

FCC RELEASES REPORT REGARDING BROADCAST LOCALISM AND A RELATED NOTICE OF PROPOSED RULEMAKING February 4, 2008

I. Executive Summary

The Commission recently released its long-awaited *Report on Broadcast Localism and Notice of Proposed Rulemaking* (“Report”), more than four years after initiating a wide-ranging inquiry into the efforts of broadcasters to respond to the needs and interests of the communities they serve. The Report serves as a comprehensive overview of various broadcasting issues found by the Commission to affect issues of localism. It contains actions that the Commission states that it is taking now. More significantly, it seeks comment on various topics, and summarizes other recent or pending proceedings which have localism implications, which could have significant effects on all broadcasters.

II. Background

In August 2003, the Commission launched a “Localism in Broadcasting” initiative to review, and possibly enhance, localism practices among broadcasters. “Localism practices” are designed to ensure that the programming offered by each radio and television station addresses the significant needs and issues of the community that it serves. Through a July 2004 Notice of Inquiry (“NOI”), the Commission sought comments from the public on how broadcasters are serving the interests and needs of their communities; whether the Commission should adopt new policies, practices, or rules designed directly to promote localism in broadcast television and

radio; and, if so, what those policies, practices, or rules should be.¹ In response to the NOI, the Commission received more than 83,000 written comments. In addition, the Commission has conducted six field hearings scattered around the country at which it heard testimony of more than 500 panelists and members of the public.

Based on its review of this record, the Commission drafted the Report as a comprehensive overview of the current state of localism efforts and the various broadcast areas which affect localism. Specifically, the Report:

1. Describes actions the Commission itself plans to take;
2. Seeks comment on various areas of broadcasting which may affect localism, and provides tentative conclusions for some of these areas; and
3. Summarizes other Commission proceedings, including some still open for comment, which the Commission believes directly affect localism.

III. Commission Actions

A. Increased Public Involvement in Renewal Proceedings

The Commission's rules require each broadcast station to maintain in its public file a copy of the publication entitled "The Public and Broadcasting." Notwithstanding this resource, the Commission believes that a substantial need exists for greater public understanding of broadcaster obligations, including serving the needs of the local community, and of the proceedings by which the Commission enforce these obligations. To provide more of this information, the Commission decided that it must better educate citizens about the tools available to them should they conclude that their local broadcast stations are not fulfilling their service obligations. The Commission, therefore, will update "The Public and Broadcasting" in order to

¹ The NOI sought comment on the following nine general localism areas of inquiry: (1) communication between licensees and their stations' communities; (2) nature and amount of community-responsive programming; (3) political programming; (4) underserved audiences; (5) disaster warnings; (6) network affiliation rules; (7) payola/sponsorship identification; (8) license renewal procedures; and (9) additional spectrum allocations.

attempt to provide more guidance to the public on how individuals can "participate" directly in the license renewal process (*i.e.* object to license renewal). The revised publication is supposed to contain links to pages on the Commission's website where the public can find more detailed information on particular topics. Finally, the Commission will establish and publicize a point of contact at the Commission for public inquiries about its license renewal processes.

B. Television Market Definitions/Cable Broadcast Carriage

Another way the Commission intends to increase access to community-responsive programming is by examining its rules to remedy the infrequent but significant situations in which cable and satellite subscribers do not receive the local news and information provided by an in-state television station because FCC rules effectively require carriage of an out-of-state station.² Accordingly, the Commission plans to commence a rulemaking proceeding to address the need to ensure that all cable and satellite subscribers have access to television broadcast stations licensed to communities within the viewers' home state. This proceeding could have significant effects on broadcasters in markets that include more than one state, for example, for television licensees in DMAs which include counties from two different states.

C. Computer Program for Identifying Suitable Available FM Spectrum

The Commission plans to develop a new computer program designed to assist potential radio applicants in identifying suitable available commercial FM spectrum in the location from which they desire to operate. The Commission believes that, by making such software available to the public free of charge, the process of finding potential frequencies amid the congested FM spectrum will become much easier. Such a program could lead to more LPFM applications, which could be troublesome for existing full-power FM licensees.

