism." *CBS v. DNC*, 412 U.S. at 117. Thus, though the FCC "may inquire of licensees what they have done to determine the needs of the community," it "may not impose upon them its private notions of what the public ought to hear,'" [33] which is what the *NPRM*, despite FCC claims to the contrary, proposes to do.

Courts routinely rebuff FCC efforts to look over broadcasters' shoulders as they make choices about programming they believe will serve their communities of license. Such oversight

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[32] *Commercial TV Deregulation Order*, 98 F.C.C.2d at 1089] (citing *Office of Communication of the United Church of Christ*, 707 F.2d at 1430; *National Black Media Coalition v. FCC*, 589 F.2d 578, 581 (D.C. Cir. 1978)). *See also id.* (citing *CBS v. DNC*, 412 U.S. 94; *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978)). *Cf. PIRG v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) (citing "doubts as to the wisdom of mandating ... government intervention in [ programming ... decisions of [ ] broadcasters"); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968) ("the First Amendment demands that [the FCC] proceed cautiously" in regulating content, as it has "limited [ ] powers in this area").

[33] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (citing *En Banc Policy Statement*) (citation omitted).

necessarily chills editorial discretion and, by subtly (or not so subtly) coloring content choices that broadcasters make, poses a "high-risk" that regulations will cause programming to "reflect the Commission's selection among tastes, opinions, and value judgments." [34] For these reasons, courts have disapproved "a more active role by the FCC in oversight of programming" on educational stations as a "threat[ ] to upset the constitutional balance," [35] and have gone so far as invalidating requirements that noncommercial broadcasters maintain audio recordings for 60 days of all programs discussing issues of public importance because it imposed "substantial burdens" and a "risk of direct governmental interference with program content." [36] The burden imposed by the new regulations would be far more substantial than those previously invalidated.

The Commission may disavow here any intent to create programming quotas, but the D.C. Circuit has recognized the ways the FCC can pressure regulatees, "some more subtle than others," and in particular noted a "long history of employing 'a variety of *sub silentio* pressures and "raised eyebrow" regulation of program content.'" [37] In this regard, investigations based on data filed on a form pose "a powerful threat, almost guaranteed to induce the desired conduct," *id.*, such that a station "would be flatly imprudent to ignore any one of the factors it knows may

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[34] *Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968). For this reason, FCC regulations such as those at issue here "must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship." *Id. See also PIRG v. FCC & Anti-Defamation League*, *supra* note 32.

[35] *Accuracy in Media v. FCC*, 521 F.2d 288, 296-297 (D.C. Cir. 1975). *See also Community-Service Broad. of Mid-America v. FCC*, 593 F.2d 1102, 1115 (D.C. Cir. 1978) (*en banc*) (FCC and courts generally eschew "program-by-program review" due to constitutional dangers).

[36] *Community-Service Broad.*, 593 F.2d at 1105. Although the *Community-Service Broadcasting* decision turned on equal protection because of the special requirement for noncommercial broadcasters, it also noted the taping rule "in its purpose and operation serves to burden and chill the exercise of First Amendment rights by noncommercial broadcasters." *Id.* at 1110.

[37] *MD/DC/DE Broad. Ass'n. v. FCC,* 236 F.3d 13, 19 (D.C. Cir. 2001) (quoting *Community-Service Broad.*, 593 F.2d at 1116 ).

trigger intense review." *Lutheran Church-Missouri Synod*, 141 F.3d at 353. As the D.C. Circuit noted with regard to FCC EEO rules in rejecting arguments that such quantitative guidelines do not have a quota-like impact: it "cannot be seriously argued" such a guideline "does not create a strong incentive to meet the numerical goals. No rational firm – particularly one holding a government-issued license – welcomes a government audit." *Id.*

Gathering information as detailed as the proposed rules will require is thus not a neutral act, nor is it intended to be. When it adopted Form 355 and related mandates the FCC disclaimed "altering in any way broadcasters' substantive public interest obligations." The proposals here to adopt specific processing guidelines based on percentages of certain programming broadcast directly contradicts the Commissions claim that it is not adopting "quantitative programming requirements or guidelines," or requiring broadcasters "to air any particular category of programming or mix of programming types."[38]

The entire point of reporting requirements and processing guidelines is to subject broadcast programming to greater oversight. Just the fact that new processing guidelines will remove some renewal applications from Bureau approval in the ordinary course, and instead refer them for full Commission action if certain prerequisites are not met in precisely the way the new rules demand, will produce the kinds of costs and uncertainties that unconstitutionally "exert a chilling effect on the licensee's willingness to court official displeasure." *Community-Service Broad.*, 593 F.2d at 1110. This chilling effect can exist even when a new rule "neither creates any new content restrictions ... nor establishes any new mechanism for enforcement of existing standards," which is not the case here in any event, if such measures are adopted for the purpose of exerting control over content, as the *NPRM* seeks. *Id.* at 1115. In such cases, the "ultimate

[38] *Enhanced Disclosure Order*, 23 FCC Rcd. at 1275, 1287, 1292.

concern is not so much what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves." *Id.* at 1116. This chilling effect, and the extent to which the FCC seeks to interfere with broadcasters' editorial discretion in the name of "localism," raise serious constitutional red flags that the Commission cannot ignore.

