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

In the Matter of	)	
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Broadcast Localism	)	MM Docket No. 04-233
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TO: THE COMMISSION

Comments of National Religious Broadcasters to
Report on Broadcast Localism and Notice of Proposed Rulemaking

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SUMMARY AND INTRODUCTION

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic media open and accessible for religious broadcasters. We have more than 1400 members, most of whom are radio and television broadcasters that produce and/or telecast religious programming. Of those, a significant number are licensees with either single or multiple stations, all of which will be impacted negatively by those portions of the recommendations contained within the Report on Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233, January 24, 2008 ("NPRM") in paragraph 2. below (relating to the requirement of twenty-four hour staffing); all of our broadcast members will also be impacted negatively by the recommendations in the NPRM listed in paragraphs 1.(mandated advisory boards) and 3. (mandated localism content in programming) below.

NRB addresses, and opposes, the following Commission proposals that appear in the NPRM:

1. Mandated Community Advisory Boards, NPRM, ¶ 25. We oppose this suggestion because: (a) it limits the flexibility and creativity licensees need to find the best way to determine local issues; (b) being imposed as a government "mandate," it therefore would create an unrealistic expectation of empowerment in the board representatives selected, and would place administrative pressures on a licensee who may have legitimate broadcasting reasons for not agreeing to certain programming demands that are made; (b) government mandated advisory boards will decrease rather than increase the willingness of

licensees to take risks regarding the diversity of opinion of those whom they invite on such boards; (c) it will reduce the issue of localism to the mere running of a mandated advisory board bureaucracy, and will thereby lower rather than raise the bar for licensee creativity in determining local needs; (d) it violates the Religion Clauses of the First Amendment; and (e) it ignores the myriad ways in which broadcasters can use everyday technology, and creative, individualized approaches, to invite public participation in programming and assessment of community needs outside of a formal "board" structure.

2. Mandated staffing of each broadcast facility during all hours of operation. NPRM, ¶ 29. We oppose this proposal because (a) it will financially devastate many of our broadcasters, (b) it will unduly burden those of our broadcasters with multiple facilities within close proximity of each other who have staff at some locations and use automation for others; (c) the Commission does not cite any facts indicating how this rule would advance "localism" or serve the public interest; (d) the Commission's sole examples of severe weather or emergencies requiring the physical presence of staff at broadcast facilities to insure public warnings, are based on an unsubstantiated hypothesis, with no actual problem cases cited, and such examples are currently handled very effectively on a remote automated EAS system, or with other technological tools that keep live staff "on call," as the experience of our broadcast members indicates; and (e) will force many

broadcasters currently broadcasting around-the-clock, who cannot afford to pay for extra staff or over-time compensation during "all hours of operation" to begin cutting back broadcast hours, thus decreasing, rather than increasing, service to the public.

3. New mandates for localism content in programming as a condition of licensure. SFNPRM, ¶ 124. We oppose this recommendation because (a) it would violate the First Amendment: (b) it is based on an unworkable system where the Commission would try to define what it truly "local" programming in matters of news, public affairs, culture, and entertainment and then punish offending broadcasters whose view of broadcasting journalism may be different from the Commission's official "orthodoxy," and (c) it would necessarily require the Commission to construe and then apply vague, ambiguous standards of "localism," thus encouraging the Commission and its agents, even unknowingly, to make licensure decisions based on purely subjective views of the value of certain reasonably debatable types of programming.

I. DISCUSSION

A. Mandated Community Advisory Boards Would Create a Morass of Administrative Problems for Broadcasters, would Deny them Necessary Flexibility, would Ignore Real World Solutions to Assessing Local Issues and would violate the Religious Liberty Rights of Christian Broadcasters

The Commission has suggested that each broadcaster should "convene a permanent advisory board made up of" representatives and leaders of "all segments of the

community." NPRM, ¶ 26. The stated purpose would be to "help inform the stations' programming decisions," and create "improved access by the public to stations decision makers." NPRM, ¶ 25. Meetings would presumably be at least quarterly. Id.

However, the strangling administrative effect of this kind of mandate, when played out in real life, seems almost self-evident, particularly when applied to the NRB's broadcast constituents, who are all religious broadcasters. [1]

First, it has to be observed that, as the Commission notes, some broadcasters already have such community councils as part of their community outreach and have reported benefits in helping them determine local issues. See: NPRM ¶ 26. However, what is not stated is the reason for those benefits. It is likely that the common denominator of success is two-fold: (1) connection with segments of the community, and (2) the creative flexibility exercised by each licensee in *voluntarily* determining who is to be invited, how their feed-back is to be received, how often to meet, and how to assess the information received in terms of programming decisions.