² This situation is compounded with respect to satellite carriage of local broadcast stations because the applicable FCC rules, unlike the rules governing cable carriage, do not provide for market modifications.

IV. Notice of Proposed Rulemaking

Most of the Report is devoted to proposed rulemaking. This represents the last procedural step necessary for the Commission to conclude proceedings necessary to apply new "localism" rules and procedures to broadcasters. Many people who have been in broadcasting for a long time will notice the return of familiar areas of regulation that were eliminated in the early 1980s, including such matters as: formal ascertainment, program guidelines, and location of main studios in the community of license with restricted rights to operate remotely.

Another significant, and related, theme is the Commission's view that the public should be more involved in the license renewal process. That includes potentially increasing local public notice requirements and ties into expanded program reporting obligations. It is no coincidence that at the same time as it released the Report, the Commission released its order requiring television (but not radio) licensees to make almost all of their public inspection file items available via their websites and to provide greatly increased quarterly programming reports in replacement of the current Issues/Programs list requirement for television licensees. The following are the primary proposals in the Report.

A. Main Studio Rule

Until 1987, all broadcasters were required to maintain their main studios in their communities of license. Since that time, broadcasters have been able to locate their main studios, including all of their facilities and public inspection file, as much as 25 miles away from their communities of license, and under certain circumstances, even farther.

The Commission now is considering reversing that flexibility by seeking comment on whether it should revert to its pre-1987 main studio rule in order to encourage broadcasters to produce locally originated programming. It also seeks comment on whether greater accessibility

to the main studio increases interaction between the broadcast station and the community it serves.

B. Remote Station Operation

The Commission expressed concern regarding the prevalence of automated broadcast operations, which allow the operation of stations without a local presence, and the potential negative effect that remote operation may have on licensees' ability to determine and serve local needs.³ Recently, the Commission issued a Notice of Proposed Rulemaking regarding this issue in connection with a public interest review of digital audio broadcasting. Comments are still being received in that proceeding, in which the Commission is considering requiring that licensees maintain a physical presence at each radio broadcasting facility during all hours of operation. The Commission believes that requiring all radio stations to be attended will increase the ability of stations to provide information of a local nature to the community of license.⁴ The Commission now seeks comment on whether it should extend this requirement to television stations as well as radio facilities.

C. Community Advisory Boards

The Commission believes that new efforts are needed to ensure that licensees regularly gather information from community representatives to help inform stations' programming decisions. Thus, it tentatively concluded that each licensee should convene a permanent advisory board made up of community officials and other leaders to periodically provide advice

³ In 1995, in response to continuing improvements in the stability of station monitoring and transmission equipment, the Commission authorized unattended technical operation of broadcast stations and expanded the ability of stations to control and monitor station technical operations from remote locations.

⁴ In the event of severe weather or a local emergency, the Commission believes that such a requirement would significantly increase the likelihood that each broadcaster will be capable of relaying critical life-saving information to the public.

on local needs and issues. The Commission seeks comment on this proposal, including with respect to board selection criteria and the frequency of meetings.

The Commission believes that, generally speaking, if a licensee already has formal groups in place with which it consults to determine the needs of its community, it should be deemed to have satisfied this requirement. It seeks comment on what circumstances a licensee should be deemed to have satisfied this requirement with its current practices. The Commission also recognized that additional, informal efforts to gather information from community members could prove beneficial to both licensees and their audiences.⁵ It thus seeks comment on whether it should adopt rules or guidelines that encompass additional, informal efforts designed to foster better communication among licensees and their communities.⁶

D. Local Programming Renewal Application Processing Guidelines

The Commission tentatively concluded that it should reintroduce specific procedural guidelines for the processing of renewal applications based on stations' localism programming performance. Under this proposal, renewal applications filed by licensees that have met or exceeded the prescribed minimums would be processed by the Media Bureau on delegated authority. Those that do not reach these minimums will require consideration by the full Commission. The Commission seeks comment on this proposal. Specifically, should these guidelines be expressed as hours of programming per week or, as in the past, percentages of overall programming? Should the guidelines cover particular types of programming or simply generally reflect locally-oriented programming? Should the guidelines specify the types of

⁵ The record indicates that efforts such as the following have been successful for licensees: (1) listener or viewer surveys; (2) focus sessions or "town hall" meetings with viewers and listeners; (3) personnel sitting on various boards, committees, councils and commissions; and (4) dedicated telephone numbers, websites, and e-mail addresses publicized during programming.