Finally, the *NPRM*'s proposals also violate PRA and SBPRA, because they would treat educational broadcasters the same as large commercial broadcasters, without regard to the severe burdens they will impose on small entities like CBI's members. The PRA and SBPRA were enacted to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions ... resulting from the collection of information by or for the Federal Government." [39] Thus, when the FCC adopts new paperwork requirements, it is required to certify to the Office of Management and Budget ("OMB") that the new requirements "reduce[ ] to the extent practicable and appropriate the burden on ... small entities," including consideration of (1) "establishing differing compliance or reporting requirements or timetables that take into account the resources available to those who are to respond," (2) "clarification, consolidation, or simplification of compliance and reporting requirements," and/or (3) possible "exemption from coverage of the collection of information, or any part thereof." [40] It also must "make efforts to further reduce the information collection burden for small business concerns with fewer than 25 employees." 44 U.S.C. § 3506(c)(4). The *NPRM* contains no consideration of differential compliance options for small entities.

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[39] 44 U.S.C. § 3501(1); *Tozzi v. EPA*, 1998 WL 1661504, at *1 (D.D.C. Apr. 21, 1998).

[40] 44 U.S.C. § 3506 (c)(3)(C). *See also* 5 C.F.R. § 1320.9(c) (OMB regulations issued pursuant to PRA requiring consideration of compliance options for small entities).

The proposals also violate the PRA and OMB rules because they are not "necessary for the proper performance of the functions of the agency" and lack "practical utility." 44 U.S.C. § 3508; 5 C.F.R. § 1320.5(d)(1) & 1320.5(e). One of the elements of OMB's analysis under the PRA "is an assessment of the expected usefulness of the information to be collected." *Tozzi v. EPA*, 1998 WL 1661504, at *3 (D.D.C. Apr. 21, 1998). However, requiring educational stations to demonstrate through reporting mandates that they provide programming responsive to local and underserved communities is entirely unnecessary, as these stations unquestionably offer an abundance of such programming, as set forth above. Worse, as also shown above, the paperwork that will result from adoption of the proposals in the *NPRM* will actually require a *reduction* in the amount of the very programming the Commission seeks to encourage – if that does constitute a regulation lacking "utility," it is hard to imagine one that does. Accordingly, OMB will not be able to approve the increased paperwork burdens the rules proposed in the *NPRM* will require.

## V. CONCLUSION

For the foregoing reasons, the Commission should retreat from the intrusive and overly burdensome rules proposed in the *NPRM* in the name of "localism." At minimum, it should exempt from any rules adopted in this proceeding, or described in the *NPRM* but adopted elsewhere, all non-commercial educational stations with fewer than 5 full-time employees.

Respectfully submitted,

**COLLEGE BROADCASTERS, INC.**

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Dated: April 28, 2008

# APPENDIX

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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

# COMMENTS OF COLLEGIATE BROADCASTERS, INCORPORATED


Will Robedee
CBI Chair
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CBI
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November 1, 2004

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## COMMENTS OF COLLEGIATE BROADCASTERS, INCORPORATED

1. Collegiate Broadcasters, Inc. ("CBI"), representing member stations, students, and faculty advisors involved in radio, television, webcasting and other related media ventures, is filing these comments regarding broadcast localism in response to the Commission's Notice of Inquiry.

### I. Localism Overview

2. Localism has traditionally been one important way that Congress and the FCC have tried to achieve the broader goal of diversity, beginning with the allocation of licenses "among the several States and communities as to provide a fair, efficient, and equitable distribution" of stations.[1] The system of government in the United States rests on a similar scheme (elected officials representing populations in a specific geographic area). Although local media and local program content may be important for several reasons—as outlets for local expression, or as factors in the local economy, for example—they may be only one or a few of the options that ultimately contribute to the full range of diversity. Nevertheless, localism takes on particular significance because of the importance of local information to individual communities and to the political process. Terrestrial broadcast stations, limited to their local signal coverage, are uniquely qualified and able to deliver local service.