A mandated system eradicates the benefits that flow from (2) above. As one of our broadcast members (a national radio network) indicated to us, they already have substantial, informal contact with business, community, and religious leaders within the areas of license; but that a required process of advisory boards should be firmly opposed. Broadcasters need flexibility in determining the appropriate "focus groups" from different communities, as just one option among several ways to assess local issues.

[1] We realize that the NPRM here addresses only a television obligation for such advisory boards, as a prior proceeding proposed them for radio. NPRM ¶ 29. Nevertheless, our reasons for opposing such boards apply *equally* for both television and radio.

A mandated (as opposed to a voluntary) system also creates a natural expectation of empowerment and influence among the selected representatives. What happens when ardent community representatives, who know the advisory board is the result of an FCC "mandate," fail to convince the licensee of the value or legitimacy of a purported "local issue?" Not only will a certain degree of coercive pressure on the station manager result, but complaints will then be filed with the Commission arguing that the licensee is not fulfilling the Commission "mandate" in good faith.

Further, in a mandated system, station managers and licensees will be tempted to pick only *like-minded, non-opinionated* segments of the community to lessen the probability of Commission complaints or community back-lash. Clearly, this is not what the Commission has in mind. Broadcasters will be more likely to cast a wider net and risk inviting a greater spectrum of ideas and world-views if all participants understand that both the net and the casting are *voluntary efforts* by the broadcaster, rather than the grudging fulfillment of an obligation imposed by a federal agency.

Even worse, a mandated advisory board system will stifle, rather than encourage, the inclination of the broadcaster to regularly review new ways to interact with the local community. The natural temptation will be for broadcasters to conclude that the time-consuming and taxing administration of quarterly advisory board meetings has fully met their obligations for community interaction. The focus will change from the *broadcaster's* obligation to survey the community's issues in inventive and unique ways, to the *running of advisory boards*, scheduling its meetings, preparing hand-outs, meeting objections about those members selected or those rejected for inclusion, dealing with

objecting representatives, and handling the fall-out when unpopular programming decisions are made.

In other words, such a mandated board system takes the Commission motive to increase broadcaster-public interaction and raise awareness of local issues, and reduces it to a bureaucracy. The Commission has considered adopting the old ascertainment guidelines in determining what are the various "segments" of the community. NPRM ¶ 26, n. 50. Yet there are no less than twenty-four separate "segments" listed. Id. The size of these advisory boards could end up being quite daunting, particularly for a small broadcaster.

Even further, bearing in mind that NRB's broadcast members disseminate programming which is decidedly Christian in content, how would the Commission purport to enforce representation on the advisory board? One of the categories in the old ascertainment criteria, was that of "religion." NPRM ¶ 26, n. 50. Would Christian broadcasters be accused of non-compliance with the Commission's mandate by limiting representation to those co-religionists who share their faith viewpoint?

But there is an even more odious threat at play here. Mandatory "advisory" councils from a cross-section of the community, intruding themselves with government backing, into the programming decisions of Christian broadcasters is a clear imposition on the Free Exercise of Religion rights of such broadcasters. Thomas Jefferson voiced an opinion regarding religious freedom from "intermeddling" government oversight that reflects the uniform consensus of all of our Founding Fathers:

> "… I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises … Certainly no power to proscribe any religious exercise, or to assume authority in

> religious discipline, has been delegated to the general government."[2]

Not only is this concept rooted in the Free Exercise Clause, but it is also reinforced by the proscriptions of the Establishment Clause, as to which the Supreme Court has imposed the prohibition against the federal government engaging in an "excessive entanglement" with religion. *Mitchell v. Helms*, 530 U.S. 793 (2000) (verifying that "excessive entanglement" prohibition is still viable). *National Labor Relations Board v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (divesting the NLRB of jurisdiction over teachers in religious schools - even though such schools taught both religious and secular subjects, which in the mind of the NLRB vested the authority to regulate workers there - the Supreme Court refused to allow federally monitored *mandatory* collective bargaining to be imposed because of the serious risk of "excessive entanglement" between a federal agency and religious institutions.)

