Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

SUPPLEMENTAL COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)[1] respectfully files these Supplemental Comments addressing an important point of legislative interpretation that has not been developed in the record to date.[2] Specifically, in the Bipartisan Campaign Reform Act of 2002 (BCRA),[3] Congress expressly contemplated that certain election-related records would be made available online.[4] By contrast, Congress did not extend this requirement to broadcasters' political files. The clear implication is that Congress

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission (FCC) and other federal agencies, and the courts.

[2] This proceeding has permit-but-disclose status for purposes of the *ex parte* rules. NAB respectfully requests that the FCC accept the filing of these Supplemental Comments pursuant to § 1.415(d) of its rules, 47 C.F.R. § 1.415(d).

[3] P.L. 107–155, 116 Stat. 81 (2002).

[4] Similarly, when Congress has wished an agency other than the Federal Election Commission to place political information on the Internet, it has done so explicitly. *See, e.g.*, 26 U.S.C. § 527 (obligating the IRS to post spending reports by certain political organizations on the Internet); 26 U.S.C. § 6104(3) (obligating the IRS to list registered political organizations on its website).

did not intend for broadcasters to be subject to an obligation to place their political files online and thus, the FCC lacks authority to impose such a requirement absent further legislative action.

In BCRA, Congress expressly required the Federal Election Commission (FEC) to place certain election-related records on the Internet. In Section 501 of BCRA, Congress directed the FEC to "make a designation, statement, report, or notification that is filed with the Commission under this Act **available for inspection by the public** in the offices of the Commission and **accessible to the public on the Internet** not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission."[5] Thus, § 501 sets out two distinct obligations: (1) making a record available for public inspection at a particular location; and (2) making a record available on the Internet.

BCRA includes several other provisions in which Congress expressly referred to the need to place records online:

- In § 502(a), Congress required the FEC to "maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information."[6]

- Section 306 provides that the FEC "shall, as soon as practicable, post on the Internet any information received under [Section 304(a) of the Federal Election Campaign Act of 1971 ("FECA")]."[7]

- Section 502(c) directs any federal executive agency "receiving election-related information which that agency is required by law to publicly

[5] BCRA § 501, amending § 304(a)(11)(B) of FECA (2 U.S.C. § 434(a)(11)(B)) (emphasis added).

[6] BCRA § 502(a), now 2 U.S.C. § 438a(a).

[7] BCRA § 306, amending § 304(a) of FECA (2 U.S.C. § 434(a)).

disclose" to "cooperate and coordinate" with the FEC so that "such report" is made available on or through the FEC's website.[8]

- Section 308(b) requires the FEC to make disclosure reports filed by Presidential Inaugural Committees available on the Internet.[9]

- In § 201(b), Congress expressly required the FCC to "compile and maintain any information the [FEC] may require to carry out section 304(f) of the Federal Election Campaign Act of 1971" and to "make such information available to the public on the Federal Communication Commission's website."[10]

By contrast, in establishing the obligation of broadcasters to collect and make available political records under BCRA, Congress referred only to making such records "available for public inspection."[11] With respect to the obligations imposed on broadcasters, Congress did not impose any associated obligation to make such records available on the Internet (either through a station- or FCC-hosted website).

The contrast between § 504 of BCRA and the other provisions of BCRA that explicitly require records to be placed online is significant. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

[8] BCRA § 502(c).

[9] BCRA § 308(b), amending § 304 of FECA (2 U.S.C. § 434(h)).

[10] BCRA § 201(b).

[11] BCRA § 504, amending § 315 of the Communications Act of 1934 (47 U.S.C. § 315(e)) ("A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that—(A) is made by or on behalf of a legally qualified candidate for public office; or (B) communicates a message relating to any political matter of national importance….").

disparate inclusion or exclusion."[12] Thus, the FCC must "presume" that Congress acted intentionally in excluding an online requirement from Section 504.

