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

In the Matter of	)	
	)	
Standardized and Enhanced Disclosure	)	
Requirements for Television Broadcast	)	MM Docket No. 00-168
Licensee Public Interest Obligations	)	
	)	
Extension of the Filing Requirement	)	MM Docket No. 00-44
For Children's Television Programming	)	
Report (F.C.C. Form 398)	)	

TO: THE COMMISSION

Comments Of National Religious Broadcasters Opposing Mandatory Internet Disclosure By Television Stations Of "Political Files" And Information On Issue-Advocacy Groups

Frank Wright, Ph.D.
President and C.E.O.
National Religious Broadcasters
9510 Technology Drive
Manassas, VA 20110-4149

Craig L. Parshall, Esq.
Senior Vice-President and General Counsel
National Religious Broadcasters
9510 Technology Drive
Manassas, VA 20110-4149

December 15, 2011

TABLE OF CONTENTS

Page

SUMMARY …….. 3

INTRODUCTION …… 3

I. DISCUSSION

A. Mandatory Web-Posting of Political Files and Data on Members of Advocacy Groups Raises Significant First Amendment Concerns……..... 5

B. Web-Posting only Exacerbates the Vagueness Problem in the Current "Political File" Rules .....…. 13

C. Web-Posting Only Exacerbates the Over-Breadth Problem in the Current "Political File" and Issue "Sponsorship" Rules …….15

II. CONCLUSION ……..16

.

SUMMARY AND INTRODUCTION

The National Religious Broadcasters (NRB) is a non-partisan, international association of Christian communicators and broadcasters, including television stations and networks, whose member organizations represent millions of listeners, viewers, and readers. Our mission is to advance biblical truth; to promote media excellence; and to defend free speech. In addition to promoting standards of excellence, integrity, and accountability, NRB provides networking, educational, ministry, and fellowship opportunities for its members.

NRB is opposed to the proposal to change current regulations relating to the "political file" and issue "sponsorship" ad files as outlined in MM docket No. 00-168. This Further Notice of Proposed Rulemaking ("NPRM") of the Federal Communications Commission ("F.C.C.") suggests that the current rules, which require that "political files" must be made physically available for public inspection at the station together with "public files" containing information on issue-advocacy groups that request issue-related advertisements of a controversial nature, be modified so as to mandate that *all* such information must be posted on the Internet.

NRB opposes these changes. Such a change would take identifying information about citizens participating in political campaigns, as well as the names of persons who are members of issue-advocacy, civic and public interest groups, and would require that such information be placed on the Internet whenever those groups inquire about placing a television ad. The startling acts of harassment, retaliation, and violence perpetrated against supporters of traditional marriage under a similar Internet-posting rule in California during the "Proposition 8" process shows the problems with this approach.

The Supreme Court has recognized the potential for harm in giving national exposure to such private citizen information. Further, such a rule change would conflict with the First Amendment protections that afford citizens a healthy measure of privacy regarding their social and political associations.

This rule change also mistakenly assumes that every person in every part of the nation possesses an equally legitimate interest in having instant, national access to the names of members of political campaign groups or local advocacy organizations, even when the candidate or the issue is of a truly "local" nature. By contrast, the current rule has a basis in logic, by requiring that paper files be made available for inspection at stations, a provision that is more "narrowly tailored" to meeting the actual needs of those segments of the community most likely to be impacted by the ads that are broadcast by their local stations.

In addition, the general governmental interest articulated by the Commission in support of this measure, namely, that the public should have "access" to information about how television stations are serving their communities, is insufficient to overcome the potential for an extreme, burdensome "chilling effect" that will be visited on politically-involved members of the public.

Lastly, these proposed changes may actually diminish the willingness of groups to advertise on television, and will exponentially increase the problems for stations - not only the exponential rise of merit-less, web-driven complaints from around the nation - but also problems that are inherently tied to the vagueness of provisions that currently exist regarding "political files" and issue-advocacy requests for television ads.