We believe that the risk of "excessive entanglement" posed by federally mandated community boards meeting with, monitoring, and deliberating on Christian broadcasters' programming decisions is at least as intrusive as the risk of entanglement noted by the Supreme Court in *The Catholic Bishop of Chicago* decision, *supra*. The very idea of mandated community boards having a voice in Christian programming is a *non sequitur*. "Religion" is hardly a matter of what the collective representatives of the local community say it is. To the contrary, it is this kind of heavy-handed, collectivist mentality that our Founders considered to be fundamentally offensive.

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[2] T. Jefferson, letter to Rev. Samuel Miller , January 23, 1808, The Political Writings of Thomas Jefferson, Merrill Peterson, ed. (Woodlawn, Maryland: Thomas Jefferson Memorial Foundation, Inc. 1993) page 159.

Lastly, such a mandated board system ignores the real-world technology available to connect the licensee with the community. Our broadcast members inform us that they regularly receive community input on programming through email, web sites, telephone comment lines, and letters. They meet with community leaders "out in the field" and serve on community boards. One of our larger networks indicates that they: do field research regularly for interest areas in all their markets, maintain a call center for live call-in feed back from their audience and a 24 hour switchboard with five pastors who can receive comments from their audience and a 24 hour comment line, and do quarterly ascertainment surveys in each community of license for programming purposes.

With the institution of a Commission "mandate," many if not most of these broadcasters will be forced to chose to obey such advisory board mandates first, resulting in less time and energy to devote to other, more creative, and individualized ways to interact with the community and to truly assess local broadcast needs.

As one Commissioner noted, "… it is important for local news outlets to establish processes that work best in their own communities, rather than being forced to implement an edict from Washington." NPRM, Statement of Commissioner Deborah Taylor Tate.

B. Mandated Around-the-Clock Staffing at Each Broadcast Facility would Unreasonably Burden Broadcasters, would not Serve the Commission's "Localism" Mission, and is at Odds with the Technological Means of Meeting Local Needs Remotely

The Commission is considering mandating licensees to staff each broadcast facility during all hours of operation. NPRM, ¶ 29. Such a requirement will cripple many of our broadcasters, and not just the smaller ones, but the medium-sized ones as well. Our larger stations and networks also advise us that it will create a substantial financial and logistical burden.

One of our medium-sized networks has informed us that "[t]his rule will absolutely devastate my operation … I [have] just combined operations because I couldn't afford to keep all the people. By requiring more people, it would make running smaller stations almost impossible to keep profitable." This same sentiment is shared by other of our networks. Such a result is violently at odds with the Commission's stated goal, as an example, to increase "localism" through the increase of smaller, community based radio stations. See: NPRM ¶ 131-139. One of our larger networks with a large number of station facilities indicates that "our current budget structure would not allow anywhere near this kind of diversion of [staffing] resources and could jeopardize the future of the ministry as a whole."

Also, one of our larger networks advises us that they currently decide, logistically, which of several geographically-close facilities will be manned physically, and which will be remotely operated, based on feasibility and financial considerations. The Commission's proposed rule that would require "each … facility" to be staffed during all hours of operation would impose redundant and unnecessary restrictions where multiple physical facilities of a licensee exist close to each other.

Beyond that, broadcasters who "serve the public interest" by broadcasting around the clock would, in effect, be punished, because they will now be required to have staff on hand through-out the late hours of the night. That will force many broadcasters, rather than incurring the substantial financial investment of hiring new personnel, or paying over-time to existing staff, to simply limit the hours of broadcasting. We can hardly envision a result *more at odds* with the Commission's "localism" and public interest mission than that.

The Commission cites, as a basis for this proposed rule, the need to provide local warnings of "severe weather" or "local emergency." NPRM ¶ 29. However, the Commission does not cite any actual incidents where the physical absence of staff contributed to the lack of an adequate, or timely broadcast warning to the community. There are no true "facts" in the record thus far establishing that this rule would, in any meaningful way, advance the cause of "localism."

One of our NRB television broadcast members, points out that for the last two years of using a remote, automated system, it has never malfunctioned. Further, in its use of the EAS system, when an emergency (weather or otherwise) message is sent, there is an automatic graphic crawl that is broadcasted and appears on the television screen of the viewers, all accomplished without the physical presence of broadcast staff at the facility.

