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

In the Matter of Petition Regarding the Actions of Certain Radio Broadcasters in Opposition to the Performance Rights Act	))))	MB Docket 09-143

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

The National Association of Broadcasters ("NAB") replies to certain comments on the MusicFIRST Coalition's request for Declaratory Ruling ("Petition") urging the Federal Communications Commission to intervene in the legislative debate over the Performance Rights Act ("PRA"). A number of commenters in this proceeding opposed any Commission action on the Petition, noting its striking lack of evidence and its calls for governmental action beyond the FCC's authority and contrary to the First Amendment. The brief and repetitive (sometimes verbatim) comments supporting the Petition do not remedy its myriad evidentiary and legal deficiencies. They provide no support for MusicFIRST's effort to stifle radio broadcasters' speech, in violation of long-standing Communications Act law and policy, well-settled Commission precedent and broadcasters' basic constitutional rights.

As an initial matter, NAB observes that MusicFIRST failed to participate in the proceeding it initiated by filing any comments. And the commenters supporting MusicFIRST failed to provide any legal or specific factual basis that could justify an FCC investigation or other intervention in the contentious legislative debate about the PRA. One commenter alluded to a purported instance of "artist intimidation" by one station, WICB, but did not provide any detailed information for the public record. WICB, a student-run radio station at Ithaca College, is nearly as unlikely an agent of record label and artist "intimidation" as the 100-watt high school station that was (anonymously) cited in the Petition. This lack of an evidentiary record reaffirms that the Petition is merely a public relations vehicle, rather than a serious request for legal relief –

particularly in light of the fact that MusicFIRST chose to issue a press release focusing on WICB, rather than submit comments for the Commission record.

Indeed, the vagueness of and lack of evidence in the record – particularly the anonymous allegations and hearsay – make it impossible for NAB and radio stations to respond specifically to MusicFIRST's accusations. If the Commission were to take any action based on this record, it would violate its own precedent and fundamental principles of due process – principles that include adequate notice and a genuine opportunity to explain.

Ironically, MusicFIRST and its supporters complain, without justification, that their speech has been suppressed, while at the same time seeking government action to suppress broadcasters' speech. Several commenters supporting the Petition seemed to suggest that censorship is somehow acceptable if it targets speech with which they disagree, and called upon the Commission to impose an unprecedented access right for PRA advocates. As NAB's initial comments demonstrated, the Commission would contravene the First Amendment and the Communications Act if it responded to the Petition by stifling broadcasters from expressing their views on a subject of importance to them and the listening public, by forcing stations to air messages with which they disagree, by preventing broadcasters from petitioning the government, or by calling into question the license renewals of stations that exercised their constitutional rights.

In short, there is no need for the Commission to take any action – including launching an investigation – in response to the Petition. Given the complete lack of any legal or factual basis for an investigation, there is nothing for the Commission to investigate. The fact that opponents of broadcasters in the legislative arena are urging

the Commission to conduct a wide-ranging and open-ended investigation of radio stations en masse provides no basis for the agency to do so. Particularly in light of the significant First Amendment interests at stake, summary dismissal of the Petition is the only warranted course of action.

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To: The Commission

The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments filed in response to the Commission's *Public Notice*[2] on various issues presented in the Request for Declaratory Ruling ("Petition") by the MusicFIRST Coalition ("Petitioner"), an umbrella organization that advocates for passage of the Performance Rights Act ("PRA"). A number of commenters agreed with NAB and opposed any Commission action on the Petition, noting, *inter alia*, its vagueness, lack of evidence and reliance on anonymous allegations, and its calls for governmental action beyond the FCC's authority and contrary to the First Amendment. The brief and repetitive comments filed in support of the Petitioner do not remedy these evidentiary and legal deficiencies, but merely reaffirm that the Petition is a public relations vehicle, not a serious request for legal relief. Like the Petition itself, the comments submitted by MusicFIRST's supporters are short on facts and long on anonymous allegations and overblown rhetoric. They do not present any legal or factual basis for action by the Commission. Thus, the Commission should summarily dismiss the Petition.