3. In contrast to the development of broadcasting elsewhere,[2] localism has been at the foundation of U.S. policy from the beginning.[3] Beginning with the 1927 Radio Act, Congress

[1] 47 U.S.C. §307(b).

[2] *See, e.g.* Thomas A. McCain and G. Ferrell Lowe, *Localism in Western European Radio Broadcasting: Untangling the Wireless*, J. COMM., Winter 1990 at 86. "European audiences had only a few alternatives to national broadcasting services during their growth period." *Id.*

[3] The general principle of localism, even as applied to communication, traces its roots much further back in history. Americans have historically been wary of concentrated central authority, as reflected in the federalist government structure. "The pervasive desire of the American people to diffuse political power encourages commitment of power

and the Commission have attempted to provide (or at least encourage) diversity through "local service." Policies addressed localism in two fashions: (1) most frequently as "spatial" or "geographic" localism, exemplified by the distribution of licenses to various communities and the preference granted to local ownership in initial licensing in comparative hearings; and (2) "audience" or "social" localism, the bedrock obligation of licensees to identify and program for the needs and interests of the audience in the community they are licensed to serve. The question for policymakers and licensees is how one conceives the media audience: as a mass (a single "community," defined by locale) or as individuals who collectively make up a number of "communities" within the contour of a station's signal (or, increasingly, irrespective of locale). Thus, it is possible to conceive of a community in various ways because some needs and interests may be defined by taste while others are more closely related to geographic space. Commission policies and licensee practices need to take both into account.

4. Although the Commission has, over the years, had policies recognizing both notions of localism, it is the geographic structural approach that provides the basis for most current FCC regulations. Policies that directly addressed programming and the audience within a geographic framework[4] have been eliminated or greatly reduced in terms of their formal requirements since 1980. Recent instances where the industry and policymakers have been asked to consider localism (and diversity) from an audience perspective have met stiff resistance from many broadcasters and some at the FCC.[5]

5. As far back as the Radio Deregulation proceeding, the Commission seemed to recognize the problem, noting the tension between structural policies and the goals they were intended to achieve, and even hinting at recognition of an audience-centered localism policy (albeit one driven by market forces) as a means of fostering diversity and meeting the public interest.

> The growing awareness of diversity includes awareness that communities of common interests need not have geographic bounds....
>
> The economics of radio...allowed that medium to be far more sensitive to the diversity within a community and the attendant specialized community needs. Increased competition in large urban markets has forced stations to choose

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to local entities." Tom A. Collins, *The Local Service Concept in Broadcasting: An Evaluation and Recommendation for Change,* 65 IOWA L. REV. 553, 569 (1980). More to the point, the local marketplace has been viewed for centuries as the appropriate forum for trading in (political) ideas as well as commodities. Richard A. Schwarzlose, *The Marketplace of Ideas: A Measure of Free Expression,* Journalism Monographs, Dec. 1989.

[4] *E.g.,* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C. 2d 650 (1971) and Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976) (policies requiring broadcasters to both determine and address the needs of many "communities" within their service area). *See also* Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949) and Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) (the Fairness Doctrine, requiring broadcasters to (a) provide coverage of controversial issues of importance in their community and (b) provide a reasonable opportunity for presentation of contrasting views on such issues).

[5] *E.g.,* Low Power FM (LPFM) and satellite-delivered Digital Audio Radio Services (DARS) such as XM and Sirius.

programming strategies very carefully. Some stations seem to have taken a traditional approach, seeking to attract wide audiences and general advertisers....

The fragmentation of markets among many competing stations, however, has apparently made an alternative strategy--specialized programming to attract a narrow audience of interest to specialized advertisers--increasingly attractive....

Radio has become increasingly profitable while this trend toward specialization has developed. This would suggest that both audiences and advertisers are pleased with the results. [6]

Policy choices since 1980 that addressed the public interest in diverse, local programming rely almost exclusively on geographic structural factors and the licensees' general (unstructured) bedrock obligation to serve their community. With the possible exceptions of the children's television rules and the political broadcasting requirements, the FCC generally leaves programming choices up to individual licensees.[7]

6. Nevertheless, in this *Notice of Inquiry*, the Commission now asks whether there are means other than ownership rules of effectively promoting localism and proposes to "address behavioral rules that promote localism, regardless of identity of ownership."[8]

## II. Localism Topics

### A. Communication With Communities

7. The Commission asks whether there are other steps that could "further broadcasters' communication with communities,"[9] specifically whether there are better ways in which broadcasters can determine the problems, needs, and interests of their communities; and whether market forces sufficiently further the goal of ensuring that broadcasters air programming responsive to the needs and interests of their communities?