I. DISCUSSION

A. Mandatory Web-Posting of Political Files and Data on Members of Advocacy Groups Raises Significant First Amendment Concerns

The NPRM proposes a change to the current rule that mandates that television stations must maintain only a physical "political file" at the station which is to be available for inspection by the public. If adopted, this rule change would require that such "political files" be posted on the Internet. [1] We believe that this proposal is fraught with practical, constitutional, and policy problems of a substantial nature.

The current rule provides, *inter alia*, that:

> Every licensee shall keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. [2]

In addition, when a television station receives a pure "issue ad" request for air time on a "controversial issue of public importance" from a civic organization, political action committee or other advocacy group, the records relating to that request must also be maintained in the public file, and must be publicly accessible under the "sponsorship identification" provisions of section 73.1212(e) of the rules. [3] This includes, as the letter opinion in the *WSYR(AM)* matter indicated, "a list of the members of the entity sponsoring the spots." [4]

---

[1] NPRM, ¶¶ 22-24.
[2] 47 CFR § 73.1943.
[3] *See* 47 C.F.R. § 73.1212(e). *See also: In re: WSYR(AM), Syracuse, New York, CC Licenses, LLC,* File No. BR-20060201AWA, (letter opinion), Application for Renewal Of License, Petition to Deny, 2007 F.C.C. LEXIS 7575 (FCC 2007), n. 12.
[4] *In re: WSYR (AM), supra,* at n. 12.

The Commission has recommended in this NRPM that such "controversial issue" air-time requests be likewise subjected to mandatory Internet-posting by television stations. [5]

Taken together then, this NPRM would mandate that a television station's "complete" records comprising its "political file" as well as its full records relating to citizen requests for "sponsorship identification" type ads of a purely "issue" advocacy nature, would be placed on the Internet. Such information would include personal identifying information of persons who are part of every advocacy group requesting air time on a controversial issue on television, (see the *WSYR (AM)* ruling at n. 3 *infra*, requiring "a list of the members of the entity sponsoring the spots") as well as the identity of each person requesting, "on behalf of a candidate for public office," any television air-time for a political ad, even if that advertisement is never run. All of that data would be required to be posted on the Internet.

By contrast, the current rules possess a certain logic to them, requiring as they do, that physical access be provided to inquiring members of the public *at the station*. After all, those who show up and request inspection have the highest likelihood of possessing an authentic, tangible interest in this kind of political and issue-oriented advocacy information. Those persons with a substantial, legitimate public interest in these files would likely include, as an example, those within a congressional voting district that is located in the broadcast contour during a federal election, or those within the community of license of the television station itself, or those who live in the community affected by the particular "controversial" issue. While there may be minimal inconvenience for those citizens to have to drive to the local television station and ask to see these files, such a

[5] NPRM, ¶¶ 33-34.

minor inconvenience pales in comparison to the countervailing dangers that would be created if the proposal in this NPRM for Internet-posting becomes an Order.

The harm visited on citizens involved in advocacy of "controversial" issues, caused by rules that require Internet-posting of their personal identities and personal information, is clearly demonstrated by the "Proposition 8" campaign in California. There, pursuant to state law, donors who gave more than $100 to support or oppose Proposition 8, an admittedly *controversial issue* which amended the state constitution to provide that "[o]nly marriage between a man and a woman is valid," were required to disclose their identities, addresses and other information. That information was then posted on the Internet by the Secretary of State's office. What resulted was a concerted, Internet-driven campaign of harassment and, in some cases, violence mounted against them.

As Supreme Court Justice Clarence Thomas recognized in retrospect (in an unrelated case), these mandated Internet disclosures of supporters of "Proposition 8" led to rampant retaliation:

> Some opponents of Proposition 8 compiled this information [from Internet disclosures] and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result.

Citizens United v. Federal Election Commission, 558 U.S. ___ (2010), 2010 U.S. LEXIS 766, 300 (Thomas, J. concurring in part and dissenting in part).

As the U.S. District Court approached trial in the Proposition 8 case, it granted the request for the case to be televised, announcing that "an audio and video feed of trial proceedings would be streamed live to certain courthouses in other cities [and pending

approval of the Chief Judge of the 9th Circuit] the trial would be recorded and then broadcast on the Internet," an order that was immediately appealed on an application for stay to the U.S. Supreme Court. *Hollingsworth v. Perry*, 558 U.S. ___ (2010), 2010 U.S. LEXIS 533, 8.