Congress' lack of intention to require broadcast licensees to place political records online is further shown by reading BCRA as a whole.[13] It is apparent that Congress intended the FEC to be the central repository of campaign information.[14] Indeed, the data available on campaign spending at the FEC is extensive and includes detailed information about broadcast advertising. Specifically, registered political committees must disclose the identity of each person they make a disbursement to that exceeds $200 in a calendar year, in the aggregate, including that person's name, address, and the purpose of the disbursement. In addition, individuals, groups, political committees, or other organizations that purchase radio or television advertisements for electioneering communications must provide the FEC with the identity of any person paid in excess of $200 to produce or air that ad, including the person's name and address, the candidate identified, and the date the ad aired.[15] And, if the ad is an

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[12] *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991), *citing Russello v. U.S.*, 464 U.S. 16, 23 (1983); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002); *Independent Bankers Ass'n of America v. Farm Credit Admin.*, 164 F.3d 661, 667 (D.C. Cir. 1999); *U.S. v. Monzel*, 641 F.3d 528, 542 (D.C. Cir. 2011); *Village of Barrington, Illinois v. Surface Transportation Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011).

[13] As the Supreme Court has held, when interpreting "a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (citation omitted).

[14] *See, e.g.*, 2 U.S.C. § 434(a)(11)(B) (requiring the FEC to make all disclosure reports filed with the agency "accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a…report…filed electronically) after receipt….").

[15] 2 U.S.C. § 434(b)(6)(B)(iii) (disclosure obligations of political committees paying for independent expenditures); § 434(c) (disclosure obligations of persons or groups other than political committees paying for independent expenditures); and § 434(f) (disclosure obligations of persons paying in excess of $10,000 to air "electioneering communications").

independent expenditure, the purchaser must certify in a filing to the FEC that the ad was not coordinated with a candidate or political party, and if the ad is an electioneering communication, the purchaser must disclose the identity of any person sharing or exercising discretion or control over the activities of the purchaser.[16]

With this perspective, it is not surprising that Congress would choose not to require broadcasters to post the information required by Section 504 online. First, there is no need for duplicative disclosure.[17] Second, stations are not the entities placing ads. Nor are they in a position to ensure that the information given to them by an advertiser is correct.[18]

NAB further notes that, to obtain Office of Management and Budget (OMB) approval for an information collection under the Paperwork Reduction Act (PRA), the FCC must certify to OMB that the collection "is necessary for the proper performance of the functions of the agency, including that the information has practical utility" and "is not unnecessarily duplicative of information otherwise reasonably accessible to the agency."[19] In light of the extensive political records available to the FCC and to the

[16] 2 U.S.C. § 434(b)(6)(B)(iii) (independent expenditures); 2 U.S.C. § 434(f)(2)(A) (electioneering communications).

[17] Indeed, to the extent some parties have argued that placing this broadcaster record information online is necessary for disclosure, the extent of duplication with certified records at the FEC site shows that these arguments are based on a false premise.

[18] In choosing to treat the political records maintained by broadcasters differently, Congress also could have been aware, as NAB has pointed out, that online disclosure of individual rate information – one of the key aspects of the broadcaster file that differs from information available at the FEC – would likely have harmful unintended consequences. *See* NAB Comments, MM Docket Nos. 00-168 and 00-44, at 21-22 (filed Dec. 22, 2011) ("NAB Comments"); NAB Reply Comments, MM Docket Nos. 00-168 and 00-44, at 20-21 (filed Jan. 17, 2012).

[19] 44 U.S.C. § 3506(c)(3)(A), (B).

public on the FEC's website, the imposition of an online posting requirement on broadcast licensees would fail to meet OMB's standards.

NAB further submits that BCRA's carefully drawn distinctions between the FEC's and FCC's specific obligations to make certain political/campaign information available on their websites, and the differing obligations of individual broadcast licensees to "maintain" certain records and make them "available for public inspection,"[20] "supports the conclusion that the FCC is barred from mandating" that all stations post these records online.[21] Clearly, BCRA, "by its terms," does "not provide the FCC with the authority to enact" requirements for broadcast licensees to post their political files online; the "harder question is whether the provision[s]" of BCRA discussed above "effectively bar[] the FCC from mandating" that broadcast licensees place these files online.[22]

Others undoubtedly will argue that the fact that BCRA did "not expressly foreclose" [23] the Commission from imposing an online requirement for stations, provides the FCC with authority to adopt such a requirement. But, the courts previously have rejected this argument when made by various agencies "as entirely untenable under

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[20] BCRA § 504.

