

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL ASSOCIATION OF BROADCASTERS, )

Petitioner/Movant, )

v. )

Case No. 12-1225

FEDERAL COMMUNICATIONS COMMISSION )

and UNITED STATES OF AMERICA, )

Respondents. )

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**PETITIONER'S EMERGENCY MOTION  
FOR A STAY PENDING JUDICIAL REVIEW**

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## INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 18 and 27 and Circuit Rules 18 and 27, Petitioner National Association of Broadcasters (NAB) requests that the Court stay the effective date of the Federal Communications Commission's Second Report and Order, *In re: Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, etc.*, MM Dkt. Nos. 00-168 & 00-44, FCC 12-44 (rel. Apr. 27, 2012), 77 Fed. Reg. 27631 (May 11, 2012) (the "*Order*"), pending the completion of judicial review.<sup>1</sup> NAB requests that a stay be entered before August 2, 2012, the *Order*'s effective date.

This case satisfies the requirements for a stay. NAB is likely to succeed on the merits because the FCC engaged in arbitrary and capricious decisionmaking by disregarding the competitive harm that is likely to result from the *Order* and departing from the provisions of the Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107-55, 116 Stat. 81. NAB's members will suffer irreparable harm absent a stay because the *Order* compels television stations to post the prices for specific advertisements to a public website immediately after the sales occur. This will place NAB's members at a distinct disadvantage to their non-broadcast

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<sup>1</sup> The *Order* is attached as Exhibit 1. NAB sought a stay of the *Order* pending appeal from the FCC on July 3, 2012; that request remains pending before the agency. On July 9, 2012, NAB's counsel notified counsel of record for the FCC and the United States via telephone that this motion would be filed. Respondents intend to file an opposition to the motion.

competitors, who will not be required to post rate information on the Internet. The balance of hardships and the public interest also favor a stay because the likely harm from requiring immediate posting of detailed price information about specific advertising sales outweighs the benefits of such a requirement.

### **BACKGROUND**

1. Television stations are required to maintain a “political file,” which includes a record of every request for political time made by a candidate or national political issue advertiser and the broadcaster’s responses, including the date and time ads are aired and the per-spot cost to the advertiser. *See* 47 U.S.C. § 315(e); 47 C.F.R. § 73.1943(a). The record must be created “immediately absent unusual circumstances.” 47 C.F.R. § 73.1943(c).

Congress has enacted detailed requirements concerning disclosure of political expenditure and advertising information. BCRA provides that certain political *expenditure* information must be “accessible to the public on the Internet” and directs the Federal Election Commission to “maintain a central site on the Internet” for expenditure information. BCRA §§ 501, 502 (codified at 2 U.S.C. §§ 434(a)(11)(B), 438a). In contrast, BCRA does not require broadcasters to post information concerning political advertising *sales* online, nor does it direct the FCC to create a website for such material. Instead, BCRA requires television stations to “maintain, and make available for public inspection,” paper records with

respect to requests for purchase of broadcast time that are made by candidates or “communicate[] a message relating to any political matter of national importance.” *Id.* § 504 (codified at 47 U.S.C. § 315(e)(1)).<sup>2</sup>

2. In 2000, the FCC initiated a proceeding to “determine whether [its] current requirements pertaining to television stations’ public inspection files are sufficient to ensure that the public has adequate access to information on how the stations are serving their communities.”<sup>3</sup> In 2007, the FCC adopted a requirement that television broadcasters place their public files on their websites.<sup>4</sup> The FCC’s rule expressly *exempted* the “political file” portion of broadcasters’ public file from this requirement, finding that “the burden of placing this material on the Internet outweighs the benefits.”<sup>5</sup> The FCC found that “[d]aily and even more frequent requests for access by political candidates and their campaign personnel, combined with a need for the station to update the file frequently, may make requiring the station to place this material on the Internet inappropriate,” and that “[p]olitical candidates and campaigns make heavy use of the file and require quick access to

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<sup>2</sup> The FCC never amended its rules to implement BCRA, but television stations generally place records covered by BCRA in the “political file” they maintain under 47 C.F.R. § 73.1943.

<sup>3</sup> *In re Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report & Order, MM Docket Nos. 00-168 and 00-44, FCC 07-205 (rel. Jan. 24, 2008), 23 FCC Rcd. 1274, 1275, ¶ 1 (2008) (citing *Notice*, 15 FCC Rcd. 19186 (2000)).

<sup>4</sup> *Id.* ¶¶ 8–17.

<sup>5</sup> *Id.* ¶ 20.

material, and if the volume of material is too great, the station may not be able to update the Internet file quickly enough.”<sup>6</sup>

NAB and other parties sought review of the 2007 Report and Order in this Court, which held the challenges in abeyance pending FCC reconsideration.<sup>7</sup>

3. In October 2011, the FCC vacated the 2007 Report and Order and issued a Further Notice of Proposed Rulemaking in which it proposed to reverse its 2007 decision that the political file should be exempted from the online public file requirement and require television broadcasters to post their political files to an FCC-hosted website.<sup>8</sup> The FCC explained its change in position on the ground that it had “learned [since 2007] that the vast majority of television stations handle political advertising transactions electronically.”<sup>9</sup>

NAB and other commenters explained that the FCC’s perception of the political advertising sales process was incorrect. Negotiations between candidates go on continuously during the political season and often occur by telephone. Consequently, requiring broadcasters to post detailed records of political ad buys on the

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<sup>6</sup> *Id.*

<sup>7</sup> Order, *Nat’l Ass’n of Broadcasters v. FCC*, Nos. 08-1135 *et al.* (D.C. Cir. July 11, 2008). The petition for review was dismissed on petitioners’ motions.

<sup>8</sup> *In re Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, etc.*, Order on Recon. & Further Notice of Proposed Rulemaking, MM Docket Nos. 00-168 and 00-44, FCC 11-162 (rel. Oct. 27, 2011), 26 FCC Rcd. 15788, 15799–801, ¶¶ 22–23 (2011) (“FNPRM”).

<sup>9</sup> *Id.* ¶ 23.

Internet on an almost real-time basis would impose a significant burden on television stations. Moreover, the broadcasters explained, such a requirement would raise potential antitrust issues and place television stations at a competitive disadvantage to cable and satellite television, as well as other sellers of local advertising.<sup>10</sup> In supplemental comments, NAB argued that imposing an online publication requirement for stations' political files is contrary to BCRA.<sup>11</sup> Television broadcasters submitted compromise proposals that would require television stations to post aggregated data concerning individual political advertisers, but would not require immediate disclosure of spot-by-spot advertising rates.<sup>12</sup>

4. The *Order* requires online publication of political files. The *Order* rejects as vague and unsubstantiated broadcasters' concerns that requiring the political file to be posted online immediately would harm competition. *See Order* ¶¶ 38–39. The *Order* finds that the alternative proposal to post aggregated data online would deprive the public of the benefits of immediate online access to the political file. *See id.* ¶ 57 n.6. In addition, the *Order* interprets BCRA to allow the FCC to require online publication of the political file. *See id.* ¶ 52. Finally, the *Order*

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<sup>10</sup> *See, e.g.*, NAB FNPRM Comments (filed Dec. 22, 2011), at pp. 3–22.

<sup>11</sup> *See* NAB Supplemental Comments, MM Docket Nos. 00-168 and 00-44 (filed Mar. 8, 2012).

<sup>12</sup> *See* Television Station Groups *Ex Parte*, MM Dkt. Nos. 00-168 & 00-44 and MB Dkt. No. 11-189 (filed Feb. 15, 2012); Television Station Groups *Ex Parte*, MM Dkt. Nos. 00-168 & 00-44 (filed Apr. 20, 2012).

concludes that the political file requirement is consistent with the First Amendment on the ground that disclosure promotes, rather than chills, speech. *See id.* ¶ 80.

5. On May 11, 2012, the FCC published the *Order* in the *Federal Register* as a Final Rule. 77 Fed. Reg. 27631. On May 21, 2012, NAB filed a timely petition for review of the *Order* in this Court. *See* Docket, Case No. 12-1225.<sup>13</sup> On July 3, 2012, the FCC published a notice in the *Federal Register* announcing OMB's approval of the *Order* under the Paperwork Reduction Act and specifying an effective date of August 2, 2012. 77 Fed. Reg. 39439.

### STANDARD OF REVIEW

The Court considers four factors in determining whether to grant a stay pending appeal: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).<sup>14</sup>

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<sup>13</sup> Multiple television broadcasters filed a petition for reconsideration and proposed a further compromise proposal to the FCC on June 11, 2012. *See* Television Station Group Petition for Reconsideration, MM Dkt. Nos. 00-168 & 00-44 (filed June 11, 2012).

<sup>14</sup> This Circuit's decisions leave unresolved whether a movant must establish all four factors to obtain a stay or whether the less demanding sliding-scale analysis is still appropriate. *See Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011). A stay is appropriate in this case under either approach.

## ARGUMENT

### I. NAB Is Likely to Prevail on the Merits.

#### A. The FCC's Imposition of an Online Publication Requirement for TV Broadcasters' Political Files Is Arbitrary and Capricious.

1. The FCC's *Order* requires television stations to “immediately” post on the Internet detailed information about the rates charged for specific advertisements. This requirement raises serious antitrust concerns. As Commissioner McDowell noted, “if antitrust authorities learned that broadcasters were sharing pricing information market-by-market,” broadcasters “would be sued for antitrust violations.” Statement of Commissioner Robert M. McDowell Approving in Part, Dissenting in Part, FCC 12-44, 2012 WL 1513776, at \*55 (Apr. 27, 2012) (hereinafter “McDowell Statement”). “[F]orcing broadcasters to do what would otherwise be illegal is simply surreal,” *id.*, particularly when alternative proposals would enhance disclosure without harming competition.

a. Exchanges of information concerning the “most recent price charged or quoted” may violate the antitrust laws even if there is no agreement to adhere to any particular prices, the exchanges occur only on an irregular basis, and the information is sometimes fragmentary. *United States v. Container Corp. of Am.*, 393 U.S. 333, 335–36 (1969). Exchanges of information about the most recent price charged or quoted are likely to have “an anticompetitive effect in the industry, chilling the vigor of price competition.” *Id.* at 337; *see also United States v. U.S.*



*Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (“Exchanges of current price information . . . have the greatest potential for generating anticompetitive effects and . . . have consistently been held to violate the Sherman Act.”).<sup>15</sup> In this case, unlike *Container Corp.*, the exchanges would occur on a *continuous* basis rather than an irregular basis, and would be *comprehensive* rather than fragmentary. See *Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001) (“[T]he frequency of the meetings is itself problematic . . .”).<sup>16</sup>

The federal antitrust enforcement agencies have issued guidelines warning that information exchanges among competitors “may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables.” Fed. Trade Comm’n & U.S. Dep’t of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.31(b) (2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161, *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

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<sup>15</sup> Numerous courts have likewise recognized that exchanging information about current prices on specific transactions generally is impermissible under the anti-trust laws. See *Cent. & S. Motor Freight Tariff Ass’n, Inc. v. United States*, 777 F.2d 722, 732 (D.C. Cir. 1985); *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1151–52 (10th Cir. 1981); *United States v. Airline Tariff Publ’g Co.*, 836 F. Supp. 9 (D.D.C. 1993); *United States v. Brink’s, Inc.*, 1979-2 Trade Cas. ¶ 62,902 (N.D. Ga.); *United States v. FMC Corp.*, 306 F. Supp. 1106 (E.D. Pa. 1969); accord HERBERT HOVENKAMP, 13 ANTITRUST LAW ¶ 2113e, at 97–98 (2d ed. 2005) (“direct interseller communications of current prices on specific transactions” should be treated as a “nearly naked” restraint of trade).

<sup>16</sup> Because the television stations will be compelled to publish the price information, there will be no “agreement” in restraint of trade for purposes of Section 1 of the Sherman Act. Nevertheless, posting detailed, current pricing information is likely to have significant anticompetitive effects.

The guidelines note that “the sharing of information relating to price . . . is more likely to raise competitive concern” than the sharing of other types of information, and that “the sharing of individual company data is more likely to raise concern than the sharing of aggregated data.” *Id.*; accord *Exxon Corp.*, 275 F.3d at 211–13 (exchange of current data that identifies “particular parties, transactions, and prices” signals anticompetitive behavior). The FCC’s *Order* raises *all* these concerns: It concerns *prices* – the most competitively sensitive topic of all – and it involves *immediate* sharing of *individual company* data about *specific transactions*.<sup>17</sup> As one commentator noted, making “sensitive price information available to a television station’s customers and competitors at the click of a mouse” is “at odds with the commonsense view that the sharing of pricing information among rival sellers is unhealthy for competition.”<sup>18</sup>

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<sup>17</sup> The Antitrust Division and the FTC have established a “safety zone” for exchanges of price and cost information. See U.S. Dep’t of Justice & Fed. Trade Comm’n, Statement of Antitrust Enforcement Policy in Health Care (1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153, *available at* <http://www.ftc.gov/reports/hlth3s.pdf>. These guidelines require that the price information should be more than three months old, and that any information be aggregated so that it is not possible to identify the prices charged by any particular market participant. See *id.* at 50. The *Order* does not come close to meeting these guidelines. The pricing information is posted on the Internet “immediately,” and no steps are taken to aggregate the pricing information. Instead, the *Order* requires the release of detailed information about the prices charged for *specific* transactions by *individual* broadcasters.