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[1] NAB is a nonprofit trade association that advocates on behalf of free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] FCC, *Public Notice, Media Bureau Action*, DA 09-1773 (Aug. 7, 2009).

I. The Record Demonstrates the Fundamental Nature of the Petition as a Public Relations Exercise

Although the *Public Notice* sought comment on the Petition generally and on four specific aspects of the Petition in particular, MusicFIRST itself failed to participate in the proceeding it initiated by filing any comments. Thus, MusicFIRST still has not provided any factual or legal basis to support its request for government action to stifle broadcasters' speech opposing the PRA. Although several groups filed brief comments supporting the Petition, specific factual details of any alleged broadcaster wrongdoing remain remarkably elusive.[3]

One commenter, the Music Manager's Forum ("MMF"), alluded to one purported instance of "artist intimidation" against a particular artist involving Ithaca College's WICB, a student-run radio station that "gives Ithaca College students a chance to put classroom theory into practice by experiencing all aspects of radio including news, sports, producing programs and being an air personality."[4] According to WICB's website, this station has been ranked as the top college radio station by the Princeton

[3] A number of the commenters supporting the Petition are members of the MusicFIRST Coalition, including the Music Managers Forum, the American Association of Independent Music, the Vocal Group Hall of Fame Foundation, the Recording Academy, and the American Federation of Musicians. There were also a number of commenters opposing the Petition, due to its lack of evidence and affronts to the Constitution and the Communications Act. *See, e.g.*, Comments of Radio Training Network, Inc. (filed Sept. 8, 2009) ("RTN"); American Women in Radio and Television (filed Sept. 8, 2009) ("AWRT"); Trinity Christian Center of Santa Ana, Inc. (filed Sept. 8, 2009); Law Offices of Robert J. Buenzle (filed Sept. 8, 2009). Several commenters also noted the public interest implications – specifically, the deleterious effects on local radio stations (including minority- and women-owned stations) and their service to listeners – if the PRA is passed. *See, e.g.*, Comments of the Minority Media and Telecommunications Council (filed Sept. 8, 2009); AWRT at 6-7; George Chambers (filed Aug. 18, 2009); James Bielefeldt (filed Aug. 17, 2009).

[4] http://www.wicb.org/about.php.

Review and others. NAB observes that WICB seems an unlikely agent of artist and record label intimidation.[5]

MMF, moreover, did not include any details about the alleged incident involving WICB in its comments, other than to suggest that it involved singer Aimee Mann's manager.[6] While MMF declined to provide this information for the public record, some additional details about this alleged instance of "intimidation" were included in MusicFIRST's September 8, 2009 press release.[7] NAB notes the irony that MusicFIRST apparently chose to issue a press release rather than provide any facts for

[5] Similarly, the 100-watt high school radio station that was (anonymously) cited in the Petition would not present any real threat of intimidation.

[6] MMF's comments on the FCC's website state only that "I have also been told by a fellow MMF-US Board Member of the following act of intimidation by the General Manager of college radio broadcaster WICB in Ithaca, NY: The MMF-US member (manager) represents Aimee Mann, a singer/songwriter popular on college, public and alternative stations. Aimee was also the lead sing of Til Tuesday before embarking upon a solo career." Comments of Music Managers Forum-US (filed Sept. 4, 2009) at 1.