8. As a preliminary matter, the Commission must first settle on a definition of "community." Conceptually, community can take many forms, from a material physical space with discrete boundaries (for example, geo-political entities such as cities, states, and countries) to a purely socially produced space existing primarily, or solely, in the mind of its inhabitants (often described, for example, as "communities of taste"). In terms of media, the elements

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[6] *In re* Deregulation of Radio, Notice of Inquiry and Proposed Rulemaking, 73 F.C.C.2d 457, 489 (1979).

[7] The radio deregulation proceeding ended formal ascertainment guidelines as well as news and public affairs requirements that had previously accounted for much local programming. *In re* Deregulation of Radio, Report and Order, 84 F.C.C.2d 968 (1981). A later inquiry accomplished the same changes for television. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, *Report and Order*, 49 Fed. Reg. 33,588 (1984). The so-called "format cases" eventually relieved the Commission of its responsibility for preserving unique radio programming in a market. FCC v. WNCN Listener's Guild, 450 U.S. 582 (1981). The Fairness Doctrine was eliminated just a few years later. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989); *see also In re* General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 145 (1985).

[8] In the Matter of Broadcast Localism, *Notice of Inquiry*, ¶5.

[9] Id., at ¶11.

common to either definition are the presumption of community members' shared interests and needs and the media's ability to serve and perhaps shape those interests.

9. Traditional localism, in the Communications Act and a variety of broadcast policies, leans heavily toward the former definition, generally casting community in terms of stable, independent, Jeffersonian villages. This view of community finds its clearest expression in the framework of broadcast licensing[10] and the emphasis on community as a single city (of license), or as more recently, in the Arbitron Metro market definition. [11]

10. In a reexamination of its suburban community policy,[12] the FCC explicitly sought comment on the definition of "community," in particular "whether the term 'community' should be redefined for §307(b) purposes . . . to mean, not the [city of license] but the metropolitan area covered by the signal of the proposed station."[13] This was a side issue in a rulemaking primarily focused on a larger localism question (whether suburban cities of license had distinct, discoverable and possibly unmet programming needs; and whether the policies mentioned substantially addressed those concerns without creating even greater problems). Then-Commissioner Stephen A. Sharp proposed that the answer to the alleged problems with the doctrines affected by this rulemaking lay in shifting the FCC's understanding of community in relation to the charge of §307(b).[14] However, this (re)definition of community did not alter the fundamental reliance on a geo-political framework ("community" equals Standard Metropolitan Statistical Area instead of city of license).[15] After considering the comments, the Commission decided that a change was not warranted. Thus, the relevant definition of community remained geographical in nature and the relevant audience was bounded by the city of license.

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[10] *E.g.*, the FM Table of Allotments and related licensing procedures. 47 C.F.R. §73.201 *et seq.*

[11] In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; and Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, *Report and Order and Notice of Proposed Rulemaking,* at ¶ 239. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.doc.

[12] This policy was one of several focused on the intent of applicants for new stations in major metropolitan areas. An applicant proposing to offer new service to a suburb would receive a preference over one proposing additional service for the larger central city. This particular policy stated that AM applicants whose 5 mV/m daytime contour penetrated the city limits of any community whose population was at least 50,000 and was more than twice the size of the applicant's specified city of license would be presumed to be realistically proposing to serve the larger city. 2 FCC 2d 190 (1965).

[13] *In re* The Suburban Community Policy, the *Berwick* Doctrine, and the *De Facto* Reallocation Policy, *Report & Order*, 93 FCC 2d 436, 441 (1983).

[14] *Id.*, at 461-466 (Dissenting Statement of Commissioner Stephen A. Sharp).

[15] The Commission displayed a bit of schizophrenia on the issue, however. In another section of the Report explaining their reasoning for abandoning the policies in question, the FCC noted the existence of "discrete markets" defined by "ethnicity, educational level, or cultural preference" within the large geographic region defined by a station's signal. *Id.*, at 450. This definition of "market" (as opposed to "community") recognizes that the connections between individuals--and their programming tastes and needs--are frequently better defined by factors other than geography.