The Supreme Court granted the stay, holding that the trial court had committed a probable violation of federal rules in granting the broadcasting request, but, more pertinent to this Comment, the majority also held that the objectors had demonstrated that "irreparable harm" was likely if the broadcasting of witness' testimony (including streaming over the Internet) was carried out. *Id*. at 2010 LEXIS 533, 10. This harm was demonstrated by evidence that:

> Opponents of Proposition 8 also are alleged to have compiled "Internet blacklists" of pro-Proposition 8 businesses and urged others to boycott those businesses in retaliation for supporting the ballot measure … [a]nd numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters.

Id. at 4. Moreover, what is particularly relevant is the distinction made by the Court between the *physical* appearances by witnesses in a public courtroom and the national broadcasting of their identities and their point of view in a *medium* that is both *instantaneous and national* in its reach. As the Court noted: "[t]here are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country." *Id.* at 20.

Similarly, we would submit that there is a "qualitative difference" between listing information on the identities of persons supporting a particular candidate or the names of members of a local advocacy group in a *physical* file open for public inspection (a

situation akin to *physically* appearing to testify in the local courtroom, the situation in the *Hollingsworth* case) and having that information spread over the Internet.

Further, it is dubious to suggest that every Internet-trolling person in Los Angeles, Chicago or Miami has a tangible, substantial "public interest" in the identity of local activists in Ohio who are paying for a pro-life "issue" ad on the local television station in Toledo, or for that matter, any legitimate interest in the identity of a campaigner inquiring about a television ad for his candidate who is running for election in the local congressional district in Ohio. [6]

While not all public issues or election campaigns are as controversial as Proposition 8, nevertheless the instantaneous, limitless, national (and international) reach of the Internet makes this NPRM suggestion of web-posting of the personal identities of citizens contained in political files, or the identity of members of every issue advocacy group inquiring about a television ad, a highly disturbing one. In an age where political retaliation and harassment, and sometimes even violence, are regrettable realities, the potential "harm" of this proposal is equivalent to what the Supreme Court determined in *Hollingsworth* to be "irreparable harm." *Id.* at 10.

There is a discernable constitutional right to enjoy a level of privacy and anonymity regarding one's political, social, moral and religious values and beliefs, and associations, particularly when the government is the entity demanding mass public disclosure. The First Amendment has been held to require, in some instances, that

[6] As a current illustration how all "public" inspections of F.C.C.-required station files may not be equally legitimate, it has been reported that "Occupy Wall Street" organizers are instructing their protesters to "occupy" radio stations within the Clear Channel network by demanding to see their public files, an act apparently designed to send a political message. *"Occupy" activists target radio*, Inside Radio.com, December 12, 2011.

heightened public exposure and loss of privacy be left up to the citizen to decide rather than for a government official to mandate.

The Supreme Court held that an Ohio law that prohibited the *anonymous* distribution of political pamphlets had violated the First Amendment, rejecting the argument of the state of Ohio that the law advanced the "interest in providing the electorate with relevant information" and that it trumped the constitutional right to political anonymity. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 338 (1995). Ohio's failed justification seems to echo a similar public interest basis stated by the Commission in this NPRM, to the effect that political files and issue-ad files should be posted on the Internet because "the public is entitled to ready access to these important files." [7]

There is a "vital relationship between" political association "and privacy in one's associations." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Further, "[t]he Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers 74' Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982).

Of course, in *Citizens United*, the Supreme Court did affirm, in a divided opinion, the constitutionality of a *four-second* disclosure for television political candidate ads "of the name of the person or group that funded the advertisement" if the ad was placed by a person or group other than the candidate. *Citizens United, supra*, 2010 U.S. LEXIS 766, at 94. Nevertheless, such a limited, *fleeting* disclosure is a far cry from what this NPRM would mandate: posting, for long periods of time on the Internet, identifying information on individuals inquiring about candidate television advertising, or worse yet, "a list of the

[7] NPRM, ¶ 23.

members of the entity sponsoring the [issue ad] spots." In addition, the majority court opinion in *Citizens United* noted that any realistic risk of an organization's members "fac[ing] threats, harassment, or reprisals" flowing from mandated disclosure of identities could result in the striking-down of such rules. *Id*. at 100.