[7] MusicFIRST Press Release, *FCC Probes Corporate Radio's Misdeeds* (September 8, 2009). This press release quoted "part" of an e-mail purportedly sent by WICB to Aimee Mann's online message board, and stated that MMF included the email in its FCC comments. However, the MMF comments on the FCC's website do not include any portion of such an email. In any event, NAB notes that referring to a college radio station as "corporate radio" is something of a stretch. Beyond mentioning WICB, the September 8 press release merely repeats the handful of wholly anonymous anecdotes of station "intimidation" cited in the Petition, including the "Delaware radio station" that "boycotted" artists associated with MusicFIRST "for an entire month." *Id*. As NAB explained in its comments, this station is actually the Mount Pleasant High School station, WMPH, that chose not to air certain performers for a month two years ago as a protest against performance tax legislation. *See* Comments of NAB (filed Sept. 8, 2009) at 41 and Attachment D. NAB also reiterates that stations are under no obligation to play the music of any particular artist for any specific amount of time – and that declining to air a particular artist or song is not improper "intimidation."

the Commission record, thus reaffirming that the Petition was designed as a public relations document, rather than as a genuine legal pleading.

II. The Commission Would Violate Fundamental Due Process Principles by Acting on the Basis of the Hearsay and Anonymous Allegations Contained in the Record

As NAB demonstrated in its comments, the Commission has no basis for any action, given the evidentiary record in this proceeding. A number of commenters supporting MusicFIRST urge the Commission to investigate and take action against "broadcasters" without providing actual facts warranting any FCC action.

Several parties professed to be "familiar with the *stories* of artist intimidation described in musicFIRST's Petition and believe them to be true."[8] These verbatim statements provide no facts, identify no stations or artists, and do not relate first-hand experiences. Indeed, calling these anonymous allegations "stories" appears entirely appropriate – and referring to them as "rumors" might even be more so. Other commenters made similar statements based on hearsay and unsupported allegations.[9]

Other repetitive statements designed to add an illusion of specificity -- such as "I personally have heard the misleading radio ads that insinuate the Performance Rights

[8] Comments of Tony Butala – The Letterman (filed Sept. 14, 2009) at 1; The Vocal Group Hall of Fame Foundation (filed Sept. 10, 2009) at 1; MMF at 1 (emphasis added).

[9] *See* Comments of American Association of Independent Music ("A2IM") (filed Sept. 4, 2009) at 2 ("We have heard" that radio stations have stated that they will not play artists supporting MusicFIRST; "some of our label members have heard comments from radio stations" that "support for the Performance Rights Act might not be a good idea."). The Music Industry Lawyers Group claimed that "[s]ome of us have direct knowledge of the type of intimidation described in musicFIRST's petition," but made clear that they would not provide any "specific instances" to the FCC, due to "confidentiality." Comments of the Music Industry Lawyers Group (filed Sept. 8, 2009) at 1.

Act is an attempt to tax air play" -- add nothing to the discussion at hand.[10] NAB discussed in its comments why it is reasonable for broadcasters to characterize the PRA as imposing a "tax" on radio stations, and why supporters of the PRA may reasonably choose a different terminology. As NAB explained, what is not reasonable is MusicFIRST's attempt to engage the Commission to evaluate competing definitions and to referee the bounds of permissible political speech.[11] The fact that a few of MusicFIRST's supporters have heard radio advertisements opposing the PRA and disagree with broadcasters' choice of language in describing the PRA has no possible relevance. Indeed, the degree to which commenters focus on the definitional difference between a "tax" or a "fee" or some other term as support for unprecedented FCC action against broadcasters only reveals the extreme weakness of their arguments.[12]

In short, Petitioner and its supporters are urging governmental action – and, indeed, governmental sanctions – without attempting to provide the necessary evidentiary basis. Neither NAB nor individual radio stations can respond in detail to the vague, generic and, particularly, anonymous allegations made against "broadcasters" en masse.[13] If the Commission were to take any action based on the hearsay and

[10] Comments of Tony Butala at 1; Vocal Group Hall of Fame Foundation at 1.

[11] Comments of NAB at 28-29.

[12] *See, e.g.,* Comments of Institute for Policy Innovation ("IPI") (filed Sept. 8, 2009) at 1-2; The Recording Academy (filed Sept. 8, 2009) at 2 (arguing that broadcasters are spreading misinformation by using the term "tax").