Another of our broadcasters (a network) has indicated to us that they use other technology to keep in contact with "on call" staff around the clock: "Some [of our staff} carry alarmed weather radios through which they receive notification of severe weather. When the person on call is notified of severe weather, he or she can either cut into regularly scheduled programming with weather bulletins from home or travel to the station to deliver those bulletins."

We are strongly opposed to this Commission recommendation.

C. Mandating "Localism" Content Violates the First Amendment, Creates an Unworkable System based on Undefinable Terms And Unmeasurable Standards

The Commission proposes to enforce "special procedural guidelines for the processing of renewal applications for stations based on their localism programming performance." NPRM ¶ 124.

We believe that the imposition of this kind of content control will inevitably violate the Free Speech provisions of the First Amendment. Even the commenters who have demanded that the Commission impose an "aggressive policy of localism and diversity" also seem to recognize that such a rule faces the substantial hurdle of not "conflict[ing] with First Amendment principals." NPRM ¶ 35. Further, at least one Commissioner has agreed with NRB's assessment that Free Speech guarantees will most certainly be violated: "We risk treading on the First Amendment rights of broadcasters with unnecessary regulations. An order reflecting these [localism programming] conclusions will be overturned in court." NPRM, Statement of Robert M. McDowell, Concurring in Part.

It has been suggested in one recent Court of Appeals decision that when the Commission creates rules that permit it to impose its "subjective" views of the value of certain programming, it risks violating the First Amendment. As the Court stated in *Fox Television Stations, Inc. v. F.C.C.*, 489 F.3d 444, 464 (2d Cir. 2007):

> We also note that the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its *subjective view* of the *merit of that speech* ... In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials. (emphasis added) (citations omitted).

Secondly, the Commission risks the real probability that its localism mandate regarding required programming will be struck down as establishing an unconstitutional "orthodoxy" in Free Speech matters. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be *orthodox* in politics, nationalism, religion, *or other matters of opinion* …" *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642

(1943)(emphasis added); cited in *Connell v. Higginbotham*, 403 U.S. 207, 209-210 (1971)(Marshall, J., concurring). By requiring that the programming of all broadcasters must contain required elements of "local" information, and then entertaining a rule that would set-out the categories of programming that the Commission defines as "local," the Commission is, in effect, establishing an official "orthodoxy" of broadcasting content.

Thirdly, this "localism" restriction on Free Speech is unlike the indecency area, as an example, where the Supreme Court has provided a specific exception within which the Commission can regulate the content of certain kinds of indecent communications. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Here, by contrast, the "localism" mandate would affirmatively tell broadcasters what kinds of speech they *must* transmit because they Commission has decided it is valuable and meritorious.

Nor is it convincing that the Commission seeks to do so because it has determined that it desires "greater diversity in what is seen and heard over the airwaves …" NPRM ¶ 3. The desire to pursue diversity doesn't immunize it from violations of the First Amendment. *Miami Herald Publishing Co, v. Tornillo*, 418 U.S. 241, 257 (1974) ("Government-enforced right of access [in forcing a wider spectrum of opinion through forced right-of-reply in newspapers] inescapably dampens the vigor and limits the variety of public debate" and therefore was unconstitutional) (internal citations omitted).

Nor does the Commission's localism programming content mandate pass First Amendment muster because "broadcasting" is a field where government regulation and licensure is permitted. Government regulation of electioneering is also permitted,

as an example. However, the Supreme Court has noted that in that context where regulations prohibited certain corporate-paid speech advocating political candidates but also overlapped into permissible "issue advocacy," then "[i]n drawing the line, the First Amendment requires us to err on the side of protecting political speech …;" standards of judicial scrutiny must "give the benefit of any doubt to protecting rather than stifling speech." *Federal Election Commission v. Wisconsin Right to Life, Inc*., 551 U.S. ____ (2007)(ruling that, under the First Amendment framework, no "compelling" government interest justified the FEC's regulation of issue ads).

Lastly, there is the obvious constitutional defect here that we have noted elsewhere in these Comments. See: *infra*, pages 8-9 (the Commission may not intrude into the internal programming decisions of Christian broadcasters without hitting the dual trip wires of both Free Exercise of Religion, and the excessive entanglement prong of the Establishment Clause). In one sense, this part of the NPRM is even more ominous and offensive than mandating advisory boards. There, the boards would simply intrude into the workings of the Christian broadcasters programming discussions. Here, under this proposal, the Commission deigns to tell Christian broadcasters what it can, and cannot broadcast, and perhaps even the proportionate amount of mandated broadcasting content it must transmit.