<sup>18</sup> Reply Comments of Network Station Owners, MM Dkt. No. 00-168 (filed Jan. 17, 2012), at pp. 12–14. These comments are attached as Exhibit 2.

b. The FCC concluded that posting political advertising rates on the Internet will cause no significant harm because this information is already available for public inspection in paper files located at individual television stations. *See Order* ¶ 39; *id.* ¶ 111 n.11. This conclusion conflicts with the basic rationale for the FCC's *Order*. The FCC determined that access to paper files is "limited" by current procedures, which require persons seeking access to visit a television station's main studio during regular business hours. *Id.* ¶ 13. Under the current rules, a competitor wishing to gather price data from a number of stations would be required to make separate visits to multiple stations. In contrast, "[m]aking the information available online will permit 24-hour access from any location, without requiring a visit to the station, thereby greatly increasing public access to information." *Id.* Because price data is highly time-sensitive, greatly reducing the time and effort required to gather current pricing data is likely to have a significant market impact. As the FTC has warned, "[t]he Internet allows firms to share information at an unprecedented rate," enabling market participants to "learn in real time, for example, the identities of the purchaser and seller in a transaction, the quantity purchased, the date and time of the transaction, and the purchase price." This efficient exchange of information "might injure competition by facilitating price or other anticompetitive coordination." Fed. Trade Comm'n Staff Report, *Entering the 21<sup>st</sup> Century: Competition Policy in the World of B2B Electronic*

Marketplaces, Executive Summary, at 2 (2000), *available at* <http://www.ftc.gov/os/2000/10/b2breport.pdf>.<sup>19</sup>

c. The *Order* will also distort competition by giving non-broadcast media asymmetrical access to information about local advertising rates. *See* Reply Comments of the Joint Television Parties, MM Dkt. Nos. 00-168 & 00-44 (filed Jan. 17, 2012), at p. 15 (online publication will cause “‘market distortions’ that favor other media”). Cable and satellite television operators, as well as other media that compete for local advertising, are not subject to the immediate Internet disclosure requirement.<sup>20</sup> As a result, “[o]ne poker player would, in effect, have had at least a partial glance at the other’s hand.” *Order* ¶ 38 (quoting Reply Comments of Network Station Owners, at p. 14). This information asymmetry will give non-broadcasters an opportunity to shift advertising away from over-the-air television

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<sup>19</sup> Courts have reached a similar conclusion in the context of online publication of judicial records. *See, e.g., Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (granting stay of order posting trial proceedings to Internet because “[t]here are qualitative differences between making public appearances regarding an issue and having one’s testimony broadcast throughout the country”); Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 883 (2008) (state courts have “take[n] a very cautious approach to online public access,” and in guidelines have limited online public access to indices and “‘judgments, orders, or decrees’” that pose “‘little risk of harm to an . . . unwarranted invasion of privacy or proprietary business interests’”).

<sup>20</sup> Cable and satellite operators must disclose their political rates, but are not required to publish them online. *See* 47 C.F.R. §§ 76.1701, 25.701(d). At a minimum, the FCC’s failure to impose an Internet disclosure obligation on cable and satellite providers, as well as television stations, is arbitrary and capricious. *Cf. Sinclair v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002) (FCC acted arbitrarily and capriciously when it failed to explain why its local television ownership rule did not take cable and other media into account when its other ownership rules did so).

stations to these other media. *See* Reply Comments of Network Station Owners, at pp. 14–15 (cable systems will “have extensive information about their competitors’ pricing”).

The competitive disadvantage will extend to commercial advertising sales as well as political advertising. By law, candidate rates during specified periods of time must be based on the lowest rate charged to a commercial advertiser for a comparable advertising spot. *See* 47 U.S.C. § 315(b)(1)(A). Immediate publication of these rates on the Internet will give competitors and potential advertising customers near real-time access to a television broadcaster’s best commercial rate.<sup>21</sup> Issue ad rates, unlike rates charged to candidates, are not regulated by BCRA, so the rate offered to an issue advertiser is often a commercial rate. *See, e.g.,* Ex. 3, Drafts Decl., at ¶¶ 5, 13. Thus, the *Order* requires television stations to post on the Internet current information on *non-candidate* commercial rates.

d. The FCC acknowledged that “several parties raised the claim of ‘commercial harm,’” but discounted the claim as “little more than generalized and vague assertions.” *Order* ¶ 39. That commenters forecasted future commercial harm does not relieve the FCC of its duty to address these concerns. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011) (SEC acted arbitrarily

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<sup>21</sup> For periods outside certain pre-election windows, the rates provided to candidates are the station’s standard commercial rates. *See* 47 U.S.C. § 315(b)(1)(B).

by failing to respond to comments arguing that certain investors “can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value”). Here, the FCC was not presented with “purely speculative” comments that “do not disclose the factual or policy basis on which they rest.” *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 n.58 (D.C. Cir. 1977). Disclosure of detailed, current price information on the Internet clearly is problematic under the antitrust laws, and clearly creates an informational disparity. Moreover, the FCC itself concluded that the information is likely to be far more accessible on a single Internet site than in paper files at multiple locations. There is thus more than “some basis for thinking [the] position taken in opposition to the agency is true.” *Id.*

In sum, the FCC has no authority to create exceptions to the antitrust laws. *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 339–46 (1959); *Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1149 (D.C. Cir. 1980). By brushing aside the serious anticompetitive implications of its *Order*, the FCC failed to address an “important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n of Am. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

2. The FCC’s decision is particularly vulnerable because the agency rejected an alternative approach that would largely avoid the anticompetitive concerns. Under a compromise proposal submitted by several television station groups, television stations would be required to report online the total number of dollars spent

by each candidate or other political advertiser on that station, compiled on a weekly, every-other-day, or daily basis depending on the political season. *See supra* notes 12–13. More detailed spot-by-spot information would continue to be available in the station’s paper file, but would not be posted on the Internet.<sup>22</sup>

The alternative proposal would avoid the anticompetitive consequences of posting current price information about specific advertising transactions. Similar aggregation requirements commonly are employed to allay antitrust concerns. *See supra* Part I.A.1.a. The *Order* summarily rejects this alternative approach on the ground that it would “deprive the public of the benefits of immediate online access to *all* the information in the political file.” *Order* ¶ 57 n.6 (emphasis added). But the *Order* does not explain why weekly (or even more frequent) posting of aggregated data, supplemented by review of paper files as needed, is not sufficient to meet the goals of public disclosure. The FCC’s rejection of the alternative proposal was arbitrary and capricious. *See ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (agency action is arbitrary unless it “responds to significant points raised by the public” (citation and quotation marks omitted)).

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<sup>22</sup> Commissioner McDowell offered a similar compromise proposal. *See McDowell Statement*, 2012 WL 1513776, at \*55.

**B. The FCC's Imposition of an Online Publishing Requirement for TV Broadcasters' Political Files Is Inconsistent with BCRA.**

1. When Congress enacted BCRA it specified that certain election-related records should be made available on an FEC website as well as for hard-copy inspection. *See* BCRA § 501 (codified at 2 U.S.C. § 434(a)(11)(B)) (political expenditure information shall be “accessible to the public on the Internet”); *id.* § 502(a) (codified at 2 U.S.C. § 438a(a)) (FEC shall “maintain a central site on the Internet to make accessible to the public” election-related information). In contrast, Congress adopted a hard-copy inspection requirement for broadcasters, but did *not* require online publication. *See* BCRA § 504 (codified at 47 U.S.C. § 315(e)). Nor did BCRA instruct the FCC to maintain a website for broadcasters' political files. Moreover, when Congress wanted the FCC to publish election advertising-related information on its website, it said so explicitly. *See* BCRA § 201(b) (codified at 2 U.S.C. § 434 note) (instructing FCC to “compile and maintain any information the [FEC] may require” to meet certain disclosure obligations, and to “make such information available to the public on the [FCC's] website”).

“[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 disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration in original) (citation and quotation marks omitted). Under this “basic tenet[] of statutory interpreta-



tion,”<sup>23</sup> the FCC was barred from imposing video description requirements where the relevant statute specifically authorized the FCC to impose only closed captioning. *See MPAA v. FCC*, 309 F.3d 796, 802 (D.C. Cir. 2002); *see also Indep. Bankers Ass’n of Am. v. Farm Credit Admin.*, 164 F.3d 661, 667 (D.C. Cir. 1999) (farm-related businesses could not receive loans from farm credit banks for activities not listed in the relevant statute even though another provision referenced loans for “any . . . purpose”).

The *Order* concludes that the language and structure of BCRA is either (i) ambiguous or (ii) indicates congressional approval of the FCC’s then-two-year-old proposal to require Internet publication. *See Order* ¶ 52. These justifications are erroneous. As this Court has stated, statutes typically are “not written in ‘thou shalt not’ terms.” *Ry. Labor Executives’ Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc). When Congress expressly instructs the FCC to act in one area, it “supports the conclusion that the FCC is barred” from taking analogous action in another area covered by the same statute. *MPAA*, 309 F.3d at 802; *see also Ass’n of Commc’ns Enters. v. FCC*, 235 F.3d 662, 665–68 (D.C. Cir. 2001). Had Congress intended that television broadcasters publish their political files online to an FCC website, it would have said so in BCRA.

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<sup>23</sup> *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 661 (D.C. Cir. 2011).

2. Interpreting BCRA to allow the FCC's *Order* also raises First Amendment concerns. "[C]ourts make every effort to construe statutes so as to . . . avoid needless constitutional confrontations." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008). In upholding BCRA Section 504's "election message request" requirement against a facial constitutional challenge, the Supreme Court found that its "recordkeeping requirements do not reach significantly beyond other FCC recordkeeping rules," and "will [not] impose disproportionate administrative burdens." *McConnell v. FEC*, 540 U.S. 93, 238–40 (2003). The Court also upheld against a facial challenge BCRA Section 504's "issue request requirement," despite ambiguity over the administrative burden imposed, because the FCC "has often ameliorated regulatory burdens by interpretation in the past, and there is no reason to believe it will not do so here." *Id.* at 242. Rather than ameliorate these concerns, the *Order*'s imposition of additional, disproportionate burdens raises significant First Amendment concerns.<sup>24</sup> *See John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2822 (2010) (Alito, J., concurring) ("[F]acially valid disclosure requirements can impose heavy burdens on First Amendment rights in individual cases.").

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<sup>24</sup> *See Target Media Ex Parte* Presentation, MM Dkt. No. 00-168 (filed Apr. 19, 2012), at p. 16 ("This type of online disclosure raises serious privacy concerns and places an unreasonable burden on individuals' First Amendment right to participate in political speech."); Comments of National Religious Broadcasters, MM Dkt. Nos. 00-168 and 00-44 (filed Dec. 15, 2011), at pp. 6–9 (online publication of issue ad-related inquiries will chill First Amendment rights, as demonstrated by harassment of supporters of Proposition 8 in California whose names were posted to a government website pursuant to state law).

The Supreme Court “ha[s] repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”” *Davis v. FEC*, 554 U.S. 724, 744 (2008) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam)); accord *Nat’l Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 20 (D.C. Cir. 2009) (rejecting proposition that “repercussions from compelled disclosure can never outweigh the government’s interests in requiring it of a particular organization”). Indeed, the Court has invalidated regulations that seriously burden First Amendment rights absent compelling justification. See, e.g., *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982); see also *NAACP v. Button*, 371 U.S. 415, 438 (1963) (“Precision of regulation must be the touchstone” in the First Amendment context). Contrary to these principles, the *Order* justifies the online political file requirement under the general notion that disclosure promotes, but does not chill, speech and discussion. See *Order* ¶ 80. This failure to conduct the relevant legal analysis under the First Amendment renders the *Order* arbitrary and capricious. See *Town of Barnstable, Mass. v. FAA*, 659 F.3d 28, 35–36 (D.C. Cir. 2011).

## **II. NAB’s Members Will Suffer Irreparable Harm Absent a Stay.**

Absent a stay, NAB’s members will be required to post the rates they charge for specific advertising spots immediately to the Internet. Non-broadcast competitors will be able to determine in a matter of seconds exactly what prices local

broadcast stations are charging for specific spots. As a result, they will acquire an unfair advantage over broadcasters in the competition for political and commercial advertising, just as a poker player who is able to peek at an opponent's hand acquires an unfair advantage in a poker game. Political advertisers spend more than a billion dollars on television advertising in election years. *See, e.g.,* Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 26 (2009). If the FCC's *Order* allows non-broadcast media to shift even a small percentage of this advertising away from television, NAB members will lose millions of dollars in revenue. Broadcasters will have no means of recouping this lost revenue from the FCC or any other source. In addition, broadcasters will be unable to recoup the substantial costs of complying with the *Order*.<sup>25</sup>

These losses constitute irreparable harm. Although economic harm generally does not constitute irreparable injury, “th[at] rule is based upon the presumption that ‘adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.’ That presumption does not hold and the general rule does not apply” when, as here, the party seeking a stay cannot recover monetary damages. *Robertson v. Cartinhour*, 429 F. App’x 1, 3 (D.C. Cir. 2011) (internal citation omitted) (quoting *Va. Petroleum Jobbers Ass’n v. Fed. Power*

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<sup>25</sup> *See* Ex. 3, Drafts Decl., at ¶¶ 8–14; Ex. 4, Tamerlano Decl., at ¶¶ 8–14; Ex. 5, Baratta Decl., at ¶¶ 8–13; Ex. 6, Wexler Decl., at ¶¶ 8–11.

*Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). NAB’s members are likely to suffer unrecoverable economic losses, and thus irreparable harm, if a stay is not entered prior to appeal.

### **III. The Balance of Hardships and the Public Interest Favor a Stay.**

The balance of hardships and the public interest also favor a stay. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (“These [two] factors merge when the Government is the opposing party.”) A stay would leave the FCC’s current public file rules in effect pending NAB’s appeal. Those rules ensure that information concerning political advertising, including rate information, is available in a public file. The FCC did not conclude that the existing rules are insufficient for candidates. Any benefit to others from immediate on-line access to detailed, current price information is outweighed by the serious harms that would likely result from that requirement. The public interest is not served by implementing a rule that is arbitrary and capricious, harmful to competition, and contrary to BCRA. Because NAB has shown a likelihood of success on the merits, the public interest weighs in favor of injunctive relief. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1326 (D.C. Cir. 1998).

### **CONCLUSION**

The Court should stay the effective date of the *Order* prior to August 2, 2012, and pending the completion of judicial review.

Respectfully submitted,

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*Counsel for Petitioner/Movant NAB*

**CIRCUIT RULES 18(a)(4) and 27(a)(4)**  
**CERTIFICATE OF PARTIES AND AMICI CURIAE**

Pursuant to Circuit Rules 18(a)(4) and 27(a)(4), the undersigned, on behalf of Petitioner/Movant the National Association of Broadcasters (NAB), hereby states that as of the date of the filing of this Motion on July 10, 2012, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

NAB

Federal Communications Commission

United States of America

On June 20, 2012, Free Press, Benton Foundation, Common Cause, Campaign Legal Center, New America Foundation, and Office of Communication, Inc. of the United Church of Christ filed a motion for leave to intervene, which remains pending before the Court.