⁶ The Commission noted that the newly adopted standardized disclosure form will require broadcasters to describe any public outreach efforts undertaken during the reporting period.

locally-oriented programming to be aired at particular times of the day? How should local programming be defined?

E. Renewal Application Pre- and Post-Filing Announcements

In order to increase the public awareness of, and participation in, license renewal proceedings, the Commission believes that it should change the existing rules governing the “pre-filing and post-filing announcements” that licensees must air in connection with their renewal applications, and seeks comment on this issue. In addition to the existing requirement for on-air announcements about soon-to-be-filed and pending license renewal applications, the Commission seeks comment on whether it should require that the same information be posted on a licensee’s website. It also seeks comment on whether to broaden the required language for these announcements, for instance, by including the Commission’s website address in addition to its mailing address as a source of information.

F. Class A Status for Low-Power Television (“LPTV”) Stations

The Commission found that upgrading LPTV stations to Class A status would provide security for LPTV stations looking to make investments in the DTV transition. It believes that, because the Class A rules require these stations to provide locally produced programming, increasing the number of Class A stations would ensure the existence of continued community programming. The Commission thus tentatively concluded that it should allow additional qualified LPTV stations to be granted Class A status, and seeks comment on this conclusion as well as on how to define eligibility for the upgrade.

G. Sponsorship Identification/Payola

The Commission’s sponsorship identification rules are designed to alert listeners and viewers to the fact that they are hearing or watching programming for which valuable

consideration has been promised or provided, directly or indirectly, by ensuring that the station discloses that fact. As an outgrowth of the sponsorship identification rules, the Commission has defined “payola” as “the unreported payment to, or acceptance by, employees of broadcast stations, program producers and program suppliers of any money, services, goods or other valuable consideration to achieve airplay for any programming.” Payola practices appear to be particularly common with respect to airplay of music, so-called “pay-for-play.”⁷ In addition, some radio stations that have consolidated with concert promoters may tie airplay to concert performances by refusing to give airplay to artists who do not appear at concerts sponsored by the stations. “Plugola” is the broadcast promotion of products, goods or companies in return for consideration provided or promised, directly or indirectly, without proper on-air identification.

The Commission expressed concern with respect to the alleged practices throughout the broadcast industry, including those mentioned above, that appear to violate the sponsorship identification rules. The Commission stated its intention to continue vigilant enforcement of its sponsorship identification rules, as well as impose strict penalties for violations of them. The Commission, however, declined to revise its sponsorship identification rules because it believes the current rules are sufficient for its regulatory purposes because they are sufficiently broad to cover the various practices described by commenters. Nevertheless, the Commission seeks

⁷ “Pay-for-play” sometimes involves “independent promoters” acting as a liaison between radio stations and record labels, so that the labels themselves do not make the payments to the stations. In the typical case, a promoter pays radio stations for the exclusive right to promote music to them, and charges record labels an upfront fee to market songs to radio stations, as well as additional fees for songs that stations add to their playlists that the promoter recommended. In other words, record labels pay promoters to market their music, and for music that stations actually play, and promoters pay stations to promote music, thus enabling the promoters to influence the songs that are included on the stations’ playlists.

comment on current trends in "embedded advertising" and the efficacy of the current sponsorship identification regulations with respect to such forms of advertising.⁸

H. Voice-Tracking

Voice-tracking is the process by which stations import popular out-of-town personalities from bigger markets to smaller ones and customize their programming to make it appear as if the personalities are actually broadcasting locally.⁹ The Commission seeks comment on the prevalence of voice-tracking and whether it can and should take steps to limit the practice, require disclosure, or otherwise address it.¹⁰ The Commission also sought comment on this issue in the Digital Audio Broadcasting proceeding, asking whether it should require that radio stations maintain a physical presence at their broadcasting facilities during all hours of operation. It now seeks comment on whether such a requirement should also apply to television licensees.