What the Commission must remember is that there is a constitutionally significant difference between mandating a news/sports/ weather/traffic channel to carry "local" news, and telling a Christian broadcaster, whose programming is thoroughly religious in nature, how much "local" content must be provided. NRB has not invented this significant difference; rather, our Founding Fathers did when they

imbedded these principals into the language of the Religion Clauses of the First Amendment.

In conjunction with the fatal unconstitutionality of this proposal, there are practical problems as well. We infer that the Commission may already recognize the dilemma in this. It seeks comment on whether the rule should require "particular types of programming, such as local news, political, public affairs and entertainment, or simply generally reflect locally-oriented programming?" NPRM ¶ 124. In the case of the former, it will presumably be the Commission which will ultimately define what is "local news," or "political" news, or "public affairs" or, for that matter, "entertainment."

If this is the rule, then the Commission apparently intends to delegate to itself the authority to define what is officially "orthodox" (*West Virginia State Board of Education v. Barnette*, *supra*) in the fields of electronic journalism and broadcasting. There is a difference between the Commission overseeing the public trust of the airways to insure that licensees are generally serving the interests of the public, and what it proposes here: an official lexicon of what is, or is not "local" in terms of news, editorial content, public affairs, or entertainment.

The Commission asks: "how shall we define local programming?" NPRM ¶ 124. But that fatally begs the question. Rather, the Commission should be asking, "*should we* attempt to define local programming?" To that, we would answer: no. The Commission should, instead, advise licensees on what values, interests, and *objectives* it would like to see achieved by programming, whether "local" or otherwise.

Then it should permit the licensees to achieve those values, interests, and objectives by doing what broadcasters do best, and what a federal agency does least effectively: chose the precise categories of programming that the public wants and needs, and the proportionate allocations for those categories. Failure to meet the wants and needs of public listeners and viewers regarding programming categories does not need the enforcement sanctions of the Commission as a remedy; the public will cease to support, and advertisers will cease to sponsor failed programming decisions by broadcasters.

While the Commission questions whether "market forces" have adequately advanced "localism" goals (NPRM ¶ 7), it bases this, in part, on what some advocates "perceive" about local issues that are not being addressed. NPRM ¶ 36. When the Commission cites studies that purport to *objectify* that point, by concluding that there has been a decline, particularly among networks, of "locally oriented programming" (NPRM ¶ 37-38), it does not show that there is a consensus on what those terms might mean.

Nor should the Commission try to create such a consensus by fiat. When it attempts close the debate on what certain sweeping, broadly-used broadcasting terms (news, entertainment public affairs, local affairs) really mean, it invites endless mischief. The more the Commission seeks to enforce its own definition of such broad terms, the more it invites unprincipled decision-making, where the Commission's decision makers, even unknowingly, will ultimately be forced to rely on their own subjective philosophical biases about programming.

That scenario can hardly serve the public interest. And it will most certainly not withstand judicial scrutiny. *Fox Television Stations, Inc. v. F.C.*C, *supra.*, (suggesting a First Amendment violation if the Commission "seeks to sanction speech [read: programming] based on its subjective view of the merit [or lack of merit] of that speech").

Further, programming need not be locally-produced, or independently produced, to provide coverage of local news. Further, "local" news may coincide with regional or national trends on certain issues to the extent that news coverage of one related story in another geographical area may provide a "local" application to the community of license.

But does a story about the wide-spread devastation of Hurricane Katrina fail the "localism" test because it contains interviews with residents of a neighboring community, but not the community of license itself?

Does a local program which interviews local residents in a community of license about their opinions on a *national* election thereby fail to qualify as *local programming*?"

This kind of endless parsing, and definitional minutia will consume the Commission, and every broadcaster, if the Commission pursues its stated rule.

We strongly oppose this proposal.

II. CONCLUSION

For the foregoing reasons, we request that the Commission abandon the following proposed rules, to-wit: Those relating to the requirement of twenty-four hour staffing at each broadcast facility, those relating to mandated advisory boards, and those relating to

mandated localism content in programming as a condition of, or in conjunction with, licensure.

Respectfully submitted,

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