/s/ Robert A. Long, Jr.

Robert A. Long, Jr.

*Counsel for Petitioner/Movant NAB*

**CIRCUIT RULES 18(a)(4) and 27(a)(4)**  
**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Circuit Rules 18(a)(4) and 27(a)(4), the undersigned, on behalf of Petitioner/Movant the National Association of Broadcasters (NAB) hereby states as follows:

NAB is a nonprofit, incorporated association of radio and television stations. It has no parent company, and has not issued any shares or debt securities to the public; thus no publicly-held company owns ten percent or more of its stock. As a continuing association of numerous organizations operated for the purpose of promoting the interests of its membership, the coalition is a trade association for purposes of D. C. Circuit Rule 26.1.

/s/ Robert A. Long, Jr.

Robert A. Long, Jr.

*Counsel for Petitioner/Movant NAB*



**EXHIBIT 1:**

Second Report & Order,  
*In the Matter of Standardized and Enhanced Disclosure Requirements  
for Television Broadcast Licensee Public Interest Obligations, etc.*,  
MM Dkt. Nos. 00-186 & 00-44, FCC No. 12-44 (rel. Apr. 27, 2012),  
77 Fed. Reg. 27631 (May 11, 2012)

Dated: April 26, 2012.  
**G. Jeffrey Herndon,**  
*Acting Director, Registration Division, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

**PART 180—[AMENDED]**

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.910, the table is amended by revising the entry for the inert

ingredient which reads in part “α-[p-(1,1,3,3-tetramethylbutyl)phenyl]” to read as follows:

**§ 180.910 Inert ingredients used pre and post-harvest; exemptions from the requirement of a tolerance.**

\* \* \* \* \*

| Inert ingredients                                                                                                                                                                                                                                                                                                                                                                                                                      | Limits                                     | Uses                                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------|-----------------------------------------------|
| * * *                                                                                                                                                                                                                                                                                                                                                                                                                                  | * * *                                      | * * *                                         |
| α-[p-(1,1,3,3-tetramethylbutyl)phenyl]-ω-hydroxypoly(oxyethylene) produced by the condensation of 1 mole of p-(1,1,3,3-tetramethylbutyl)phenol with a range of 1–14 or 30–70 moles of ethylene oxide: If a blend of products is used, the average range number of moles of ethylene oxide reacted to produce any product that is a component of the blend shall be in the range of 1–14 or 30–70 (CAS Reg. Nos. 9036–19–5, 9002–93–1). | Not to exceed 7% of pesticide formulation. | Surfactants related adjuvants of surfactants. |
| * * *                                                                                                                                                                                                                                                                                                                                                                                                                                  | * * *                                      | * * *                                         |

\* \* \* \* \*

[FR Doc. 2012–11064 Filed 5–10–12; 8:45 am]  
 BILLING CODE 6560–50–P

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

[MM Docket No. 00–168, 00–44; FCC 12–44]

**Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children’s Television Programming Report (FCC Form 398)**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

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**SUMMARY:** In this document, the Commission revises its public file regulations to require that television station public inspection files be made available in an online public file to be hosted on the Commission’s Web site.

**DATES:** The rules in this document contain information collection requirements that are not effective until approved by the Office of Management and Budget (OMB). These rules will become effective 30 days after the Commission publishes a document in the **Federal Register** announcing OMB approval of those information collection requirements.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact Holly Saurer, *Holly.Saurer@fcc.gov* of the Media Bureau, Policy Division, (202) 418–2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission’s *Second Report and Order*, FCC 12–44, adopted and released on April 27, 2012. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission’s copy contractor, 445 12th Street SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an email to *fcc504@fcc.gov* or call the Commission’s Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

The Commission will seek written comments on the Paperwork Reduction Act (PRA) modified information collection requirements in a separate

notice that will be published in the **Federal Register**.

**Paperwork Reduction Act of 1995 Analysis**

This document contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public to comment on the information collection requirements contained in this *Second Report and Order* as required by the Paperwork Reduction Act of 1995, Public Law 104–13 in a separate notice to be published in the **Federal Register**. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. We received one comment specifically addressing this issue. In the present document, we have assessed the effects of the new requirements on small businesses, including those with fewer than 25 employees, in the Final Regulatory Flexibility Analysis (“FRFA”) below.

**Summary of the Second Report and Order**

**I. Introduction**

1. In this *Second Report and Order* we modernize the procedures television broadcasters use to inform the public about how they are serving their

communities, by having stations post their public files online in a central, Commission-hosted database, rather than maintaining the files locally at their main studios. This updating of our rules harnesses current technology to make information concerning broadcast service more accessible to the public and, over time, reduce broadcasters' costs of compliance. This Order is another step in our modernization of the Commission's processes to transition from paper filings and recordkeeping to digital technology. Without imposing any new reporting obligation, it will help bring broadcast disclosure into the 21st century.

2. Specifically, we adopt—with significant modifications—the proposal discussed in the *Further Notice of Proposed Rulemaking* (“FNPRM”) to replace the decades-old requirement that commercial and noncommercial television stations maintain a public file at their main studios with a requirement to post most of the documents in that file to an online public file to be hosted by the Commission. All permittees and licensees of a TV or Class A TV station in the commercial and noncommercial educational broadcast services must maintain a public inspection file. We have departed from the proposal in a number of respects to maximize public benefits while avoiding compliance costs that the record suggests would not be justified at this time. First, because many stations' existing political files are large, and the retention period for the political file is shorter than for other portions of the public file, we will not require stations to incur the cost of upload their existing political files to the online public file. Rather, stations may upload documents in that portion of the public file only prospectively. Second, broadcasters will be responsible for uploading only those items now required to be in the public file but not otherwise filed with the Commission or available on the Commission's Web site. In particular, the Commission will itself import to the online public file any document or information now required to be kept in the public file and that must already be filed with the Commission electronically in the Consolidated DataBase System (“CDBS”), so that stations do not need to post that information. Third, we do not adopt new disclosure obligations for sponsorship identifications and shared services agreements at this time, as had been proposed in the FNPRM. Rather, broadcasters will only be required to place in their online files material that is already required to be placed in their local files. Fourth, we do not impose

specific formatting requirements on broadcasters at this time, although stations should upload relevant documents either in their existing electronic format or in a simple, easily created electronic format such as .pdf. Finally, we will provide an organized file system for uploading documents so that the resulting public file for each station is orderly, and organizationally similar for all stations, thus promoting ease of use by stations and the public.

3. To better ensure that the Commission can accommodate television broadcasters' online filings and to limit any unforeseen start-up difficulties to those stations that are best able to address them, we will phase in the new posting requirements. For the next two years we will only require stations that are affiliated with the top four national networks (ABC, NBC, CBS and Fox) and that are licensed to serve communities in the top 50 Designated Market Areas (“DMAs”) to post political file documents online. We exempt all other stations from posting their political file documents to their online public file until July 1, 2014. The Media Bureau will issue a Public Notice no later than July 1, 2013 to seek comment on the impact of this posting requirement, to enable us to consider whether any changes should be made before it takes effect for the other stations. We also defer considering whether to adopt online posting for radio licensees and multichannel video programming distributors until we have gained experience with online posting of public files of television broadcasters.

## II. Background

4. One of a television broadcaster's fundamental public interest obligations is to air programming responsive to the needs and interests of its community of license. Rather than dictating how broadcasters must meet that obligation, the Commission affords broadcasters broad latitude, subject to a reporting requirement under which broadcasters must maintain a public inspection file that gives the public access to information about the station's operations.

5. Almost seventy-five years ago—in 1938—the Commission promulgated its first political file rule. That initial rule was essentially identical to our current political file regulation in its requirements that the file be available for “public inspection” and include both candidate requests for time and the disposition of those requests, including the “charges made” for the broadcast time. More than 45 years ago—in 1965—the Commission additionally adopted a broader public inspection file rule. The

public file requirement grew out of Congress' 1960 amendment of Sections 309 and 311 of the Communications Act of 1934 (the “Act”), which allowed greater public participation in broadcast licensing. Finding that Congress, in enacting these provisions, was guarding “the right of the general public to be informed, not merely the rights of those who have special interests,” the Commission adopted the public inspection file requirement to “make information to which the public already has a right more readily available, so that the public will be encouraged to play a more active part in dialogue with broadcast licensees.”

6. In October 2000, in the first *Notice of Proposed Rulemaking* issued in this proceeding, the Commission concluded that “making information regarding how a television broadcast station serves the public interest easier to understand and more accessible will not only promote discussion between the licensee and its community, but will lessen the need for government involvement in ensuring that a station is meeting its public interest obligation.” The Commission tentatively concluded that it should require television licensees to make the contents of their public inspection files, including a standardized form reflecting the stations' public interest programming, available on their stations' Web sites or, alternatively, on the Web site of their state broadcasters association. In 2007, the Commission adopted a *Report and Order* implementing these proposals.

7. Following the release of the 2007 *Report and Order*, the Commission received petitions for reconsideration from several industry petitioners and public interest advocates. The industry petitioners raised a number of issues, generally contending that the requirements were overly complex and burdensome. Public interest advocates argued that the political file should be included in the online public file requirement rather than exempted as provided in the 2007 *Report and Order*. In addition, five parties appealed the 2007 *Report and Order*, and the cases were consolidated in the United States Court of Appeals for the District of Columbia Circuit. The court granted a petition to hold the proceeding in abeyance while the Commission reviewed the petitions for reconsideration. Challenging the rules in a third forum, several parties opposed the 2007 *Report and Order*'s “information collection” under the Paperwork Reduction Act.<sup>1</sup>

<sup>1</sup> The Paperwork Reduction Act of 1995, Pub. L. 104–13, requires that the Office of Management and

8. In June 2011, Commission staff released “The Information Needs of Communities” Report (“*INC Report*”), a comprehensive report on the current state of the media landscape created by a working group including Commission staff, scholars, and consultants. The *INC Report* discussed both the need to empower citizens to ensure that broadcasters serve their communities in exchange for the use of public spectrum, and the need to remove unnecessary burdens on broadcasters who aim to serve their communities. The *INC Report* recommended an online system for public inspection files in order to ensure greater public access. It also recommended that stations be required to disclose online shared services agreements and “pay-for-play” arrangements. The *INC Report* further suggested that governments at all levels collect and publish data in forms that make it easy for citizens, entrepreneurs, software developers, and reporters to access and analyze information to enable them to present the data in more useful formats, and noted that greater transparency by government and media companies can help reduce the cost of reporting, empower consumers, and foster innovation.

9. In October 2011, the Commission vacated the *2007 Report and Order*, determining that technological and marketplace changes since 2007 may be pertinent to our consideration of television broadcasters’ public disclosure obligations, and that the best course of action would be to take a fresh look at the policy issues raised in this proceeding. The Commission also adopted an *FNPRM* to refresh the record in this proceeding. It solicited comment on various proposals, including some of the proposals parties raised on reconsideration, to improve public access to information about how broadcasters are serving their communities while minimizing the burdens placed upon broadcasters.

### III. Discussion

10. The updated rules we adopt today modernize disclosure procedures to improve access to station files that, for decades, have been public more in

theory than in practice. Today, reviewing a television station’s public file typically involves the substantial expense and inconvenience of traveling to the station and paying for paper copies. Under our rules, review will involve a quick and essentially costless Internet search. This modernization is plain common sense. The evolution of the Internet and the spread of broadband Internet access has made it easy for stations to post material online and for many consumers to find information online. The television broadcast industry should not be left out of the online revolution that has improved the delivery of products and services across our economy, as well as the availability of government services and government information to the public.

11. At the same time, we are committed to updating the outdated procedures for public access to television stations’ public files in a manner that avoids unnecessary burdens on broadcasters. We have significantly departed from the proposals in the *FNPRM* to achieve this goal. Based on this balance of considerations, the online public file requirements we adopt today will replace the existing in-station retention requirements as follows:

- Each station’s entire public file will be hosted online, by the Commission.
- Television broadcasters will be responsible for uploading only those items now required to be in the public file but not otherwise filed with the Commission or available on the Commission’s Web site. These items include citizen agreements, certain EEO materials, issues/programs lists, children’s television commercial limits records, donor lists for NCEs, local public notice announcements, time brokerage agreements, must-carry or retransmission consent elections, joint sales agreements, Class A continuing eligibility documentation, materials related to FCC investigations (other than investigative information requests from the Commission), and any new political file materials.

- Any document or information now required to be kept in a television station’s public file and that must already be filed with the Commission electronically in the Consolidated DataBase System (“CDBS”) will be imported to the online public file and updated by the Commission. This includes authorizations, applications and related materials, contour maps, ownership reports and related materials, EEO materials, The Public and Broadcasting manual, children’s television programming reports, and

Letters of Inquiry and other investigative information requests from the Commission, unless otherwise directed by the inquiry itself.

- Television stations will not be required to upload their existing political files to the online file; rather, they will be permitted to maintain at the station those documents placed in their political file before the effective date of our rules, and only upload documents to the online political file on a going-forward basis.

- To smooth the transition for both stations and the Commission and to allow smaller broadcasters additional time to begin posting their political files online, we will exempt all stations that are not in the top 50 DMAs and all stations not affiliated with the top four national television broadcast networks, regardless of the size of the market they serve, from having to post new political file materials online until July 1, 2014.

- Stations will not be required to upload letters and emails from the public to their online public file; rather, they will continue to maintain them in a correspondence file at the main studio.

- Stations will not be required to include in their online public file any documents not already required to be included in their local file.

We believe these procedures will substantially advance the original goals of the public file requirements and better enable the public to engage with their local broadcasters. Further, while broadcasters will incur a modest, one-time transitional cost to upload some portions of their existing public file to the Commission’s online database, that initial expense will be offset by the public benefits of online disclosure. Over time, moreover, broadcasters will benefit from the lower costs of sending documents electronically to the Commission, as opposed to creating and maintaining a paper file at the station.