I. National Playlists

The Commission previously sought comment on the possible adverse effects of national music playlists developed by large corporate radio licensees on the access of local talent to airtime.¹¹ The Commission, however, found that these comments did not support the prohibition of the use of national music playlists, and thus declined to affirmatively require stations to give airplay to local artists. Still, the Commission remains concerned about the lack of access to the airwaves by local musicians.

⁸ The Commission proposed to release an item concerning sponsorship of "embedded advertising" in its December 2007 open meeting agenda, but that agenda item was deleted before the meeting began.

⁹ By centralizing talent and creating name recognition, the practice enables stations to both decrease costs and increase ratings, and thus revenue.

¹⁰ The Commission believes that the practice may diminish the presence of licensees in the communities and thus hinder their ability to assess the needs and interests of their local communities.

¹¹ Commenters argued that, absent such access, local artists are stifled and localism accordingly suffers.

Accordingly, the Commission now seeks comment on whether it should require licensees to provide data regarding their airplay of the music and other performances of local artists and how they compile their stations' playlists, which the Commission would use in its renewal application process to evaluate a station's overall station performance under localism standards. The Commission also seeks comment on the appropriate form for these disclosures and asks commenters to state what information should be supplied.

V. Other FCC Proceedings Affecting Localism Obligations

A. Enhanced Disclosure¹²

The Commission recently released an *Enhanced Disclosure Order* in a separate proceeding designed to increase public awareness of licensee localism efforts. That order requires that television licensees begin filing, on a quarterly basis, a standardized programming form which calls for the disclosure of information with respect to the programming aired by a station during the previous three months.¹³ The *Enhanced Disclosure Order* also requires that television licensees who maintain a website place most of the contents of their public inspection files on their websites or on the website of their state broadcasters association. In addition, television stations must notify viewers of the existence, location, and accessibility of their public files twice daily during station identification announcements.

As noted, these new obligations have been applied only to television licensees. However, in yet another proceeding, the Commission has sought comment on whether radio licensees should also be subject to such enhanced disclosure requirements.

¹² For a detailed summary of this proceeding, please see out January 28, 2008 memorandum.

¹³ Television licensees should refer to out January 28, 2008 memo describing that order, including a copy of the quarterly reporting form and its instructions, and a description of the new obligation to make most television station the public inspection file items available via station websites. The new quarterly reporting obligation has not gone into effect as of this writing.

B. Low-Power FM (“LPFM”) Stations¹⁴

The Commission recently adopted a series of ownership, eligibility, and technical rules concerning the LPFM service and sought comment on additional technical and interference matters.¹⁵ These actions were designed to strengthen and promote the long-term viability of the LPFM service and the localism and diversity goals that this service is supposed to advance. Specifically, the Commission: 1) allowed certain transfers of LPFM licenses; 2) reinstated rules limiting ownership to one station per licensee and requiring that the licensee be local to the community; 3) encouraged voluntary time-sharing agreements; and 4) retroactively imposed a 10-application cap on pending 2003 FM translator filing window applicants. In addition, and of greatest significance to full-power broadcasters, the Commission will no longer consider second-adjacent channel LPFM licensees to be “secondary.” Instead, on an interim basis, the Commission will bestow significant new interference rights to LPFM stations under new “processing standards.”¹⁶

At the same time, the Commission: 1) sought comment on making the interim interference standards permanent, including a proposal that full-power stations must provide technical and financial assistance when a modification would cause interference to certain LPFM stations; 2) tentatively adopted a contour-based protection methodology for LPFM stations; and 3) recommended to Congress that it remove the requirement that LPFM stations protect full-power stations operating on third-adjacent channels. The Commission is currently accepting comments in this proceeding.

¹⁴ For a detailed summary of this proceeding, please see our December 28, 2007 memorandum.

¹⁵ Please see our memo of December 28, 2007 for further discussion.