[13] *See* Comments of RTN at 1 (noting the "vagueness and anonymity" of the Petition, and stating that it "is impossible for RTN and others to properly respond to MusicFIRST's accusations if there are no specifics").

unsupported allegations in the record, it would violate its own precedent[14] and fundamental due process principles. The courts have said time and again that the "'core requirements' of due process" are "'adequate notice . . . and a genuine opportunity to explain.'"[15] Any FCC action taken on the basis of the Petition's shadow boxing allegations would fail to satisfy these requirements.[16]

III. Commission Action in Response to the Petition Would Be Contrary to the Communications Act and the First Amendment

Ironically, the Petitioner and its supporters complain that broadcasters are suppressing their speech,[17] while at the same time seeking government action to

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[14] *See* Comments of NAB at 38-41 (discussing decades of FCC cases demonstrating that the Petition fails to establish a prima facie case of licensee misconduct or other behavior worthy of FCC investigation or action). *See also* Comments of AWRT at 4-5 ("the Commission should be loathe to issue a broad declaratory ruling or undertake an industry-wide investigation that implicates the First Amendment and Section 326 of the Communications Act based upon double (or triple) hearsay statements of unidentified declarants").

[15] *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991), quoting *Gray Panthers v. Schweiker*, 652 F.2d 146, 165 (D.C. Cir. 1980).

[16] It is well settled that FCC "proceedings must satisfy 'the pertinent demands of due process.'" *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 802 (D.C. Cir. 1948), quoting *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co*., 289 U.S. 266, 276 (1933). *See also Gray Panthers*, 652 F.2d at 168-69 (explaining that without adequate notice, including the specific reasons for an adverse action, a party "is reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument . . . at the risk of missing the critical one altogether"); *General Electric Co. v. United States EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (Court observed that "fair notice" rule is most commonly applied in criminal context, but explained that "as long ago as 1968, we recognized this 'fair notice' requirement in the civil administrative context").

[17] To the extent that commenters suggest that broadcasters are acting contrary to the First Amendment by supposedly suppressing speech, this claim cannot withstand either factual or legal scrutiny. *See, e.g*., Comments of A2IM at 1-2; Tony Butala at 2; Vocal Group Hall of Fame Foundation at 2. As NAB demonstrated in its comments (at 17-22), MusicFIRST and its supporters cannot contend that they have no avenues to make their views known. Such statements also demonstrate a fundamental misunderstanding of

suppress broadcasters' speech. As NAB's initial comments demonstrated, the Commission would act contrary to the First Amendment and the Communications Act if it responded to the Petition by stifling broadcasters from expressing their views on a subject of importance to them and the listening public, by forcing stations to air messages with which they strongly disagree, and/or by preventing broadcasters from petitioning the government.[18]

Several commenters essentially express the view that censorship is somehow acceptable if it targets speech with which they disagree. For example, IPI repeatedly asserts that the current legislative debate over the PRA is "unique" in some way that justifies granting unprecedented (and unconstitutional) access rights to supporters of the PRA.[19] In actuality, there is nothing unique in the present legislative debate. As NAB pointed out in its initial comments, broadcast stations are business entities that are affected by legislation of interest to all businesses and employers (including health care legislation, tax legislation and local land-use ordinances), and may wish to express their opinions on air about these issues and a wide range of others. The resulting whipsaw

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First Amendment law. As NAB demonstrated in its comments, there is no right for private persons or groups to express any specific views on any particular broadcast station. The First Amendment provides protection against governmental actors or agents that might try to control private speech. *See, e.g., S. Christian Leadership Conference v. Supreme Court of La*., 252 F.3d 781, 795 (5th Cir. 2001) (the "fundamental purpose behind the First Amendment is to promote and protect the free expression of ideas, unfettered by government intrusion"). NAB and broadcasters are not government agents.

[18] *See* Comments of NAB at 10-16, 23-35. *Accord, e.g.*, Comments of RTN at 2-4; AWRT at 3-5; Trinity Christian Center at 6-20.