#### A. A Commission-Hosted Online Public File Will Serve the Public Interest

12. We agree with commenters who maintain that placing the public file online will improve the public’s access to information and facilitate dialogue between broadcast stations and the communities they serve. As the Commission noted in the *FNPRM*, making public file information available through the Internet should facilitate public access and foster increased public participation in the licensing process. The information provided in the public file is beneficial to persons who wish to participate in a station’s license renewal proceeding. For example, as the Public Interest, Public

Budget (“OMB”) approve any information collections. As required, the Commission published a notice in the *Federal Register* seeking comment on the projected burdens of the rules. See 73 FR 13462 (Mar. 13, 2008); 73 FR 30316 (May 27, 2008). Because of pending petitions for reconsideration requesting substantial revisions to the *2007 Report and Order* that would affect the projected burdens, the Commission did not formally transmit the information collection to OMB for its approval, choosing instead to address the petitions for reconsideration, and therefore the rules adopted in the *2007 Report and Order* never went into effect.



Airwaves Coalition (“PIPAC”) notes, when broadcasters fall short of their obligations or violate Commission rules, the public’s ability to alert the Commission by filing complaints or petitions to deny the renewal of a station’s broadcast license is essential, and the public file provides information necessary to file such complaints or petitions.

13. We also agree with commenters that access to the public files has been inconveniently (and unnecessarily) limited by current procedures. Currently, the public can access a station’s public files only by visiting the main studio during regular business hours. Several commenters discussed the inconvenience of this limited access and identified problems they experienced in attempting to access stations’ public files. Making the information available online will permit 24-hour access from any location, without requiring a visit to the station, thereby greatly increasing public access to information on how a station is meeting its public interest obligations. The Internet is an effective and low-cost method of maintaining contact with, and distributing information to, broadcast viewers. Indeed, given the considerable flexibility that stations have in locating their main studios and the fact that many members of a station’s audience may be working during “normal business hours”—the only time stations are obliged to make the file available—there seems little doubt that 24-hour Internet access would greatly improve the accessibility of these files. The public benefits of posting this information online, while difficult to quantify with exactitude, are unquestionably substantial.

14. We further conclude that it will be efficient for the public and ultimately less burdensome for stations to have their public files available in a centralized location. The Commission will, therefore, host the online public file. A Commission-hosted online public file will allow consumers to easily find the public files of all stations in their viewing area, making the Commission’s Web site a one-stop shop for information about all broadcast television stations in a viewer’s market and eliminating the need to access multiple stations’ Web sites. As we further discuss below, a uniform organizational structure among all files will allow consumers to more easily navigate the public files of all stations of interest. The public will be able to review the online public file of any station, and quickly navigate to where each category of documents is found,

because each station’s online public file will be organized in the same format.

15. The Commission’s hosting of the public file also addresses concerns expressed by many broadcasters about the burden of hosting files online themselves. The rules adopted in 2007 would have required stations to host their public files on their own Web sites. In petitions for reconsideration, two broadcast trade associations proposed that the Commission host the files instead, suggesting that such a solution would be less burdensome to licensees, who would not have to devote resources to creating and maintaining an online public file. They also contended this approach would be more efficient, since many public file items are already filed with the Commission. For instance, the Named State Broadcasters Associations estimated that the Commission’s hosting of the files would save broadcasters more than \$24 million in first-year costs, and almost \$14 million in annual costs thereafter. We agree that having the Commission host stations’ public file information will ultimately reduce costs for stations—compared to the existing local file requirements.

16. We agree with commenters who reject the argument that there is no public need that can be met by placing online the political file portion of the station’s public inspection file. As noted by commenters, placing the political file online will enable candidates, as well as the public, journalists, educators, and the research community, to identify and investigate those sponsoring political advertisements. Under current rules, the political file must contain, among other things, all specific requests for broadcast time made by or on behalf of a candidate and the disposition of those requests. It must also contain information regarding other appearances by candidates (excluding those in certain news programming exempt from the equal opportunities provision), and information about issue advertising that “communicates a message relating to any political matter of national importance.” As noted by some commenters, political ad spending is rapidly increasing, and often the only way to track such expenditures is through stations’ political files. We also agree with PIPAC’s assertion that the disclosures included in the political file further the First Amendment’s goal of an informed electorate that is able to evaluate the validity of messages and hold accountable the interests that disseminate political advocacy. As the Supreme Court stated in *Citizens United v. FEC*, “transparency enables the electorate to make informed decisions

and give proper weight to different speakers and messages” and that, “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.” We are also persuaded by commenters claiming that “the public must have access to information about the messenger as well as the message to fully understand an ad’s content.”

17. Campaigns and candidates will be among those who benefit from being able to obtain political file information online. Some industry comments argue that candidates will obtain only limited benefits and possibly experience detrimental effects from moving the political file online. Broadcasters argue that the existing process serves the candidates and the stations well, and there is no reason to believe that changing the process will benefit candidates or campaigns. Other broadcasters argue that it is more meaningful and efficient for a candidate’s representatives to speak with a station’s sales department on the phone or in person. According to these broadcasters, personal interactions would be lost if the political file were to be placed online, which would be frustrating and create inefficiencies for advertising buyers and station staff. We fail to see how the online availability of past political time purchases will discourage buyers from having contact with the station concerning current and future time buys or how this information’s availability will interfere with ongoing relationships between the stations and buyers. The fact that buyers and candidates will have increased ease of access to relevant information should not preclude or hinder candidates or buyers from a continuing dialogue with stations as they purchase time. Although some stations may elect to continue to make information routinely available to candidates through personal interaction at the station during business hours, which we do not intend to discourage, we expect that candidates and their representatives will use the online political file to obtain information from source documents without filtering by station personnel and at any time of day. LUC Media, a candidate media buyer, argues that “the only way that candidates can make sure that they receive the availabilities and prices that the law requires is to have access to stations’ and cable television systems’ political files.” LUC Media claims that the political file is necessary because “stations and cable television

systems have learned over the years that, if they can limit the information that candidates have about availabilities and rates, they can get candidates to overpay for the airtime that they buy.” While LUC Media notes that this is not the practice of all stations, LUC Media routinely reviews stations’ political files to ensure that they are providing candidates with equal opportunities, which is why “the Commission requires that this information be available for public inspection.” LUC argues that “Internet access to those files will enable more candidates to become better informed about availabilities and pricing and, thus, demand that they receive the lowest unit charge for the time that they buy.” Internet access will also eliminate the need for such buyers to travel to every station in a market to verify the contents of the public file, and to ask for help from station employees who have to take time away from their normal duties to accommodate such requests. We agree with LUC Media that placing the political file online will enhance the underlying purpose of the political file.

18. Some broadcasters argue that the Commission’s focus in this proceeding has inappropriately changed from increasing broadcast dialogue with the public to enabling access to information about the stations for research and public advocacy groups with no ties to the broadcast stations’ communities. We do not perceive the dichotomy these broadcasters suggest. While the public file is first and foremost a tool for community members, it is also a tool for the larger media policy community. Public advocacy groups, journalists, and researchers act in part as surrogates for the viewing public in evaluating and reporting on broadcast stations’ performance. And as we stated in the *FNPRM*, easy access to public file information will assist the Commission, Congress, and researchers as they fashion public policy and recommendations relating to broadcasting and other media issues. For example, the Commission has said that “the quarterly issues/programs lists will provide the public and the Commission with the information needed to monitor licensees’ performance under this new regulatory scheme and thus permit us to evaluate the impact of our decision. Existing procedures such as citizen complaints and petitions to deny will continue to function as important tools in this regard.” Academic analysis of such lists help the Commission monitor whether stations are meeting their responsibilities to their local

community, and can provide information relevant to citizen complaints and petitions to deny. We recognize the efforts of public interest groups and academics to analyze publicly available information and educate the public about how their local stations are serving their communities, and believe that this work is an important aspect of educating viewers about their local television broadcast stations.

*B. Broadcasters’ Initial Costs To Comply Will Be Minimized and the Online Public File Will Ultimately Lead to Cost Savings*

*1. We Are Tailoring the Requirements To Minimize Costs of Moving the Public Files Online*

19. We have adopted a variety of measures to minimize the efforts broadcasters must undertake to move their public files online. In addition, we have declined to adopt certain proposals in the *FNPRM* at this time, to further ensure that the costs of compliance with the new posting procedures are outweighed by the benefits of online disclosure.

20. First, we are minimizing burdens on stations by not requiring them to upload documents that are currently part of the public file but which are also filed in the Consolidated DataBase System (“CDBS”) or that the Commission already maintains on its own Web site. The Commission will import these documents into the online public file. Documents that fall in this category include station authorizations, applications and related materials, contour maps, ownership reports and related materials, EEO materials, The Public and Broadcasting manual, children’s television programming reports, and Letters of Inquiry and other investigative information requests from the Commission, unless otherwise directed by the inquiry itself. Broadcasters will be responsible for uploading only those items not otherwise filed with the Commission or available on the Commission’s Web site.

21. We recognize that stations’ need to upload other items in the public file—including citizen agreements, certain EEO materials, issues/programs lists, children’s television commercial limits records, donor lists for NCEs, local public notice announcements, time brokerage agreements, must-carry or retransmission consent elections, joint sales agreements, Class A continuing eligibility documentation, materials related to FCC investigations (other than investigative information requests from the Commission), and new political file

materials—will entail some burden initially, inasmuch as stations will have to upload electronic versions or scan and upload paper versions of existing public files to the online public file. But not all stations will have all of these documents. For example, a station may not have time brokerage agreements, joint sales agreements, or citizen agreements, and may not be a Class A station. In that situation, there will be nothing in these categories for the station to upload. Moreover, many of the items in the public file will not require frequent updating. An LMA, for example, may have a term of 5 or more years and would not require any further action on the part of the station unless the agreement was amended or replaced. Joint sales agreements, citizen agreements, retransmission and must-carry consent elections similarly involve extended periods of time. In addition, as discussed below, stations will not be required to upload any of their existing political file documents. Rather, stations may upload documents to the political file component of the online public file only prospectively. We conclude that, for those public file items that stations do have to post, the transitional costs would involve only a one-time burden on broadcasters that, as further explained below, we find is outweighed by the significant benefits of transitioning the public file online.

22. Second, we minimize burdens on broadcasters by declining to adopt any new recordkeeping requirements. As discussed below, we are not adopting the proposal in the *FNPRM* to require stations to include sponsorship identification information in the online public files or to include shared services agreements that are not already required to be included in the local file. Instead, only information already required to be included in the local file will need to be posted online.

23. Third, we are not requiring stations to post files online in a particular format at this time. Thus, they will not need to undertake the costs of developing new electronic forms or of conforming their current recordkeeping practices to accommodate a Commission-designed form.

*2. Broadcast Commenters Greatly Overstate the Costs Involved*

24. Based upon the actions we are taking to minimize burdens, discussed above, and our analysis of some television stations’ public files, we conclude that the broadcast commenters vastly overstate the burdens of moving their public files online.

25. The Commission is taking steps to ensure that the process of uploading

files to the online public file—both initially and prospectively—will be simple and efficient. We are developing the online public file system to permit broadcasters simply to drag and drop documents into the relevant folders of their online public file. As a result, although the initial upload of existing documents—that is, those documents maintained in the paper file before the effective date of our new rules—will impose some costs on stations, we do not believe these costs will be unduly burdensome, particularly compared to the resulting benefits.

26. Some broadcasters argue that uploading the existing public file will be unduly burdensome. They argue that we should implement the online public file requirement solely on a forward-looking basis, encompassing either all documents created after a certain date or all documents created after a station's next renewal. Joint TV Broadcasters notes that many materials must be retained until final action is taken on a station's next license renewal application, and a decision requiring all existing local files to be scanned and uploaded would require stations to upload eight years of information that may soon be obsolete. It argues that some of the materials, like the issues/programs lists, commercial limit certifications, and the political file,

should be required to be uploaded to the online public file only on a going-forward basis.

27. We find that the one-time electronic upload or scanning and upload of existing documents is not unduly burdensome and that adoption of a grandfathering approach would be confusing to those seeking access to the information. Such an approach would necessitate the continued maintenance of a robust local file, which could diminish the benefits to the public of the online file with respect to improved public access to information, and would diminish the benefits to the stations of moving their files online. We agree with Common Frequency that scanning existing paper documents does not constitute an extraordinary burden, as it is a rote process that can be affordably outsourced if necessary. In addition, if the documents are currently maintained in electronic form, as some are likely to be, the one-time burden will be de minimis.