It must be remembered that under current F.C.C. sponsorship rules regarding "issue" ads where "the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance," the television station must "require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection." [8] If this NRPM is made into a rule, then the names of each person serving in leadership on boards and committees of any group sponsoring any issue ad will be required to be spread over the Internet.

The "chilling effect" that would be imposed by this NPRM on citizens participating in political campaigns and on the members of issue advocacy groups is obvious. We believe that the resulting burden raises grave First Amendment issues. This proposal for Internet-posting of every television station's "political file" and public file containing issue-ad requests contents would require television stations to reveal over the Internet the names of members of issue-advocacy groups requesting air-time, and as a result would burden political speech. Because of that, such a rule would have to pass the exceedingly high bar of "strict scrutiny" to be found constitutional. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that

[8] 47 C.F.R. § 73.1212 (e).

interest.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 464-65 (2007) ("*WRTL*") (citations omitted).

It is important to note that in the *WRTL* decision the Supreme Court concluded, where a non-profit, pro-life advocacy group "had to turn over many documents related to its operations, plans, and finances" during litigation involving the question of whether its ads violated campaign reform rules, that such disclosures "constitutes a severe burden on political speech." *WRTL*, at 468, n. 5. We would suggest that the mandatory Internet-posting of the identities of the members of every non-profit citizen group advocating a highly controversial issue, just because the group inquires about a television advertisement, trumps even the burden critiqued in *WRTL*.

We have previously illustrated above why this new Internet-posting rule change would lack any truly "compelling" governmental interest, particularly when that interest is couched in this NPRM only in vague, generalized terms relating to the *public's right to know*, and particularly when it is so out-weighed by the specific, tangible interests of politically active citizens in keeping some measure of *Internet privacy* regarding their personal information and identities in order that persons of ill-will surfing the Internet cannot abuse them. But there is a final problem, too. Clearly, this Internet-posting paradigm is not "narrowly tailored" so as to avoid running afoul of First Amendment guarantees. *WRTL*, *supra* at 464-65. The phrase - "narrowly tailored" - might fit the existing rule that requires only that files regarding political ads be available for public inspection at television stations. But mandating their display over the Internet does not.

B. Web-Posting only Exacerbates the Vagueness Problem in the Current "Political File" Rules

In order for a government rule to avoid being stricken as unconstitutionally vague, it must be "sufficiently explicit to inform those who are subject to it, what conduct on their part" is proscribed. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Citizens (as well as television stations) cannot be forced to guess at "the line between the allowable and the forbidden." *Winters v. New York*, 333 U.S. 507, 519 (1948).

The current text of F.C.C. rules dealing with "political files" is fraught with vagaries. An analysis of the case-by-case review of stations sanctioned by the Commission gives little explicit clarification. A review of those cases dealing with violations of the "political file" rule shows that nearly all of them deal with a station's abject failure to maintain a political file, but with few particulars which can give us guidance here. Thus, administrative case-by-case-decision-making in these cases has yielded little clarity. Further, if political files are posted on the Internet, the Commission will begin to see an explosion of complaints regarding such postings – allegations of insufficient information for example, or demands for more particularity - that will be limited only by the nearly limitless reach of the web itself.

We believe that the terms in the following excerpt of the language from § 73.1943 that we have highlighted below in bold are unduly ambiguous:

> Every licensee shall keep and permit public inspection of a **complete** and orderly record (political file) of all **requests** for broadcast time made by or **on behalf of a candidate** for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted.

What should a "complete" political file contain? While the F.C.C. rules, including 73.1943, tell us *some* of the required contents, especially regarding rates (something mentioned in part (a) of the rule but not quoted above), but, do they tell us *everything*? A "complete" record of every "request" would, literally contain every bit of information that transpires in every conversation dealing with a political ad request, including information that might be irrelevant or highly personal, or both.