[21] *MPAA, Inc., et al. v. FCC*, 309 F.3d 796, 802 (D.C. Cir. 2002) (where Congress directed FCC to adopt closed captioning rules while also directing agency to inquire and report on video description, the court found that the statute did *not* authorize the FCC to adopt video description rules, and also found that the disparate statutory language "support[ed] the conclusion that the FCC is *barred* from mandating video description") (emphasis added). *See also id*. at 807 (stating that statute did not "instruct (or even permit) the FCC to promulgate regulations mandating video description").

[22] *Id*. at 801.

[23] *Aid Association for Lutherans v. United States Postal Service*, 321 F.3d 1166, 1174 (D.C. Cir. 2003).

well-established case law."[24] As an *en banc* Court of Appeals for the District of Columbia Circuit has made clear, statutes are "not written in 'thou shalt not' terms."[25] If the courts were "to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[26]

Questions of statutory authority aside, the placement of the political file online raises "very complex implementation problems."[27] As NAB explained previously, maintenance of the political file "requires very significant time and personnel resources," especially during busy political seasons.[28] Moreover, "designing an online database system that is, at once, sufficiently flexible to accommodate the myriad ways broadcasters sell and document political advertisements and yet still useful to candidates, advertisers and members of the public, will be an extremely challenging task."[29]

The concerns about burdens, complexity, and the desirability of flexible solutions that NAB has raised in this proceeding parallel those that the FCC previously raised regarding its obligation to place information online under BCRA. In 2002, the FEC

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[24] *Id*. at 1174-75 (citing numerous cases).

[25] *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994).

[26] *Id.* (emphasis in original).

[27] NAB Comments at 5.

[28] NAB Comments at 8. *See also* Comments of NAB on Proposed Information Collection Requirements, MM Docket Nos. 00-168 and 00-44, at 2, 8-12 (filed Jan. 23, 2012) (additionally pointing out that, under the PRA, the FCC must reduce to the extent practicable and appropriate the burden on persons providing information to the agency).

[29] NAB Comments at 8 (also citing concerns about market distortion due to asymmetric regulations).

proposed rules to implement § 201(b) of BCRA, "regarding a database the [FCC] will be asked to create, maintain and make available to the public on [the FCC's] website."[30] In response, the FCC filed comments "to make clear that this undertaking could be extraordinarily complex and will require the expenditure of substantial resources in terms of time, money and personnel."[31] The FCC's response went on to say that the burdens and complexities of the FEC's proposals argued in favor of "rules that will simplify the task to the extent possible,"[32] with the FCC calling for "flexibility and discretion."[33]

The online posting burdens that the FEC proposed to impose on the FCC ten years ago and that caused the FCC to express concern are different from those the agency proposes to impose on television stations today. But the issues here about the burdens that would be imposed on stations by the FCC's online file proposals "in terms of time, money and personnel" are similarly entitled to respect and weight.[34] This is particularly the case, given the statutory language that makes clear Congress did not

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[30] FEC Notice 2002-13, Electioneering Communications, 67 FED. REG. 51,131 (Aug. 7, 2002). The FEC proposed that the FCC compile and maintain on the FCC's website information from which it could be determined whether a communication disseminated by a broadcast station or by a cable or satellite system reached 50,000 or more persons in a particular congressional district or state.

[31] *See* Comments of the FCC, Media Bureau, before the FEC, Re: Notice 2002-13, Electioneering Communications, at 1 and 3 (Aug. 29, 2002) ("FCC Comments").

[32] *See* FCC Comments at 1 and 2.

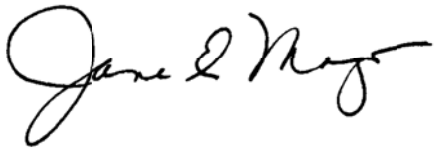
[33] *Id.* at 3.

[34] NAB has suggested that the Commission "consider forming a joint broadcaster-FCC working group that will be able to explore creatively the best options for moving the public file online and in ways that serve the public without creating unnecessary new burdens for broadcasters." NAB Comments at 37. Notably, OMB encourages agencies to test an information collection through a "pilot program," where appropriate. 5 C.F.R. § 1320.8(a)(6).

intend to require broadcasters to place their political files online and that raises serious questions about the FCC's authority to do so.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS



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March 8, 2012