28. Our determination that the transition process will not be unduly burdensome is based in part on a review, in March 2012, of the public files of stations in the Baltimore DMA. Commenters provided little data based on actual station records. The Commission therefore determined that it was advisable to supplement the record

with empirical data from a sample market. Baltimore was selected because its proximity to Commission headquarters in Washington, DC, and the relatively compact size of the Baltimore DMA allowed staff to visit stations there without great difficulty. Our review of the Baltimore DMA public files indicates that most stations will only need to upload a fraction of their existing public file to the online public file—or approximately 250 to 2200 pages, as reflected in the second column of the chart below. Columns three and four reflect what we believe the costs are likely to be for stations to upload this information. We estimate that stations that choose to scan and upload this information in-house can do so for \$.10 per page,<sup>2</sup> while stations can outsource such work for approximately \$.50 per page. Based on this assumed cost of \$.10 to \$.50 per page, we calculate a range of the average cost for a station to upload their existing public file in accordance with this Order, with the average cost per station ranging from approximately \$80–\$400 per station. We believe that this modest one-time expenditure (even if it were not offset by later costs savings as we believe it will be) is worth the benefits of providing the public with access to a station's existing public file.

|               | Public file<br>pages to<br>upload w/in<br>6 months <sup>1</sup> | In-house cost<br>per page <sup>1</sup> | Outsourced<br>cost per page | In-house<br>total | Outsourced<br>total |
|---------------|-----------------------------------------------------------------|----------------------------------------|-----------------------------|-------------------|---------------------|
| WBAL-TV ..... | 998                                                             | 0.1                                    | 0.5                         | \$99.80           | \$499.00            |
| WMAR-TV ..... | 987                                                             | 0                                      | 0                           | 0.00              | 0.00                |
| WJZ-TV .....  | 844                                                             | 0.1                                    | 0.5                         | 84.40             | 422.00              |
| WNUV .....    | 251                                                             | 0.1                                    | 0.5                         | 25.10             | 125.50              |
| WBFF .....    | 2094                                                            | 0.1                                    | 0.5                         | 209.40            | 1,047               |
| WUTB .....    | 2126                                                            | 0.1                                    | 0.5                         | 212.60            | 1,063.00            |
| WMPT .....    | 2180                                                            | 0                                      | 0                           | 0.00              | 0.00                |
| WMPB .....    | 2180                                                            | 0                                      | 0                           | 0.00              | 0.00                |
| Total .....   | 11660                                                           | .....                                  | .....                       | 631.30            | 3,156.50            |

29. We agree with commenters that, once they incur these modest costs, stations will realize savings by no longer having to keep a local file on a going-forward basis. We recognize that stations will be required to maintain and make publicly available a correspondence file with letters and

emails from the public, but we agree with commenters that stations will nonetheless realize significant reductions in burdens by not having to maintain a more robust local file. Placing the information online will minimize disruptions in the daily operation of a station, and reduce the

burdens placed on station staff that currently field phone calls and chaperone in-person requests to inspect the files.<sup>3</sup> When Commission staff sought to obtain the public files of the Baltimore stations, as well as those of five other stations around the country, stations dedicated staff resources to

<sup>2</sup> Under the Freedom of Information Act, the Commission is allowed to charge for our research and reproduction services under certain conditions. See <http://www.fcc.gov/guides/how-file-foia-request>. We have determined those costs to be \$.10 per page. See Modification of the Freedom of Information Act Fee Schedule, D.A. 10–97 (Jan. 19, 2010). We believe this to be an accurate reflection of actual reproduction costs, and we expect that

scanning costs would be equal to this or lower, because paper, ink, and fasteners are not required.

<sup>3</sup> Our current rules do not require stations to accommodate political file requests over the phone, because such a requirement could disrupt station operations. We expect that requiring stations to place the public files online will have a similar beneficial effect; reducing rather than expanding disruptions to operations at the station as station personnel would no longer have to process requests

for access to this information in person, as they are currently required to do. Instead of accommodating each candidate or their campaign representatives personally on a frequent basis, an online requirement will allow a station to upload the most up-to-date information periodically for all interested parties. As discussed below, however, we are requiring stations to maintain a back-up of the political file for use in the event the Commission's database becomes unavailable or disabled.



copying the files, and were in no case able to provide the copies on the same day as the request. Further, once broadcasters have completed the initial upload of documents in the existing public files, as specified herein, we do not believe that uploading public file documents on a going-forward basis to an online public file is likely to be any more burdensome than placing such documents into a paper file. Indeed, in many instances, using the online public file will be less burdensome, because uploading (or even scanning, then uploading) a file may be easier and more efficient than photocopying it, walking it to the local paper file, finding the appropriate folder and inserting it in the proper order.

30. The industry's arguments regarding the costs involved with uploading documents to the online public file focus on the political file, which they identify as the most active element of the public file. NAB states that two stations have estimated that the time involved in completing political ad buys will "essentially double" in an online environment, at a cost of \$80,000 per station. Joint Broadcasters estimates that "creating electronic versions of all political time requests" and uploading such documents will take one half hour per record, which would amount to almost 16 hours per week per station during the political season, compared to the 2.5 hours a week that stations spend under the current paper filing system. We find unpersuasive the argument that the time required to assemble the online political file will double or quadruple. Instead of photocopying documents and placing them in a paper public file, stations will upload to the online public file documents already stored in electronic format or scan paper documents (a process akin to photocopying) and upload the electronic versions. One commenter notes that not all stations own a scanner, or a scanner of sufficient quality to make copies of documents adequate for uploading to the Commission's online public file. For stations that do not wish to make this minor investment, other business solutions are available, including creating documents electronically or outsourcing the scanning functions. Scanning costs may be higher on a per-page basis if outsourced, just as it would be more expensive per page to outsource the copying and filing of paper copies. Given that stations will be uploading fewer documents into the online public file than they currently place in their paper files, we expect that station costs going forward will be lower than under

the existing requirements. Given that the requirement to drag and drop the files into our online public file will replace the requirement to photocopy and walk the documents to the local file, we expect that fulfilling this requirement will not take substantially more time and may take less time to accomplish. Broadcasters provide no specific support for their facially implausible assertion that creating electronic versions of political file requests and uploading them would take a half hour. Moreover, they fail to acknowledge that the time involved in uploading documents electronically should decrease substantially with time as station personnel become more accustomed to this process.<sup>4</sup>

31. We also disagree with the commenter who projects that the proposed online public file, and specifically the political file and sponsorship identification requirements, will require each station to hire one to three employees at an average cost of \$30,000 to \$140,000 per station per year. On the contrary, given that the requirement to upload the files will replace rather than add to the existing file requirements, we expect that stations will be able to assign these responsibilities to existing staff, rather than hire additional staff. We fail to see how this requirement could legitimately result in the need to hire three additional staff members, even in the heat of an election. Moreover, the commenters' estimated figures include the costs of complying with the *FNPRM's* proposed new public file requirement for sponsorship identification, which, as we discuss below, we are not adopting. Further, to the extent these figures include costs associated with the initial upload of the existing political file, they overestimate the burden on broadcasters because we do not require the existing political file to be uploaded.

32. We note that because the size of the political file appears to roughly correlate with a station's political advertising revenues, stations with little or no revenue will have little to no obligations under these rules, and

<sup>4</sup> As discussed further in Section III.C.1 below, stations are required to "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." 47 CFR 73.1943. We note that political files that Commission staff reviewed frequently contained more information than is required by our rules. Stations that are concerned about the burdensomeness of placing their political file online on a going-forward basis may wish to review their political file retention practices.

stations with larger numbers of pages to upload will tend to have similarly large income associated with those pages. In addition, although candidate advertising must be sold at the lowest unit charge, issue advertisers are not entitled to reduced rates and therefore pay market rates for advertising on broadcast stations. When balanced against the revenues earned from political advertising—which brought broadcasters an estimated \$2.29 billion in 2010 and are expected to bring in even more in 2012—the costs of complying with the online posting requirement seem even less significant. Indeed, political files reviewed by Commission staff, from markets across the country, generally reflect that stations receive political advertising revenues of thousands of dollars per page of political file that must be uploaded. We also agree with commenters who note that ad buyers, candidates, and the public must today undertake burdens to obtain information about the political file, including traveling from station to station to obtain political file information. Our collection of the Baltimore DMA public files required, in total, dozens of person-hours, driving back and forth to stations (first to request the copies and then to collect them), and copying costs that were estimated at close to \$1,700 by the stations themselves. Our action today will substantially reduce or eliminate each of those burdens.

### *C. Application of Online Posting Rule to Specific Public File Components*

#### *1. Political File*

33. We consider public access to stations' political files particularly important. Therefore, we will adopt the proposal in the *FNPRM* that political files be included in the online public file, but will exempt all stations not in the top 50 DMAs, and all stations in the top 50 DMAs that are not affiliated with the top four national television broadcast networks, from posting their political file documents online until July 1, 2014. Prior to this exemption expiring—by July 1, 2013—the Media Bureau will issue a Public Notice seeking comment on the impact of moving online the political files for these 200 stations, to enable us to consider whether any changes should be made before the requirement takes effect for the other stations. In addition, as discussed above, we will not require any stations to upload their existing political file; rather, they will be required to upload new political file content on a going-forward basis.



34. We believe circumstances have changed to warrant reaching a different conclusion about posting the political file online than we reached in the *2007 Report and Order*. In the *2007 Report and Order*, the Commission excluded the political file from the requirement that stations post their public files on their Web sites. The Commission determined that the frequent requests for access by campaigns and the need for stations to update the file frequently during an election season made an online posting requirement inappropriate. The Commission also reasoned that political campaigns generally have greater resources than individual viewers and, therefore, access to the in-station political file would tend to be less burdensome for campaign organizations. Petitioners for reconsideration argued that such a decision focused exclusively on the interests of the candidates and broadcasters, and not on the public. In addition, as the Commission noted in the *FNPRM*, television stations now handle many political advertising transactions electronically, through emails and a variety of software applications. As a result, requiring stations to make this information publicly available online will impose far less of a burden under current circumstances than under previous conditions. We thus disagree with arguments that the Commission does not have a sufficient basis to reverse the decision of the *2007 Report and Order* to exclude the political file from the online requirement. Our understanding of how stations manage their political transactions and their traffic systems, technological advances that have occurred since the *2007 Report and Order*, and our decision to host and centralize the online public file support our revised approach. Below, moreover, we respond to specific arguments that we should exclude the political file from the online public file.

35. *Electronic Processes*. Some industry commenters argue that our understanding that stations now conduct political advertising transactions electronically is incorrect. They argue that for some candidates the purchasing process is not electronic, but done through a variety of means, including phone, fax, and in person. For political ad buys, the process can be multi-staged. They state that negotiations may result in many entries into the political file before an agreement to provide time is reached. After an agreement is reached, the actual times the advertisement is aired can still change if the spot is purchased

on a preemptible basis. Advertising time sold on a preemptible basis means that the advertising spot may be preempted by another advertiser and re-scheduled for another time. In addition, NAB states that national advertising sales representatives communicate with the stations they represent using proprietary software that varies among companies and may not include information about classes of time or rates in the documents they generate, and therefore do not provide sufficient information to fulfill the political file documentation requirements. Thus, these parties argue, stations do not collect information in a uniform manner, and the Commission cannot assume that all of the information that must be in the public file will be included on one form. NAB goes on to explain that billing systems commonly used by stations generate a separate series of reports for each order. During the political season, advertisers generally order time on a weekly basis. A typical billing system will generate three documents for the political file relating to each order—one report showing the original order placed into the station's traffic system, another showing the exact times that spots ran, and a third showing the final charges paid by candidates for those spots. For each order, these reports occupy three to ten printed pages, and for very active advertisers, a weekly report may be much longer. Further, commenters argue that computerized traffic management systems used to sell and schedule television advertising time will not in any way facilitate compliance with an online political file requirement, as there are many different types of automated systems that collect, track, and process information in different ways.

36. Notwithstanding these arguments, broadcasters' record descriptions of how stations actually track advertising purchases and manage the scheduling of such transactions confirms our understanding that stations are capable of, and often do, include electronic processes in their assembly of the political file. While we recognize that there are still some portions of the sales process and political file assembly that are not fully automated, and that some stations use electronic means to a larger extent than others, our review of Baltimore political files confirms that many of the records that would be required to be in the public file originate as or are reduced to electronic files and would thus be relatively easy to upload in a universally readable format, such as .pdf. To the extent that a required document is not automatically

converted to electronic form by the sales or invoice and reconciliation process, they can be easily scanned and uploaded instead of photocopied and placed in the paper file, as is the current practice.

37. Furthermore, we reject broadcasters' burden arguments that are based on the fact that existing electronic traffic management systems may not be programmed to allow stations to upload documents directly to a database. According to some broadcasters, each traffic management software system provider would have to program, test, and finalize an export function tailored to the Commission's servers, consuming "hundreds of thousands of man hours," after which broadcasters would have to install this new software on their existing systems, and [t]aken together, these steps would stretch into years, and the costs would be significant." Under the rules we are adopting, broadcasters will not need to change the software in their traffic systems to post documents to our online public file, though they are free to do so if that is the approach they wish to take. Rather, stations will either need to save such files to widely available formats such as Microsoft Word (.doc) or rich text format (.rtf), or convert the files to portable document format (.pdf), and then drag and drop those files to the Commission's online public file. We do not believe that either of these alternatives will impose appreciable increased costs on broadcasters as compared to current requirements.

38. *Increased Access to Lowest Unit Charge Information*. NAB expresses concern about the "unintended but potentially very real marketplace distortions and consequences that could occur if market sensitive information is readily accessible" to its competitors. It notes that, in addition to broadcasters, cable operators and DBS providers must also keep a political file, and requiring only broadcasters to place their political file online would "place broadcasters at a disadvantage vis-à-vis their competitors." NAB argues that "[b]roadcasters could see advertising revenues drop if competitors attempt to use the data in the file to undercut their rates. This disadvantage would directly harm the public," NAB continues, "because, if advertising revenue drops due to disparate regulation, stations would not be able to expand service offerings, and may have to cut back on current offerings." Network Station Owners also express concern about making "[t]his proprietary information \* \* \* available to commercial as well as political advertisers, to other local stations, and to competing advertising

media such as cable operators, newspapers and web sites.” It argues that because the political file contains “information on the station’s lowest rates on particular programs and rotations,” placing the political file online will “afford a significant intelligence advantage to one side in private commercial negotiations. Armed with political file information, the shrewd time buyer’s ability to drive the hardest possible bargain would be greatly enhanced by data allowing him to estimate the station’s bottom line. One poker player would, in effect, have had at least a partial glance at the other’s hand.”<sup>5</sup>

<sup>5</sup> One party also claims that online disclosure of a station’s political file will result in an uncompensated government taking in violation of the Fifth Amendment. We disagree. Target Enterprises is a media buyer that claims to have “built a proprietary computer statistical model and database” to enable “its clients to achieve the most effective media purchases during an election cycle.” Target claims that an uncompensated taking will result if the details of political ad spending become available online in real-time because Target’s “protected business model and proprietary approach” will be disclosed to the public and its competitors and thus “cause the value of the company to be lost.” We reject Target’s takings claim on several grounds. The regulation at issue does not result in a “physical taking” because it does not deprive Target of any property right, much less result in a direct appropriation or physical invasion of private property; rather, it requires television broadcast stations to post online information that they already make publicly available at their stations. Indeed, television broadcast stations—not media buyers such as Target—are subject to the online requirement, and thus no direct appropriation or physical taking of Target’s property can be shown. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (to establish a physical taking requiring just compensation, a party must show a direct government appropriation or physical invasion of private property). We note that no broadcast station has raised a takings argument. Similarly, Target has failed to establish the factors required for demonstrating what constitutes a “regulatory taking,” including the economic impact of the regulation, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action). Nothing in the Commission’s regulations restricts Target’s ability to use or keep confidential its computer models, database, or any other alleged “trade secrets.” Moreover, Target’s claim involves the general health of its business rather than specific property or estimates as to the property’s likely diminution of value. As the Supreme Court has explained, unilateral expectations and abstract needs are not sufficient to raise takings concerns. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–1006 (1984). Further, the broadcasters subject to the online posting requirement operate in an industry that has long been regulated and thus this regulatory context undercuts the reasonableness of Target’s purported expectations. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645–646 (1993) (noting, in rejecting the claim of interference with reasonable investment backed expectations, that “those who do business in the regulated field cannot object if the legislative