11. For most of us, a sense of community synthesizes external and internal factors. It is constantly reformulated using elements of both material nature and mental space. Yet, it is distinguishable from either one.[16] The best contemporary definitions of community recognize this synthesis, emphasizing the factors that affect community formation, and the process of formation itself. Moreover, this model of community assumes people are actively involved, reacting to pressures of large-scale social systems and attempting to access, claim and control available resources.[17] Community members develop sets of commonly held beliefs, shared principles and practices (in some cases explicitly including the ritual sharing of information); and membership in the community may or may not include geographic proximity. In other words, community is less a "thing" and more a "process" (or, more accurately, a multitude of processes that bind a group of individuals together, and also larger groups of groups together).[18]

12. Broadcasting is clearly a part—but only a part—of that process, and the broadcast media are seldom, if ever, isolated purely within tight geo-political boundaries. Rather, the space and time transcending nature of electronic media make them ideal vehicles for supporting communities independently of existing geo-political units. Thus, the Commission should recognize that "community" is most effectively defined from the bottom up—by all of the community members—not from the top down by the Commission (or by particular broadcasters). Licensees should be able to serve communities defined by interests and needs as well as by geography. As the Commission recognized in the Radio Deregulation rulemaking, not all licensees need to serve all of the needs and interests of the market (or markets) they cover. A community's needs and interests can be effectively met by the cumulative efforts of all licensees in a market.

13. To effectively communicate with those communities, broadcasters and the Commission must recognize that a concept (market forces) that treats the viewer or listener as a consumer may have some overlap with local programming that treats the individual as a citizen, but it is absurd to argue that the two are identical. The marketplace of ideas that broadcasters are a part of should serve both ends; but programming we want as consumers is not always the same thing as the programming we need as citizens.[19] The market will always effectively provide the former in a commercial system, at least for the majority of the audience; it may or may not provide the latter.

14. A significant local presence in the community is the best way to ensure effective communication with the residents of a licensee's listening or viewing area, and their participation

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[16] *See* Edward Soja, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY 120 (1989).

[17] Barry Wellman, *The Community Question Re-evaluated*, 1 COMPARATIVE URBAN & COMMUNITY RESEARCH 81, 82, 96 (1988).

[18] *See* Steven G. Jones, *Understanding Community in the Information Age*, in CYBERSOCIETY 10, 16-17 (Steven G. Jones ed., 1995).

[19] See Theodore L. Glasser, *Competition and Diversity Among Radio Formats: Legal and Structural Issues*, 28 J. OF BRDCST. 127 (1984). We would also note that the Supreme Court has never reversed their oft-quoted statement in *Red Lion v. FCC* that it is the audience's right to hear, rather than the broadcaster's right to speak, which is paramount (395 U.S. at 390).

in the process. Satellite, cable, and online media are all suitable platforms for automated programming fed to a mass audience from one location. Local broadcasting—radio and television—is a special regulatory case. The Commission's rules support this concept in (a) the main studio rules; (b) the quarterly list of issues and programs; and (c) the public file requirements. Each could be adjusted to better encourage broadcasters to be more responsive to the local needs of their community while maintaining maximum flexibility for licensees in how they serve those needs.

15. The licensee's main studio needs to be staffed locally; however, it should not be only acceptable to meet the staffing or the public inspection file requirements at one particular site. In the case of non-commercial educational stations, a nearby church, university administrative office or local governmental agency should be permissible as the site of greeting visitors and providing access to the public file.

16. Many student-operated stations find the main studio staffing requirement problematic. The staffing requirement (see *Jones Eastern*[23]) places an undue burden on many stations. A common 'management' scenario at CBI stations includes a licensee which is the college or university itself. Faculty, staff and primarily students are given the duties of station management. In many cases, students are the only form of station management. Due to varied class schedules and other activities, at least some "student stations" are unable to meet the regulatory requirement of having a meaningful management presence *during business hours,* yet the overall management presence in most cases far exceeds 40 hours per week. Indeed, those later (or earlier) hours may be more convenient for many other members of the community.

17. With advent of automation techniques and unattended operation rules, some stations are completely unmanned during "normal business hours," yet they are not unresponsive to the community needs because they do staff the station for significant portions of the week with both a staff and management presence.

18. CBI proposes that the main studio staffing standards developed in *Jones Eastern* be relaxed specifically for these types of stations. The Commission could allow a significant management presence at these stations to be defined by alternative criteria that allow the community to interact with station management outside of "business hours." In doing so, the Commission should consider the enhanced means and opportunities to interact with station management in this communications age. Station management is often available to the community via alternate means of communication, including such options as e-mail, voice mail, electronic messaging, cell phones and other developing means of communication. While these alternatives will not satisfy all needs for in-person communication, they will alleviate the staffing burden and allow interested parties to coordinate a mutually agreeable meeting time with station management when a face-to-face meeting is desirable or required.

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[23] 6 FCC Rcd 3615 (1991)

19. In order to facilitate access to station management, the station could be compelled to post on its website a means of communication with management if it does not meet the current rules concerning presence at the main studio. It could also be compelled to post a notice at the main studio to provide information allowing any interested party a means to contact the management.