[19] *See* Comments of IPI at 1-2 (claiming that it is "an egregious violation of broadcasters' public interest obligations to deny" access to "legislative opponents").

effect from a compelled rights of access – turning broadcasters into common carriers or forcing them to self-censor their own political speech – is statutorily and constitutionally unsupportable.[20] The Commission should not invite opponents in the legislative arena to use the agency as a tool in public policy debates by taking action in response to MusicFIRST's request.

The arguments of other commenters similarly urge the Commission to exceed its authority. For example, a couple of commenters would have the Commission create new law regarding employment and workers' rights. Industry Ears cited a few alleged instances of broadcaster employers not allowing employees to support the PRA on air.[21] These complaints appear to be an unmeritorious access claim dressed up as an employee/labor issue. As NAB explained in detail in its comments, there is no right under the Communications Act or the First Amendment for any person to gain access to a broadcast station to speak on air about any particular issue.[22] The fact that an individual may be employed by a broadcast station or a broadcast network or program provider does not give such an individual any additional right to go on air and say whatever they wish about any issue of their choice.[23]

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[20] Comments of NAB at 16.

[21] *See* Comments of Industry Ears (filed Sept. 8, 2009) at 1.

[22] *See* Comments of NAB at 11-16 (discussing Section 3 and Section 326 of the Communications Act, as well as relevant Supreme Court and D.C. Circuit Court decisions).

[23] For instance, what if an employee of a radio station wanted to go on air to denigrate the station or advocate a position that would offend large numbers of the station's listeners? The station, just like any other employer, would be well within its rights to prevent such behavior.

The American Federation of Musicians ("AFM") also labors in vain to turn the current legislative controversy into a workers' rights issue, over which the Commission clearly has no jurisdiction. AFM draws an inapposite parallel that broadcasters' decisions purportedly not to play the music of certain performers or to air pro-PRA ads is "tantamount to an employer threatening an employee for unionizing, demanding higher wages or otherwise trying to protect his or her civil rights."[24] But musicians are not the employees of broadcasters. Performers and their record labels instead produce a product that broadcasters may freely choose to promote on air or not.

The Commission, moreover, has no authority under the Communications Act or any other federal law to create new rights for musicians or other "workers," nor the authority to create a "right of access through ad buys."[25] As NAB demonstrated in detail in its initial comments, requiring radio stations to air pro-PRA spots and/or to cease airing anti-PRA spots violates fundamental principles of the Communications Act and the First Amendment.[26] NAB also explained in its comments that threatening the license renewals of stations that oppose the PRA is, in effect, the same as ordering stations to air MusicFIRST's PRA spots and/or to stop airing anti-PRA ads.[27] A

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[24] Comments of American Federation of Musicians of the U.S. and Canada (AFL-CIO) and National Consumers League (filed Sept. 8, 2009) at 2-3.

[25] *Id*. at 2.

[26] *See* Comments of NAB at 10-16; 23-35. Indeed, on the same day that comments were due in this proceeding, the Commission's "well-settled policy" that it "does not scrutinize or regulate programming" was reaffirmed. Letter to Dr. Israeli A. Jaffe, *et al*. *Re*: WQXR-FM, New York, New York from Peter H. Doyle, Chief, Audio Division, Media Bureau, DA 09-2021 (Sept. 8, 2009) at 2 (denying objections and petition against assignment of radio station license based on programming-related concerns).

[27] Comments of NAB at 10 and n. 25.

Commission declaration that broadcasters' actions opposing the PRA are contrary to the public interest, thus calling into question stations' license renewals, is the regulatory equivalent of a direct order forbidding licensees from engaging in those activities. Because radio "licensees are dependent on the FCC and the government for their economic well-being," no broadcaster will act in a manner that puts its license at significant risk, even if that means "curtailment of a constitutional right" by "avoid[ing] controversial speech," particularly "political or artistic expression."[28] The Commission's license renewal processes should not be used by legislative opponents such as MusicFIRST to stifle the political speech of local stations.[29]