39. We find that placing this already-public information online will not cause significant market distortions. Furthermore, the benefits of placing the political file online are substantial, and we will not exclude it on the basis of unsubstantiated burden arguments. Broadcasters have failed to provide any evidence to support their claims of commercial harm. We note that several parties raised the claim of “commercial harm” in the final weeks prior to adoption of this item, but the filings contain little more than generalized and vague assertions. Most important, we are not requiring broadcasters to make any information publicly available that stations are not already required to make public. Broadcasters have been required to make political file information including rates charged for political advertising, available in some form since 1938, and anyone, including broadcasters’ competitors and customers can currently access these data in the paper files. In addition, since 2002, Section 315(e) of the Act has specifically required that the political file include “the rate charged for the broadcast time.” Moreover, the public files of broadcasters’ competitors have been available in paper form to television broadcasters and the public for years. Given the mutual, long-standing public availability of such documentation and the likely knowledge of this availability among major commercial and political buyers, we do not believe that the increased ease of access to broadcasters’ public files will lead to significant distortions in the marketplace. Although we do not know the exact percentage of advertisers and competitors that seek review of information in stations’ political files, we are aware they do so on a regular basis, as Commission staff frequently receives calls from stations asking whether or not they must provide such entities access to the political file. As staff has previously instructed in these situations, all members of the public—including advertisers and competitors—are entitled to access a stations’ political files. To the extent it is economically beneficial for competitors, potential advertisers, or buyers who seek to represent advertisers, to access this data, they already have the ability to review the material at the stations. Buyers do, in fact, review the political file. We recognize that, because of their economic incentive, competitors and potential advertisers may be more likely to undertake the expense of visiting stations to review the current political

scheme is buttressed by subsequent amendments to achieve the legislative end”).

files. We expect that having the files accessible online will encourage other members of the public to make use of the political files. Commenters have failed to show that an online posting requirement would alter in any meaningful way the economic incentive of these entities. Moreover, even if it had not been publicly available for decades, online posting of lowest unit charge information would not necessarily lead to marketplace distortions. While the political file lists the lowest unit charge that a candidate receives, it does not reveal significant information about the commercial transaction that established that lowest unit charge. Various factors unknown to another commercial buyer—including that the advertiser establishing the lowest unit charge bought a higher volume of ads, committed to a long-term advertising relationship, or other variables—can justify denying the lowest unit charge rate to a different commercial buyer under different circumstances. In addition, the fact that there are many variables (lengths, classes of time, and time periods) for any given lowest unit charge makes it harder for any potential purchaser to find a lowest unit charge that is comparable to the ad purchase it is seeking to make. These variables also make it difficult to compare the lowest unit charges of competing stations, as the stations may not sell the same classes of time. In the end, stations are in control of setting lowest unit rates, and have final determination of how low they are willing to set their commercial rates. Further, given that the statute expressly requires such information to be placed in the public file, exempting such rate information would be contrary to the statutory directive to make the political file publicly available.

40. *Effect on How Stations Sell Time.* NAB argues that online filing would necessitate changes in how stations sell political advertising time, because “the variances in the ways in which stations manage political advertising sales and the political file” would not be compatible with a “standardization of stations’ political file processes.” These arguments seem to be based on a misunderstanding of our proposal in the *FNPRM*. As the Commission emphasized in the *FNPRM*, the online political file is meant to serve as a source of information to candidates, buyers, viewers, and others, but the actual purchase of advertising time and the receipt of equal time requests will continue to be handled by the station. We reiterate that we are merely

changing the form of disclosure to the public of information already required to be in the public file. We are making no change in the political advertising sales process. Rather, we expect stations to continue handling political ad sales in whatever way is most convenient to them.

41. *Substantive Political File Requirements.* We likewise are not persuaded by arguments that the rules regarding what material must be included in the political file are vague and that, therefore, the Commission should not adopt an online posting requirement. As discussed above, this proceeding simply modernizes the procedures television broadcasters use to inform the public about information they are already required to disclose. If any licensee is unsure about any aspect of our political file requirements, it may request clarification of our existing substantive disclosure rules. To respond to specific questions raised in this record, however, we offer the following guidance. The political file rule requires that licensees “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.” The same information, among other things, must be included with respect to issue advertising containing a message relating to a “political matter of national importance.” These issue ads will also need to be included in the online political file, just as they currently need to be included in the local political file. One commenter argues that it is unclear what “requests” includes. Although we do not think that term is unclear, we clarify that licensees are required to place in their political files any final orders by candidates for specific schedules of time or availabilities within a specific schedule of time—in other words, orders to buy particular schedules (including programs or dayparts), amounts of time (including spot or program lengths), and classes of time for particular days (such as preemptible spots, Monday-Friday rotations, runs of schedule or specific placements). We note that “any final orders” mean orders that station representatives reasonably believe to be a final, agreed-upon order. If the final order is later amended after being included in the on-line political file, a station can replace the previously final order with the amended final order, or may simply upload the amended final

order. Licensees are not required to place in their political files general requests by candidates for advertising time stations have available to purchase, or rates for a general array of time.

42. In response to concerns that the term “disposition” is unclear, we note our rules define it as “the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.” We clarify that the “disposition” of the request does not include a record of the negotiations or back-and-forth discussions between the licensee and the candidate after the request is made. It does include the final, mutually agreed upon order of time, including: classes of time purchased; charges made; as well as any subsequent, relevant reconciliation information about the order, including the times spots actually aired and details such as any “make goods” provided for preempted time, and rebates or credits issued.

43. *Existing Political File.* Commenters argue that if we require stations to upload the existing political file, it will be unduly burdensome. Some broadcasters provide projected costs and burdens of placing the political file online. NAB estimates that just uploading the existing political files could take hundreds of hours per station. NAB supported its assertions about the burdens of uploading the existing political file by providing the estimated size of the political file in inches for six stations in six different television markets, ranging in size from 3,150 pages to 8,100 pages. For example, NAB noted that a political file in Burlington, Vermont measured 19.5 inches, which they estimated as equaling 4,388 pages. Free Press argues that such estimates are exaggerated. Free Press states that it visited all of the television stations in Burlington, Vermont, and was unable to find any political file that was as large as the files discussed by NAB. Further, their review found that each political file reviewed contained documents beyond the required two year retention period, illustrating the possibility that “broadcasters may be mistakenly (and vastly) inflating the size of the political files they actually are required to maintain.” NAB bases its projections on the largest political file it reported. While we believe that this burden projection is overstated, we recognize that the existing political file may contain the greatest number of pages for broadcasters to upload as they transition to an online public file. Our review of the public files in the Baltimore DMA indicates that the commercial stations’ political files were made up, on average,

of 1568 pages, and accounted for, on average, 30% of the stations’ public files. This excludes letters and emails from the public, which will be retained in the local file. One station’s political file was made up of 4079 pages, or almost 70% of its public file.

44. Departing from the proposal in the *FNPRM*, we do not require stations to post the contents of their existing political files to the Commission’s online public file. Given the two-year retention period for the political file, broadcasters’ investment in uploading existing political files would have a limited return for the public. Likewise, exempting the existing political file will only require broadcasters to continue to maintain a robust local file for a relatively short period. Because of the two-year retention period for the public file and the relatively large size of existing files, we conclude that exempting the existing political file from online posting is a reasonable means of reducing the initial burden of moving public files online.

45. *Small Market and Non-Affiliate Exemption.* Finally, we adopt in part a broadcaster request that we delay online posting of the political file for smaller stations. These commenters argue that we should allow all broadcasters to gain experience working with the online public file system before requiring that they maintain their political file online. As noted above, this proceeding is over a decade old, and we believe it is time to bring the accessibility of the entire public file into the 21st century in as expeditious a manner as is possible.

46. We are persuaded, however, that it is appropriate to allow certain stations additional time to begin uploading the political file. As discussed further below, because the contents of the political file are time-sensitive, stations must place records in the political file “immediately absent unusual circumstances.” We believe it is appropriate to require stations with a greater market reach to undertake this time-sensitive transition first, as they will be more likely to have dedicated resources to address any implementation issues that arise, if necessary. Therefore, we will temporarily exempt stations that are not affiliated with the top four national television broadcast networks (ABC, CBS, NBC and Fox) in the top 50 DMAs and all stations that serve markets below the top 50 DMAs, regardless of affiliation, from including their political file in their online public file for two years. We note that this exemption is permissive, not mandatory. If any station that falls within this exemption prefers instead to immediately



transition to the online political file, it is permitted to do so. This exemption will ease implementation for broadcasters during the initial transition to the online public file, while also giving the Commission time to ensure that the online public file system is implemented effectively.

47. We believe that exempting stations that are not affiliated with the top four networks (ABC, CBS, NBC and Fox) in the top 50 DMAs, and those stations in markets below the top 50 DMAs, creates an exemption threshold that is clear, easy to establish and implement, and not often subject to significant change. Other options for identifying the class of stations to exempt do not provide the certainty that this clear definition provides. For example, an exemption for the top four ranked stations in each market would create a threshold that is often subject to change, would be difficult to measure and administer, and would provide uncertainty to broadcasters, as they are not as able to predict or control ratings. The Commission has used a DMA and affiliation-based standard in other contexts, and we believe it is appropriate to use in this instance.

48. Moreover, while this exemption will ease the initial implementation for broadcasters, it will nonetheless provide the public with online access to the political files of stations garnering the vast majority of political advertising time and money. Stations affiliated with the top four broadcast networks often provide the highest-rated programming, and therefore the most-watched advertising, including a large proportion of political advertising. Based on numbers provided by Kantar Media, we find that these 11 percent of stations, which reach 65 percent of Americans, account for roughly 60 percent of the total television political advertising dollars spent in each major election cycle. Affiliated stations are also more likely to have dedicated IT resources to resolve issues that may arise with implementation of the online political file in the expeditious manner that will be necessary for the political file. Stations that will be exempt initially from the rule generally have smaller political files than the affiliates in the top 50 DMAs, and therefore the public will not be deprived of online access to substantial amounts of political file information during the limited exemption period. In our review of the political files of the Baltimore DMA, the political files of the stations that will be exempt averaged 247 pages, which is substantially smaller than the political files for the stations affiliated with the top four networks, which averaged 2104

pages. In addition, we believe that the approximately two years of experience that stations will gain by transitioning the rest of the online public file will help to ensure that they are prepared to upload the political file. We also believe that delayed implementation for stations with a smaller market reach will ensure that the Commission is able to target assistance to these stations, if necessary. Commission staff will gain experience with the process of assisting the smaller first wave of broadcasters transitioning to the online political file. This will enable staff to more efficiently assist the larger number of stations that will transition later, who may need enhanced support because of their more limited IT resources.

49. As part of our efforts to evaluate the effect of this transition, the Media Bureau will issue a Public Notice by July 1, 2013 seeking comment on the impact of these rules. This Public Notice will give commenters—including the initial group of stations to use the online political file, stations that have yet to transition, and members of the public that review the online political file—an opportunity to provide the Commission with information regarding the impact and utility of the online political file. The Public Notice will enable the Commission to consider whether any changes should be made before the requirement takes effect for the other stations.

50. As discussed above, we do not believe online posting of the public file, including prospective posting of the political file, will impose an unreasonable burden on any television broadcaster. Nevertheless, if licensees not covered by the two-year exemption believe filing new political file materials online will impose an undue hardship, they may seek a waiver of this requirement. Stations seeking waivers should provide the Commission with information documenting the economic hardship the station would incur in complying with this requirement, its technical inability to do so or such other reasons as would warrant waiver under our general waiver standards.

51. *Authority.* No commenter challenged the Commission's authority to require online posting of the public file generally, but NAB suggests that the Commission lacks authority to require the placement of station political files online, and that we therefore must carve out the political file from the rest of the public file. In supplemental comments, NAB argues that in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress expressly required that the IRS and FEC make certain election-related records available

online, but did not do so for the items required to be placed in broadcasters' political files. They assert that "the clear implication is that Congress 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." NAB further argues that "[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 disparate inclusion or exclusion."

52. We find NAB's argument unpersuasive. NAB overlooks relevant facts relating to the adoption of BCRA. First, in adopting the political file retention requirements of Section 315(e) of the Communications Act as part of BCRA, Congress explicitly required that "a licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time" and that "[t]he information required under this subsection shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years." In doing this, Congress essentially codified the existing political file regulations as reflected in Section 73.1943 of our rules at the time, and placed no new restriction on the Commission's discretion to implement the public-access policy. That is particularly significant because, at the time of BCRA's passage, the Commission had tentatively concluded in this very proceeding that stations should place their public inspection files—including their political files—online. Congress was presumably aware that moving the political file online was actively being considered by the Commission, and expressed no intent to prevent such updating of the rules. Congress instead placed no restriction in BCRA on how the Commission may direct stations to make the political file "available for public inspection." Because the statute is silent on the question of how stations should make the political file "available for public inspection," the Commission, as the expert agency required to implement the Communications Act's provisions, has discretion in determining how to do so, provided that the Commission's decision "is based on a permissible construction of the statute." Given this context, we do not believe that "available for public inspection" equates to "available only in paper format and not online," as NAB asserts. We instead believe that this

requirement of availability for public inspection allows us to require that such records be made available for public inspection online, particularly given the ubiquity and general expectation of electronic access to records today.