20. Given the ability in this age to reach and communicate with station management and the scenario described above that would allow a station to operate during business hours in an unattended mode, CBI asks for an elimination of the staffing requirement with respect to these stations, provided that access to the public file is maintained. Given the history of the main studio rule, CBI believes that the non-management portion of the staffing requirement is intended to assure a presence and access to station documentation, such as the public file.

21. Commercial and non-commercial stations can provide non-management presence in the form of an employee who is hired specifically to meet the letter of the rules. Such an employee could have little or no familiarity with the operation of the station and, in essence, be useless to the public. Given this scenario, we suggest that the staffing requirement be eliminated with respect to non-management personnel at non-commercial educational stations that do not exceed the level of staffing required to subject the licensee to the Equal Employment Opportunity rules. This change should only be acceptable to the Commission if the public file is made accessible at another location that is reasonably accessible to those seeking access.

22. For instance, a station that has adequate management presence under the proposal above could place a copy of the public file at the campus library, counsel office or other location that is located on the same campus as the main studio. Consistent with the above proposal, the station should be compelled to make the location of the public file accessible to the public via a sign at the main studio and, if it has one, via its website. Consistent with current rules, the station could also make the public file available via the Internet or a campus networked computer.

23. The main studio rules exist specifically to serve the Commission's localism goal. Through the years, these rules have been watered down to allow stations to not maintain a local studio within the original community but they still require the station to provide reasonable access. These changes have largely been implemented to allow licensees to locate their studios in the most economically advantageous location. Moreover, waivers to the main studio rules are commonplace. While well intended, these rules continue to dilute the local presence of a station.

24. CBI agrees strongly with the current flexibility concerning the location of the main studio and the waivers currently in place. The Commission may wish to consider whether there is a need to make the waiver process more stringent, so that main studios are not mere illusions designed to serve the letter, but not the intent, of the rules.

**B. Community Responsive Programming**

25. The Commission asked a number of questions in the Notice about the nature of licensees' service to their community through programming and other activities. CBI will address only a few of those.

26. Programming is far from the only way college stations are involved in their communities. Increasingly, college and educational stations are developing an Internet presence. Through these communication portals, stations continue to extend information about their communities. For example, KDVS provides an entertainment calendar (http://www.asucd.ucdavis.edu/radio/entertainment_calendar.cfm?title=Entertainment Calendar), a Hip Hop Calendar and a Folk calendar, an interactive public affairs forum. KJFC hosts pages concerning local concerts and clubs, WICB offers a community events page (http://www.ithaca.edu/radio/wicb/community_events.html), KXUL provides local weather information from the national weather service fed by RSS.

27. Many college stations program events and activities off the air as well as on the air that contribute to the local community in substantial ways. For example, CBI members have developed projects involving K-12 students in on-air and off-air activities such as on-air originally written and produced radio dramas, talk shows and news reporting as well as off-air work with local schools on literacy projects, fundraisers, and promotion of community programs.

28. Many colleges and universities face tensions between the community in which they live and the students who attend their institution (so-called 'town and gown' issues). College radio stations serve both audiences and are in a unique position to address areas of overlapping concerns. For instance, nationally-known speakers who come to campus are of interest to the community as well in many cases. College stations do a great public service by publicizing these events and an even greater service by broadcasting live, time-shifting, or holding separate interviews with the speaker that a larger audience can hear. Another example would be producing public affairs programming that promotes understanding and communication between the town/city and the college/university.

29. CBI strongly believes that if the Commission were to develop any sort of localism review of stations at license renewal time, the unique characteristics of college and other non-commercial stations' programming choices must be considered and weighed heavily as a contribution to the local culture and needs of the community. One additional way the current system could be strengthened would be to provide incentives for all licensees to produce at least some local programming dealing with the local issues through some sort of preference for licensees that originate programs locally.[24] For initial licensing, this could be in the form of a bid multiplier or bonus for commercial stations pledging a certain level of locally originated programming or a comparative hearing preference point for non-commercial licensees making a similar pledge. At renewal time, the rule could take the form of a graduated scale system up to some maximum point (perhaps based on the percentage of a licensee's quarterly list that was locally originated); or, as in the children's television rule, could be a baseline threshold of some amount of locally originated, issue-oriented programming per week. Additional points might be

[24] Such a preference is currently used for LPFM. In the Matter of Creation of Low Power Radio Service, *Report & Order,* 65 Fed. Reg. 7615, 7631-7632 (2000).

available for stations airing such programming between 7 a.m. and 10 p.m.[25] As in the case of the children's television rules, compliance with the rule would create a presumption of exemplary service to the community, but the programming that substantially complies with the rule need not be the only way a station can demonstrate such service.