Finally, a few other commenters raise additional arguments that NAB has already addressed or are completely inapposite. For example, the Parents Television Council offers patently wrong speculation that, absent FCC action with regard to the Petition,

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[28] *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.3d 397, 407 (D.C. Cir. 1975) (statement of Chief Judge Bazelon). *See also MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (observing that a "regulatory agency may be able to put pressure upon a regulated firm in a number of ways" and that the FCC "in particular has a long history of employing" a "variety of *sub silentio* pressures and 'raised eyebrow' regulation of program content"); *Lutheran Church-Missouri Synod, v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998) (FCC guidelines that operate as a "screening device" for license renewal applications create for licensees a "strong incentive to meet the numerical goals," because "[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit").

[29] *See* Comments of AFM at 2-4; A2IM at 3; Tony Butala at 2; Vocal Group Hall of Fame Foundation at 2 (urging FCC to use license renewal process to consider activities of stations opposing the PRA). As previously recognized, administrative processes that make license renewal more burdensome and uncertain pose "threats" to licensees. *Illinois Citizens Committee*, 515 F.2d at 407 (Chief Judge Bazelon observed that "potential threats" to broadcast licensees include "government refusal to grant economic and other related benefits," such as "the grant of renewal by the Commission without a hearing"); *accord Lutheran Church,* 141 F.3d at 353 (noting that the "inconvenience and expense of being subjected to further review" during license renewal has coercive effect on broadcaster behavior).

"one can easily foresee broadcasters refusing to air further educational information, whether paid or unpaid, about parental control devices."[30] The Commission should ignore this irrelevant and nonsensical claim, particularly since broadcasters have engaged in extensive efforts over the last decade to inform viewers about the television ratings system and the V-chip.[31]

In addition, NAB has already shown that Petitioner's allegations of political broadcasting violations are both unsupported and specious.[32] Thus, there is no need for the Commission to launch an investigation into whether stations have violated these rules – neither the Petition nor any commenter has given any specific example of a station that allegedly violated the sponsorship identification requirements with regard to PRA-related spots.[33] As with other allegations made by MusicFIRST and its supporters, there is no basis for the Commission to investigate, given the complete lack of cause for any investigation. The fact that opponents of broadcasters in the legislative arena are

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[30] Comments of Parents Television Council (filed Sept. 8, 2009) at 1.

[31] As discussed in more detail in other FCC proceedings, the television industry as a whole has conducted multifaceted public education campaigns about the program ratings system and V-chip after they were first adopted in the late 1990s and then again from 2006-2008. *See* Joint Comments of NAB, the National Cable & Telecommunications Association and the Motion Picture Association of America in MB Docket No. 09-26 (filed April 16, 2009) at 11-13. The broadcast networks also undertook a renewed public education campaign in 2004. *Id*. at n. 24.

[32] See Comments of NAB at 35-38.

[33] Free Press urges the Commission to examine this issue, but offers no instance of any station that might have violated the sponsorship identification rules. *See* Comments of Free Press (filed Sept. 8, 2009) at 2. The Radio Training Network noted that MusicFIRST offered no evidence against any station, but put forth only "vague accusations" in this regard. Comments of RTN at 4-5. Moreover, all the spots made freely available on the noperformancetax.org website for stations to air, if they wish, are properly tagged, in conformance with 47 C.F.R. § 73.1212(d).

urging the Commission to conduct a wide-ranging and open-ended investigation of radio stations provides no legal or factual basis for the agency to do so.

IV. Conclusion

As described above, commenters provide no evidence or legal authority to bolster MusicFIRST's request. The Commission should accordingly dismiss the Petition, which, as the public relations document it is, lacks any evidentiary, legal or constitutional basis for FCC investigation or action. Particularly because "substantial First Amendment interests are involved,"[34] summary dismissal of the Petition is the only warranted course of action.

Respectfully submitted,

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[34] *Public Notice* at 2. *See also Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985) ("the FCC policy of requiring a substantial prima facie case before proceeding against a broadcaster . . . reflects an appropriate respect for First Amendment values").