53. NAB also argues that “[i]t is apparent that Congress intended the FEC to be the central repository of campaign information.” From this, they argue that requiring the political file to be placed online would constitute “duplicative disclosure.” This argument overlooks the explicit requirement in Section 315(e) that stations “maintain, and make available for public inspection, a complete record of a request to purchase broadcast time.” NAB seems to be arguing that the statute, rather than our proposed regulation, is unnecessary and duplicative. The Commission “must give effect to the unambiguously expressed intent of Congress.” Here, that unambiguous intent is that the Commission require stations to make the contents of the political file, as outlined in the statute, “available for public inspection.” Both the existing requirement, and the proposed online update, give effect to the expressed Congressional intent. We note as well that NAB’s arguments regarding the Commission’s authority are contradictory—in the first argument, NAB wants to read BCRA’s lack of language concerning an online file strictly, and in the second, it wants to ignore the political file statutory provision entirely. We conclude that neither reading is correct. NAB also quotes the FCC’s comments in an FEC proceeding in 2002, which stated that the FCC’s creation of an online database to comply with BCRA “could be extraordinarily complex and will require the expenditure of substantial resources in terms of time, money and personnel.” NAB goes on to say that “[t]he 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.” As discussed in detail in the text, we have afforded considerable respect and weight to broadcasters’ assertions about the burdens involved with posting their public files online, and have adopted a number of measures intended to reduce those burdens without sacrificing the goals of this proceeding.

54. Furthermore, the information filed with the FCC and the FEC is substantially distinct and intended for different purposes. The FEC was established by Congress to regulate federal elections, and FEC reporting requirements are limited to federal elections. The FCC’s political file, by comparison, requires disclosure of information regarding all elective offices, including federal, state and local. The FCC’s broadcast political file must be made “available for public inspection” in part to notify candidates of information pertaining to transactions by an opponent. This notification is necessary in order to assess candidates’ equal opportunities rights under Section 315 corresponding to an opponent’s purchases of ad time. The FEC does not collect any of the specific data that would be useful to candidates in connection with their equal opportunities rights, all of which appear in the political file, including: “(A) Whether the request to purchase broadcast time is accepted or rejected by the licensee; (B) the rate charged for the broadcast time; (C) the date and time on which the communication is aired; (D) the class of time that is purchased.” Instead, the spending data collected by the FEC requires candidates to disclose the aggregate amount expended during the period of time covered by the disclosure to a particular payee, the mailing address of the payee, the purpose of the transaction(s), the candidate’s name and federal office sought, and the date of disbursement. Typically, candidates make their television advertising purchases through media buyers. Thus, under the FEC’s aggregate disclosure requirements, a candidate would only need to disclose the funds provided to a media buyer without disclosing how the media buyer allocated such funding—whether it goes to television, radio or print media, let alone how much was paid to each television station. There is no requirement to identify the specific components of the ad-sales transactions that broadcasters include in their political files, making the FEC disclosures nearly useless for a candidate seeking equal opportunities or learning what rates their opponents paid or the schedule of time purchased, and useless to members of the public who are seeking information about the purchasers of specific advertisements being carried on their local television station.

55. *Immediacy*. Consistent with our current political file rules, we adopt the *FNPRM*’s tentative conclusion that stations must upload records to their

online political file “immediately absent unusual circumstances.” Whether maintained at the station or online, the contents of the political file are time-sensitive. For example, a candidate has only seven days from the date of his or her opponent’s appearance to request equal opportunities for an appearance.

56. We do not believe that complying with the longstanding immediacy requirement will be any more difficult when uploading to an online public file than when placing paper in a local file; in fact, using the online public file should often be quicker and more efficient. Some commenters claim that uploading the political file to the online public file immediately absent unusual circumstances is either extremely burdensome or technically impossible, with no public benefit. These commenters state that political advertising buys are fluid and often made at the last minute. They also point out that the final documentation indicating when spots are aired and how much is charged for them is typically generated only on a monthly basis. They note that for this reason, the Commission has advised that rather than having to generate special documents, stations should provide the name of a contact person who can provide parties reviewing the political file with the times specific spots aired. NAB argues that if stations were required to update the online political file to reflect the times that spots aired on a daily basis, that could entail filing more than 100 pages per day of traffic reports in addition to the materials already required to be in the political file. Other commenters argue that moving the political file online will not lessen disruptions to station operations, because the delayed final disposition information about when a spot was aired is information that candidates are interested in obtaining from the station, and stations will still need to field daily in-person inquiries from buyers seeking this information.

57. These arguments generally suggest that online filing would involve a change to existing substantive requirements for assembling the public file. Under our existing rules, however, the political file must include all requests for broadcast time made by candidates, the final disposition of that request, and the charges made. The *FNPRM* did not propose to change these record-keeping requirements, and we do not do so.<sup>6</sup> We understand that stations

<sup>6</sup> We are not persuaded by alternative proposals, one by News Corporation and another by a coalition of broadcast station groups, to adopt additional record-keeping requirements for stations with

generally place initial requests and the final order agreed to between the candidate and the station into the political file immediately, consistent with our rules. We also understand that stations do not routinely place documentation relating to reconciliation information—including the times spots actually aired and details such as any make goods for preempted time, rebates, or credits issued—in the political file on a daily basis. Stations instead make station personnel available to answer questions about final reconciliation in person, by email, or over the phone, and place written documentation about the final disposition in the file at a later date consistent with business practices—usually when final billing is compiled for the purchaser on a monthly basis. This practice is permitted. As the Commission stated in the *Political Rules Reconsideration* decision, “stations need not be required to employ extraordinary efforts to place immediately in the political file the exact time that candidate spots aired \* \* \* [I]t will be sufficient to provide information concerning the spots and program times that were ordered by the candidate, with a notation that the station will, upon request, provide immediate assistance and access to the station logs or other definitive information concerning actual air time.” We are not changing this precedent or

respect to the political file. The proposal initially advanced by the coalition of broadcast station groups was that we not require stations to make their entire political files available online, but rather require online posting—on either the Commission’s or the station’s Web site, at the station’s election—certain aggregate data concerning candidate purchases of advertising time, with weekly or monthly updates. An expanded coalition later advanced a revised proposal that would require stations to upload certain aggregate data concerning candidate purchases of advertising time, with updates daily, every second day, or weekly. News Corporation, on the other hand, submitted a proposal that would provide stations with the option of either placing their political files online or putting summary information (but not individual rates) in the online public file, while requiring stations to continue to maintain a paper file at the station that includes the rate information. While we appreciate the efforts of these parties to develop alternatives, we believe that these options will deprive the public of the benefits of immediate online access to all the information in the political file. These suggested approaches would impose a new substantive public file reporting obligation on stations, which would be contrary to our goal of limiting the burdens on broadcasters. Furthermore, our political file disclosure requirements take into account a candidate’s equal access opportunities afforded under the statute. Under our rules, these rights exist for only 7 days; therefore, to be of value in this regard stations must post political file information immediately. The proposals requiring stations to post information every other day during the equal opportunity period (or even every day in the week before an election), would have limited value to candidates seeking to exercise their equal opportunities rights.

practice. We are merely requiring that the materials that stations currently copy and place in their local files on a daily basis now be uploaded to the online public file on a daily basis, and that other information be uploaded consistent with existing business practices as previously approved under Commission precedent. In addition to making this information available online, stations are free to continue making this information available over the phone to candidates and their representatives, if that is their preferred business practice, and as long as that courtesy is extended to all candidates and their representatives. Modernizing public inspection procedures for material in the public file will not increase stations’ costs of communicating information that is not yet in the public file.

58. Finally, some commenters argue that the existing political file system works adequately for stations and candidates, and that it is unreasonable to make the political file available immediately online for the benefit of researchers and other members of the public.<sup>7</sup> Network Station Owners assert that the interests of researchers, scholars and citizens in having access to information about political spending “is not immediate and can be satisfied by visiting the station either during or after the election campaign.” These commenters seem to be arguing that the needs of stations and candidates are singularly important, and that if these constituencies are not seeking changes to how the political file is maintained, then no changes are warranted. We disagree. First, as LUC Media points out, candidates will benefit from real-time posting of the political file. Supporting that view, the record indicates that the online political file will be used by candidates, their representatives, and the general public. Second, as discussed above, the statute does not prioritize any potential users of the political file; it broadly mandates that the materials be made “available for public inspection \* \* \* as soon as possible,” which the

<sup>7</sup> Joint TV Broadcasters argued that “even PIPAC, the entity urging the FCC to require stations to post their political files online has recognized that the political file can change daily during the election season and has suggested that the online posting requirement ‘could include provisions for a reasonable delay in posting updated information.’” They contend this supports their conclusion that it would be difficult for stations to upload this information “in real time.” The commenter fails to note that with respect to burdens, PIPAC actually stated its belief that “placing this information online will reduce the burden on broadcasters that often receive multiple daily in-person requests to access this information during an election season.” In their comments, PIPAC “strongly supports” the public file proposal discussed in the *FNPRM*.

Commission has long interpreted to mean available to all members of the public “immediately absent unusual circumstances.” The Named State Broadcasters Association expresses concern that “public advocacy groups and the Commission will play ‘stop watch’ roulette if the political files were to go online.” They state that the base fine for political file rule violations is \$9,000 and that “the FCC will have a strong incentive to find at least technical shortcomings in every television station’s efforts to comply with the mechanics of a new online political file requirement,” potentially exposing them to large fines “notwithstanding the good faith efforts of staff-constrained broadcasters.” We reject this reasoning. First, if such an enforcement incentive exists, it would exist now with the existing public file rule. Second, as discussed throughout this proceeding, our aim in making the public file available online is to make it more accessible to the public. Commenters’ unsupported speculation about possible arbitrary enforcement provides no basis for maintaining the obsolete paper filing system. Moreover, we reject the Named State Broadcasters Association’s argument that the base fine for public and political file violations “should be lowered, an issue that is beyond the scope of this proceeding.

59. *Orderliness.* The Commission will design the online public file with an organizational structure that will ensure that the contents of the file, including the political file components, are orderly and easily uploaded and downloaded. The Commission’s rules require licensees to keep “a complete and orderly” political file. The Commission stated in the *FNPRM* that it expected licensees to upload any political file information to the online file in an organized manner so that the political file does not become difficult to navigate due to the sheer number of filings. For an online political file to be useful, the Commission acknowledged, candidates and members of the public must be able easily to find information that they seek. The Commission asked whether it should create federal, state, and local subfolders for each station’s political file, and whether it should allow stations to create additional subfolders within the political file.

60. NAB recognizes that there are efficiencies in the Commission creating some organizational categories for stations to use, and argues that “to the extent that the Commission can do this in a timely and accurate manner, for both the general and primary elections for every race in the country where



candidates and issue advertisers may purchase advertising on a local TV station, NAB agrees that it would be desirable.” We agree with NAB that it would be desirable and less burdensome on broadcasters for the Commission to create specific organizational subfolders, not only for candidate ad buys, but also for issue ads that relate to a political matter of national importance.

61. NAB also argues that the Commission should continue its policy of allowing broadcasters to manage their political file in a manner consistent with their particular operational and sales procedures. It expressed concern that if the Commission creates a rigid standardized organizational structure, they will have to redesign their traffic management systems, which would expand the burdens on broadcasters by interfering with systems that stations use and that are tailored to their own circumstances. NAB argues that the Commission should provide broadcasters with the flexibility to create their own subfolders and “subcategories” in order to further organize the data, and recommends that the Commission consider employing the services of a third-party Web-based file hosting service such as Dropbox. To facilitate broadcasters’ use of the online file, we will create and propagate subfolders for candidates and will provide stations with the ability to create additional subfolders and subcategories in compliance with their own practices. We also agree with NAB that the use of hosting services providing a mechanism to allow stations to drag and drop files and folders to the online public file will allow for greater efficiencies. We delegate to staff the authority to incorporate such efficiencies, and to cooperate with industry as it develops specifications to enable such efficiencies and to incorporate them in the online system, to the extent the staff concludes that such approaches are workable and effective. We also delegate to staff the authority to design, add to, or adjust the features of the online public file, as needed, to increase its ease of use.

## 2. Letters From the Public

62. Responding to commenters, we exempt letters and emails from the public from the online public file, instead requiring that such material be maintained at the station in a correspondence file. In the *FNPRM*, the Commission proposed that letters and emails from the public, which now are required to be included in the local file, should not be incorporated in the online public file, but instead continue to be

retained at the station for public viewing in a paper file or an electronic database at the station’s main studio. The Commission tentatively agreed with reconsideration petitioners that privacy and burden concerns were significant enough to merit excluding these documents from the online public file, and sought comment on its findings.<sup>8</sup> Alternatively, the Commission asked whether it should allow or require stations to redact personally identifiable information before posting letters and emails online. Some commenters, broadcasters and public interest advocates agree that letters and emails from the public should not be placed online due to privacy concerns and the burdens of review and redaction that such concerns would necessitate. Some broadcasters believe that stations should maintain a correspondence file available locally at the station, while others think we should eliminate the requirement entirely. Common Frequency argues that privacy concerns are exaggerated, since it is common for members of the public to comment on publicly available Web sites.

63. We are concerned that requiring correspondence to be placed in the online public file may result in violations of the Children’s Online Privacy Protection Act (COPPA), which prohibits posting children’s personally identifiable information online. Commenters agree with our privacy concerns. Our review of the public files in the Baltimore DMA indicates that letters and emails from the public can account for up to one third of a station’s public file. Thus, requiring stations to review these documents for compliance with COPPA before uploading them to the online public file could pose a burden, which our decision avoids. Therefore, we will not require stations to post this information in the online public file.

64. At the same time, we do not believe that the requirement to retain correspondence from the public should be eliminated entirely. Letters and emails are required to be made available to the public under our rules, and this proceeding is about updating the accessibility of the public file, not about changing its underlying requirements.

<sup>8</sup> The Commission also sought comment about whether other public file information raises similar privacy concerns. We received very little input on this issue, and will not make any other privacy-based exemptions to the online public file. Our Privacy Threshold Analysis (“PTA”) of the online files indicates that the files to be posted may contain personally identifiable information (“PII”). Consequently, the Commission will be preparing a Privacy Impact Analysis (“PIA”) and a Privacy Act system of records notice (“SORN”) to govern the handling of PII in the station files.