**C. Underserved Audiences**

30. Many CBI member stations, and college broadcasters generally, pride themselves on providing programming not available elsewhere. Many stations claim their mission specifically as offering a diverse selection of programming, targeting unserved and underserved audiences in their communities with an eclectic collection of music, talk, news, and sports. The structure of these stations and the make-up of their campuses and communities leads them to be highly responsive to a diverse and frequently contentious community. As noted above, the reintroduction of something akin to the ascertainment guidelines would merely add bureaucratic redundancy to the already harried life of most student broadcasters and faculty advisors. They hear every day from the community members about their programming choices, good and bad.

31. In the Radio Deregulation rulemaking, the FCC concluded that the costs of the formal ascertainment procedure then in place outweighed the benefits, and that licensees could adequately determine individually appropriate procedures for determining the program needs and interests of their community. Most CBI member stations are operated primarily or completely by volunteer labor. As such, they lack the full-time professional staff to adequately conduct formal ascertainment. At the same time, the nature of these stations makes them more responsive than many commercial operations to less formal community input. The volunteers are in regular contact with a wide range of community members, through other organization memberships, fundraising activities, outreach programs, and other communication channels. The licensee (frequently a school's board of trustees or similar) is another conduit to the community, and a means by which members of that community can (and do) shape programming.

32. Much of that programming is focused on underserved (or unserved) audiences. Our member stations' missions frequently address the need to serve many audiences that are not attractive to larger broadcast operations. College and educational stations typically are the poster children when it comes to airing music and other forms of programming that is responsive the needs of the underserved communities. Indeed, college broadcasters are frequently derided by our commercial brethren for not paying more attention to the commercial viability of our programming and our listening or viewing audience.

33. Our member station licensees happily play that role, providing exposure for numerous little known bands rather than the latest hits from a handful of megastars; providing a thoughtful forum for discussion of local community issues instead of a shouting match between a couple of over-hyped pundits; and asking first "how does this serve our audience" rather than "how much can I sell this audience for."

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[25] *Cf.* children's television rules, outlining the characteristics of service expected in that area, along with license renewal processing guidelines for station's complying. In the Matter of Policies and Rules Concerning Children's Programming, *Report and Order* (MM Doc. 93-48, 1996). Available at http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96335.htm.

34. To more effectively further the goal of localism, the Commission needs simple rules that encourage and reward stations for involving the community in issues of local interest. The rules should be based on principle rather than a detailed list of actions quantified requirements for specific genres of programming.[26] The rules must recognize that NCE stations often don't have many (or any) paid staff and rely on volunteers for the bulk of their work.

35. Therefore, CBI opposes any return to formal ascertainment and recommends that if the Commission were to pursue a more formal ascertainment procedure, there should be exemptions allowed for non-commercial educational stations with fewer than 5 full-time employees. We address other incentives for local service below.

**D. Centralized Control of Content**

36. Radio has always had the potential to be the most local and diverse medium. The economics of programming are favorable compared to television, newspapers, or magazines. But the multitude of regulatory, technological, and economic changes since deregulation in 1980 (including the dramatic growth in the number of licensed stations; satellites as a means of distributing programming; frequent, speculative, and highly-leveraged trading of licenses; the raising or elimination of ownership caps; and greater competition among all media for a limited pool of revenue) has resulted in tremendous centralization of programming throughout much of the industry. Network formats delivered by satellite, voice-tracked programs originating halfway across the country, and totally automated program services characterize much of commercial radio outside of the large markets (and sometimes even there). Happily, this robotic approach is seldom characteristic of college radio.

37. Nevertheless, CBI views it as a broader problem affecting all of us, one characterized by the arguably fraudulent promotion example cited by the Commission in the Notice of Inquiry.[27] Every licensee should have an interest in our medium being viewed as trustworthy. When a station positions itself as "local" but is using air talent from far away and running contests that involve not only the local audience but listeners in dozens or hundreds of markets, the audience is being misled. Even if the deception does not rise the level of legally prosecutable fraud, it gives the people in our communities one more reason to not trust us.

38. The Commission should require that contest rules, announcements, and any associated promotional materials (such as direct mail or point-of-purchase merchandising at participating sponsors), clearly explain the scope of the promotion (the number of stations and markets participating).

39. Playlists, like all broadcast programming decisions, ought to be made in the interest of the local community. The willingness of many licensees in recent years to cede effective programming control as part of network contracts or less official arrangements, arguably demonstrates a lack of fitness as a licensee and should be condemned. However, the

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[26] See ¶29 above.