¹⁶ Up until now, a full-service station applicant had no obligation to assist an LPFM station potentially affected by implementation of a new station or community of license modification proposal, but that is no longer the case in certain situations.

C. AM Use of FM Translators

In order to promote diversity and localism, the Commission has commenced a rulemaking proceeding to examine its rules which prevent AM radio stations from operating FM translator stations as a fill-in service.¹⁷ In that proceeding, the Commission is considering revising its rules to expand the purpose and permissible service of FM translator stations (and possibly LPFM stations) to allow their use to provide fill-in service for AM radio stations. The Commission has concluded tentatively that (1) daytime-only AM licensees should be permitted to originate programming over fill-in FM translators during nighttime hours, and (2) any AM station should be permitted to operate an available FM translator to retransmit its AM programming as a fill-in service so long as the contour of the FM translator is located within certain specified areas. The majority of commenters in that proceeding, which remains open, favor allowing AM stations to use FM translators to retransmit their signals within each AM station's current coverage area, with many commenters noting the potential of this proposal to expand coverage of local news and events by mitigating the AM band's technical deficiencies and permitting increased nighttime operations.

D. Ownership Diversity

The Commission intends to explore ways to increase participation in the broadcasting industry by Eligible Entities ("EEs"), which are comprised of new entrants and small businesses, including minority- and women-owned businesses.¹⁸ The Commission expects that entry as broadcast licensees by EEs will not only increase diversity but will also reduce the concentration of economic power among station owners. Thus, in its *Ownership Diversity Order* adopted in

¹⁷ Please see our memoranda of August 17 and November 13, 2007 for further discussion.

¹⁸ This information is based upon a brief press release. The substantive order which was the basis for the press release had not been released during the drafting of this memo.

December 2007, the Commission took a number of actions and sought comment on others designed to make it easier for EEs to gain access to financing and spectrum opportunities. These actions include the extension of station construction deadlines, adjustment of the Equity Debt Plus ownership attribution standard, and modification of the distress sale policy. The Commission also proposed a number of new rules and policies, including reaffirmation of its commitment to bar race or gender discrimination in broadcast transactions, a zero tolerance policy with respect to ownership fraud, and the requirement that broadcasters seeking license renewals certify that their advertising sales contracts do not discriminate on the basis of race or gender.

In addition, the Commission sought to facilitate the availability of funding to EEs by encouraging local and regional banks to engage in lending with EEs, by providing incentives to licensees to finance or incubate EEs, by considering requests to extend divestiture deadlines in mergers in which participants have actively solicited bids for divested properties from EEs, and by creating a guidebook that focuses on what companies can do to promote diversity.

E. Commercial Leased Access

The Commission believes that another means for ensuring that all segments of the community have an opportunity to be heard is to enhance independent entities' access to their local cable systems.¹⁹ The commercial leased access requirements mandate that a cable operator set aside channel capacity for commercial use by video programmers unaffiliated with the operator. Leased access is a valuable tool that gives programmers the ability to distribute diverse, locally-originated programming to viewers in the community that may not otherwise benefit from local culture, news, and information through current television sources. In

¹⁹ This information also is based upon a brief press release. The substantive order which was the basis for the press release had not been released during the drafting of this memo.

November 2007, the Commission adopted an Order revising its leased access rules to facilitate the ability of independent programmers to be carried and thereby to distribute programming of local interest.²⁰ The Commission intends for its actions to facilitate the use of leased access channels by adopting more specific leased access customer service standards for programmers and increased enforcement of those standards, faster cable operator response times to information requests from programmers, and more appropriate leased access rates.

VI. CONCLUSION

It certainly is true that broadcasters are "living in interesting times." Please let us know if you are interested in filing comments in the localism proceeding or one of the other proceedings referenced in the Report, all of which may have significant effects on broadcasters, including potentially imposing new and increased obligations upon both radio and television licensees. The deadlines for filing comments or reply comments in this proceeding have not yet been established. In addition, if you have any questions, or if you would like further information about the Report or the other proceedings referenced in the Report, please contact us.

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²⁰ The Commission adopted this Order in response to comments from leased access programmers regarding slow response times to information requests and excessive rates and fees.