The problem is compounded when we ask what "requests for broadcast time" really are. Would they include *only* those requests that result in ads actually being placed on television? If so, that would seemingly conflict with the language of section 73.1943 cited above, that mandates records which must show "the disposition" of the "requests." The reference to "disposition" implies that some requests may not result in placement on television, and yet the file should contain "complete" information even on those transactions.

The language of the rule relating to requests made "on behalf of a candidate," is also troubling. For instance, what is the line that divides an ad *on behalf of* a candidate, from an issue-ad that *mentions* a candidate? The Supreme Court in the *WRTL* plurality decision could not arrive at a definition that resolved that issue. [9] Three members of the majority opinion differed from the other two on that question, citing prior Supreme Court precedent on political campaign regulations to the effect that "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." [10]

[9] *See*: *WRTL, supra*, at 474, n. 7, where the majority recognized that Justice Scalia (and two other members of the majority opinion) "thinks our test [of candidate ad vs. issue ad] impermissibly vague."
[10] *WRTL*, at 499 (Scalia, J, *concurring in part and concurring in the judgment*, joined by Kennedy and Thomas, JJ).

When these regulatory uncertainties are viewed through the prism of a mandatory Internet-posting rule, the problems and burdens created thereby are increased exponentially.

C. Web-Posting Only Exacerbates the Over-Breadth Problem in the Current "Political File" and Issue "Sponsorship" Rules

We have shown the various problems that can, and likely would, be created with the NPRM proposals impacting the duty of television stations regarding "political files" and ad placement requests by groups involved in pure issue-advocacy. The current regulations involving those types of files, if extended to a rule of Internet disclosure, would also suffer from an over-breadth problem of substantial proportions. For instance, the Commission describes its mission for issuing the NRPM this way: "to improve public access to information about how broadcasters are serving their communities, while at the same time significantly reducing compliance burdens on the stations." [11] Yet the implementation of, and the impact from, the proposed Internet-posting rule would extend far beyond simply providing the "public [with] access to information."

Ironically, this NRPM would take the information about a television station's handling of political and issue ads, many of those undoubtedly impacting only issues and elections in the *local* broadcasting area, and then would use the Internet to transport that information onto a *national* information stage. Further, citizens, faced with that kind of national exposure of their names, identities, and organizational affiliations, may well balk at participating in these kinds of civic activities, particularly involving controversial issues, as they face the specter of government-coerced lack of privacy of national proportions. In addition, this proposal may actually motivate organizations to create

[11] NPRM, ¶ 2.

complex organizational structures in order to shield reticent members from unwanted publicity and possible retaliation created by such a rule. None of that advances the "public interest," and it actually countermands the Commission's intent.

Issue-advocacy groups might avoid advertising on television altogether. In addition to the realistic cost issue that accompanies advertisement over the medium of television, the prospect of listing the names of members of civic groups on the Internet might move those groups away from TV advertising and over to other publicity avenues for their ads which are not subject to F.C.C. disclosure rules, such as print or web publications, which is hardly a result that is in the best interests of television broadcasting. The Commission has suggested that it might consider extending its Internet-posting requirement to radio as well. [12] This could only mean, in addition to increasing the burdens on the rights of civically involved citizens, that such a rule would negatively impact, not only television, but all over-the-air broadcasters.

II. CONCLUSION

For the foregoing reasons, we request that the F.C.C. refrain from imposing any of those changes suggested in this NPRM which are the subject of this Comment.

Dated this 15th day of December, 2011,

Respectfully submitted,

Frank Wright, Ph.D.
President and C.E.O.
National Religious Broadcasters
9510 Technology Drive
Manassas, VA 20110-4149

Craig L. Parshall
Senior Vice-President and General Counsel
National Religious Broadcasters
9510 Technology Drive
Manassas, VA 20110-4149
Counsel for National Religious Broadcasters

[12] *Id*. "We will consider at a latter date whether to apply similar reforms to radio licensees."