[27] In the Matter of Broadcast Localism, *Notice of Inquiry*, ¶38.

issue also raises clear First Amendment concerns. And for radio, at least, many of the abuses frequently cited (relationships with independent promoters, for example) seem to have been curbed of late. CBI believes strongly in the need for local control of programming, but also believes that such control cannot be effectively legislated without constraining licensees free speech rights.

40. Voice-tracking presents a similarly tough legal challenge, at least in part because what might constitute giving the audience the impression that the air talent is "one of them" is vague at best and is probably impossible to accurately define and control in any way that would be consistent with the Commission's statutory and constitutional authority. Further, the Commission noted that voice-tracking can refer to the importation of "popular out-of-town personalities," but it did not recognize that it can also be used as a means to stretch the available local talent (for example, the live afternoon DJ can also be the overnight DJ without needing to be present at the studio). Voice-tracking is not as easily defined in fraudulent practice rules as promotional contests. CBI would suggest that the Commission defer to the judgment of individual licensees as to appropriate use of this technology.

**E. Additional Spectrum Allocations**

41. In the localism notice, the Commission asks a number of questions that should be rhetorical, but are posed as questions and solicits comments. Perhaps this is because the Commission already knows the right course of action, but is afraid of the fall out. In the opening of the NOI, the Commission states, "Broadcasters, who are temporary trustees of the public's airwaves, must use the medium to serve the public interest, and the Commission has consistently interpreted this to mean the licensees must air programming that is responsive to the interests and needs of their communities of license."

42. The Commission further notes that translators "are not permitted to originate programming themselves, except for emergency warnings of imminent danger and announcements, limited to thirty seconds per hour, seeking or acknowledging financial support."

43. Conversely, LPFM stations were created to enhance localism in the local communities. The only way a translator operator could argue that a translator does more for the local community is if the translator enhances the local coverage of the primary station. The satellite fed translators, for the most part, do nothing to enhance localism and actually impede localism on the airwaves by preventing LPFM's from coming into existence. The benefit to the community is lost. These translators are nothing more than an informal network of money making machines, while the LPFM stations that could exists in their place would be required to generate local programming under the commissions rules.

44. The Commission asks, "What effect do these policies have on localism?" The answer is obvious: it stifles it. The Commission also asks, "How do our policies for translators affect the availability of spectrum for LPFM, and should we change any of our rules to give preference to entities with a local presence and/or local programming?" It is obvious that the current policies restrict and, in many cases eliminate spectrum for LPFM stations. The rules should be changed to give LPFM stations preference over non-local translator services, with one

added requirement for the LPFM station. LPFM stations that replace existing translators should be required to have both receive and transmitting EAS devices that are compliant with section 11. The result would be a new local service that enhances localism while not reducing the availability of local emergency information.

45. In reviewing comments and proposals on this specific topic, we urge the Commission to read the many comments filed by listeners to 'translators' with much caution. While there are genuine and well informed comments filed in this proceeding, there are a large number of comments that make inaccurate assumptions or demonstrate a complete lack of understanding of the issues at play. For instance, one comment (http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516791515) claims that removing the protections for translators in favor of a local LPFM station would deprive the listener of the service they love. Yet the information they provide in the letter allows us to determine that the station being referenced is a full service, Class C2 station, not a translator. Another example can be found at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516791506. This letter references two stations which can be identified using the FM query service on the Commissions web site. Both stations are full service stations with one a C2 and the other a C1.

46. If the Commission is to give any weight to the arguments in support of translators over LPFM's, the shear volume should not be counted. Each and every argument should be given scrutiny to determine if the comments are based on facts or fear mongering fostered by those seeking to protect their self-interests over the interests of true localism.

47. In the Low Power FM rulemaking, the Commission recognized that locally responsive service was essential. Although both translators and LPFM may provide valuable service, locally originated programming should remain a particularly favored class of content. Therefore, CBI suggests that the Commission freeze the translator application process, and continue to encourage Congress to act on the Mitre report recommendations. Furthermore, the Commission should continue to expedite processing of the existing LPFM applications, and should consider opening the second-round LPFM application windows. Again, opportunities for locally-originated service should take precedence over applications for out-of-market translator service.

**III. Conclusion**

48. CBI member stations will continue to provide exemplary local service to their markets. In any subsequent actions, we strongly urge the Commission to consider the local nature service those stations have historically provided, and the budget and staffing constraints they must overcome in providing that service. Any new localism requirements should include sufficient flexibility for licensees to implement the rules within the context of their particular situations. The best judge of local needs remains a locally based licensee.

Respectfully Submitted,

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