We will require stations to maintain in a paper file, or electronically on a computer located at the main studio, a publicly available correspondence file at the station. As currently required, this file will include all letters and emails from the public regarding operation of the station unless the letter writer has requested that the letter not be made public or the licensee feels that it should be excluded due to the nature of its content, such as a defamatory or obscene letter. We also note that NCE commenters have requested that we clarify that noncommercial educational stations are not required to retain letters and emails in their public inspection files. This request for clarification stems from an inadvertent error in the draft rules published in the *FNPRM*. We confirm that NCE stations are not required to retain letters and emails from the public, and note that the rule changes reflect this. We emphasize that we are not imposing a new requirement here, but merely retaining the existing requirement for retaining correspondence consistent with our rules.

65. The *FNPRM* also sought comment on a proposal by PIPAC to require stations to report quarterly on how many letters they have received from the public. PIPAC was the only supporter of this proposal. Another commenter noted that such reporting would be burdensome for broadcasters, some of whom receive thousands of pieces of viewer correspondence in a year. We are not persuaded that a mere count of letters received would be of substantial value to the public or the Commission. We thus conclude based on the current record that the burdens of tabulating and reporting on such correspondence cannot be justified, and we do not require it.

66. The Commission also sought comment on whether stations should have to retain comments left by the public on social media Web sites, like Facebook, and tentatively concluded that such information should not be required to be maintained in the correspondence file. Those who addressed this issue agree with our tentative conclusion that, because social media posts are already accessible to the public, the burden of requiring stations to place such material in a correspondence file would outweigh any benefit. We adopt this assessment, and will not require stations to retain social media messages in their correspondence file.

67. Common Frequency suggests that email comments to the station can be standardized for all stations through a comment form on the Commission-

hosted public file Web site, and all commenters could be directed to this form. We decline to adopt this requirement. We do not believe that the Commission is the proper forum to shape the dialogue between a local station and its viewers. Rather, we seek to encourage direct communication between the station and its viewers. As discussed below, the online public file will contain contact information for each station. We encourage members of the public to relay their concerns directly to the station.

### 3. Other Components of the Online Public File

68. *Contour maps.* We adopt the tentative conclusion that the contour maps available on the Commission's Web site are sufficient for the online public file. Our rules require that the public file contain "[a] copy of any service contour maps submitted with any application tendered for filing with the FCC, together with any other information in the application showing service contours and/or main studio and transmitter location." In the *FNPRM*, the Commission noted that maps showing stations' service contours are available on the Commission's Web site, and are derived from information provided by stations in CDBS. The Commission tentatively concluded that these contour maps available on the Commission's Web site are sufficient for the online public file as they provide the necessary information regarding a station's service contours. Only one commenter discussed this issue, agreeing with the Commission that these contour maps are sufficient. We ask that stations review these maps and contact the Media Bureau if they believe they contain any inaccuracies.

69. *Main Studio Information.* We will adopt the proposal in the *FNPRM* that we require stations to include in the online public file the station's main studio address and telephone number, and the email address of the station's designated contact for questions about the public file. Given that the correspondence file will still be publicly available at the station, along with the existing political file (until its retention period expires in two years), and because we seek to encourage an open dialogue between broadcasters and the viewing public, we believe this information is necessary to assist the public. Stations with a main studio located outside of their community of license should list the location of the correspondence file and existing political file, and the required local or toll free number. Joint TV Broadcasters argues that if access to the public file is

to be facilitated by means of online posting, the justification for government regulation of a station's main studio location, at a minimum, erodes substantially. We disagree with this assertion, which is in any event beyond the scope of this proceeding. The Commission has previously stated that a main studio is necessary to maintain reasonable accessibility of station facilities, personnel, and information to members of the station's community of license, which enables the residents of the community to monitor a station's performance, encourages a continuing dialogue between the station and its community, and integrates a station into the activities of the community in order to be more responsive to local community needs in its programming. Although as a result of our action today most required information about the station will be available online, the other benefits cited here, as well as access to the elements of the public file that will not be posted online, continue to support maintenance of a local main studio.

70. *The Public and Broadcasting manual.* We adopt the tentative conclusion that television stations will no longer be responsible for making available "The Public and Broadcasting" manual in their public files. We received no comment on this issue. As discussed in the *FNPRM*, the Commission will make this manual prominently available on the Commission-hosted online public file Web site once it is created. The staff is directed to ensure that this manual is updated to reflect the online public file requirements we adopt here.

71. *Issues/programs lists.* We adopt the proposal requiring stations to post their issues/programs lists to the online public file until the Commission adopts changes to this requirement. Broadcasters' public files currently must include issues/programs lists, which are lists of programs that have provided the stations' most significant treatment of community issues during the preceding quarter. The Commission stated in the *FNPRM* that it planned to expeditiously seek comment in a new proceeding to investigate replacing the issues/programs list with a standardized disclosure form, which it did last November in a *Notice of Inquiry*.

72. In that *Notice of Inquiry*, the Commission noted that it remains dedicated to addressing the problem of the lack of access to consistent and uniform information about television broadcasters' programming. Despite the shortcomings of the current state of the issues/programs lists, however, for now this is the best source of information the

public has when investigating how a broadcaster's programming is meeting the community's needs and interests. A group of stations commenting as Four Commercial and NCE Licensees argues that the public has minimal interest in viewing this information, and until there is a standardized reporting form, issues/programs lists should not be placed online because they are voluminous and might include program guides that may not be easily uploaded. We disagree that the public has minimal interest in viewing this information. Public advocacy commenters PIPAC and Common Frequency point out that issues/programs lists are the only requirement that broadcasters have to disclose how they are providing community-responsive programming, and agree with the Commission that these lists should be posted to the online public file on a quarterly basis until the Commission implements a new standardized form. When creating the issues/programs list requirement, the Commission declared that one of a broadcaster's fundamental public interest obligations is to air programming responsive to the needs and interests of its community of license, and described the issues/programs list as "[t]he most significant source of issue-responsive information under the new regulatory scheme." Moreover, the list is a significant source of information for any initial investigation by the public or the Commission when renewal of the station's license is at issue. Because of the importance of the issues/programs lists, we conclude that any burden imposed upon broadcasters to upload such information is justified, and find that the lists must be available to the public in the online public file.

73. *FCC investigations and complaints.* Our rules currently require that stations retain in the public file "material having a substantial bearing on a matter which is the subject of an FCC investigation or complaint to the FCC" of which the station is aware. The Commission sought comment in the *FNPRM* on whether the Commission should post published sanctions, including forfeiture orders, notices of violation, notices of apparent liability, and citations, in a station's online public file. The Commission also asked whether licensees should be required to upload their responses, if any, to such Commission actions. The Commission noted that this is the sort of information that the public would want to find in reviewing a licensee's public file, that this is a natural extension of the requirement to retain Commission



correspondence, and that parties could seek confidential treatment of particular information in the filings, if necessary. Common Frequency argues that the Commission should require broadcasters to post all materials relating to complaints, petitions, and Commission orders, because the public has a right to know how a broadcaster is conducting its business.

74. The public is entitled to review information regarding Commission investigations and complaints and we consider the scope of the disclosure rule for this material to be quite broad, although we also recognize that premature publication can hamper an investigation and that privacy concerns counsel some limitations on the online posting of some of this information. We conclude that, subject to any disclosure limitation included in a Commission inquiry itself or directed by the staff, the online public file must include Letters of Inquiry (“LOI”), any supplements thereto, and any other correspondence from the Commission commencing an investigation, materials related to such inquiries, licensee responses to these Commission inquiries, and any documents—including Commission orders—terminating or concluding the investigation or imposing penalties as a result of the investigation. We agree that public access to this type of information concerning a station—information that could be key to a full understanding of a station’s performance of its duties as a licensee—is important and conclude that it must be placed in a station’s online public file. This material is relevant to any member of the public that wishes to participate in a station’s license renewal process or to otherwise review and evaluate the service a station is providing to its community of license. We will therefore adopt the tentative conclusion in the *FNPRM* that stations’ online public files should contain all material relating to a Commission investigation. Unless directed to the contrary by the Commission (in an LOI or otherwise), stations will be responsible for uploading any materials related to a Commission investigation or inquiry that they generate or possess (such as responses to LOIs and relevant documents related to an investigation). To reduce burdens on stations, the Commission, as it deems appropriate, will post to the online public file any material that it originates relating to an investigation, such as LOIs and other investigative requests. The Commission will also post to the online public file any complaint or complaints that it possesses and that underlie an investigation, if doing so is feasible, will

not interfere with or obstruct an investigation and disclosure is consistent with any privacy concerns that publication might raise. When there are circumstances in investigatory and enforcement contexts that would weigh against the disclosure of Commission investigations and related materials, the Commission or the staff may inform a licensee that a Letter of Inquiry or request for information or other material related to a particular investigation need not be placed in the public file or uploaded to the online public file. In the *FNPRM*, the Commission acknowledged concerns expressed in reconsideration petitions about posting to the online public file any material that is the subject of an indecency investigation or complaint, and tentatively concluded that such concerns were unfounded because such material is relevant to the renewal process and the Commission already posts information relating to indecency investigations, such as Notices of Apparent Liability and Forfeiture Orders, on its Web site. As is the case today, stations filing responsive materials subject to a confidentiality request may place copies of their filings into the online database with the confidential material redacted.

75. With respect to complaints that have not prompted an LOI or other investigative request, whether filed with the Commission or submitted only to the station, we believe local retention in the station’s correspondence file is appropriate. We conclude, as a general matter, that privacy concerns weigh against routine online posting of these complaints. The Commission or relevant Bureaus on delegated authority, however, may expressly direct a licensee to post such complaints—ones not related to any Commission investigation or inquiry—to the online public file, or it may do so itself, if circumstances warrant.

76. A few commenters argued that the Commission should not require broadcasters to include information about erroneous or meritless allegations in the online public file. They argue that these claims may be unsubstantiated, and that persons with interests adverse to a broadcaster would have an incentive to file false or irrelevant complaints to establish a record tarnishing the broadcaster’s character that could be used against it in the license renewal process, and that the increased accessibility to such false claims will increase such incentives. As discussed above, we are not requiring stations to include complaints that are not the subject of a Commission investigation in their online public files, though they are required to include

them in their local correspondence files unless the Commission specifies otherwise. We believe that commenters’ concern about erroneous or meritless allegations is adequately addressed by allowing stations to include their responses to such complaints in their correspondence files. As discussed above, stations are required to include in their public files responses to Commission investigations, unless directed otherwise in the LOI. As the Commission and the courts are the final arbiters of whether allegations are meritorious, we will not allow individual stations to decide whether particular investigations and complaints against them should be kept out of the public file.

77. *EEO and Children’s Requirements.* Under the Commission’s equal employment opportunity (“EEO”) rules, all broadcast stations that are required to create an EEO public file report are also required to place their most recent annual report in their public file and post a link to the report on their Web site, if they have a Web site. This requirement was established in order to facilitate meaningful public input, as the public has a “right to participate in the process of monitoring and enforcing our EEO Rule, which directly impacts them.” We will continue to require that stations make their EEO materials available on their Web sites, if they have one. In an effort to reduce burdens on broadcasters, however, we will permit stations to fulfill this Web site posting requirement by providing on their own Web site a link to the EEO materials on their online public file page on the Commission’s Web site.

78. Similarly, in light of our decision in this Order to require stations with Web sites to provide a link to the online public file on their homepage, we will not require that stations with Web sites also post copies of their Children’s Television Programming Reports (FCC Form 398) on their Web sites. In the *Further Notice of Proposed Rulemaking* in MM Docket No. 00–44, the FCC sought comment on whether broadcasters should be required to provide their completed Form 398s on their own Web sites. Members of the public interested in viewing a station’s Form 398 will be able to locate that filing from the online public file and, therefore, we do not believe it is necessary to require stations to post the forms on their own Web sites.

79. *Existing Public File Sponsorship Identification Requirements.* Although, as discussed below, we do not impose new sponsorship identification reporting requirements, we also do not exempt existing public file requirements

regarding sponsorship identification from the online posting requirement. Specifically, we decline the request by the National Religious Broadcasters ("NRB") to exempt from the online public file the disclosure of material required in Section 73.1212(e) of our rules—namely, where "material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter," stations must disclose "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." We note that the rule also states that "[i]f the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file." In addition, Section 315(e) of the Act, added by BCRA, requires that with respect to messages relating to any "political matter of national importance," the political file must contain "the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person." This information must be included in the political file, and therefore must be posted to the online file along with other political file information. Requiring that this information be included in the online public file should impose little burden on broadcasters, as this information is already being maintained in the local file.

80. In addition, we reject NRB's argument that making such lists available via the Internet will violate citizens' First Amendment rights to enjoy a level of privacy and anonymity regarding their political, social, moral, and religious values and beliefs, and associations. NRB argues that this will have a chilling effect on citizens' willingness to participate in political campaigns. PIPAC responds that making such already-public records available via the Internet does not change the substance of the existing retention requirement. We agree. In addition, we find NRB's argument that this disclosure will chill citizens' speech overstated, as the disclosure requirement in Section 73.1212(e) of our rules applies to executives and board members of

sponsoring organizations; it does not relate to individuals' campaign contributions or other political activities. We note also that the FEC requires candidates committees to report to the FEC the identity of individuals who contribute more than \$200 to a candidate's campaign. The identity includes the individual's name, mailing address and occupation, as well as the name of his or her employer. We also agree with PIPAC that courts, in evaluating First Amendment challenges, have embraced disclosure of sponsors of political advertisements as promoting speech and discussion, not chilling it. As the Supreme Court stated in *Citizens United v. FEC*, "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages" and that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." Similarly, the First Circuit determined that state laws requiring disclosure of the names of board members on political action committees "neither erect a barrier to political speech nor limit its quantity. Rather, they promote the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas."

#### 4. Proposals To Increase the Public File Requirement Rejected

81. We decline to adopt any new disclosure obligations with respect to sponsorship identifications and shared services agreements at this time. While we continue to believe that the public would likely benefit from further information regarding sponsorship identifications and shared services agreements as discussed in the *FNPRM*, we believe it inadvisable to impose new reporting requirements at the same time stations are transitioning to the online public file. We wish to ensure that this *Second Report and Order*, in all major respects, involves changing only the form of disclosure and location of material already required to be included in the public file. We discuss both of these categories below.

82. *Sponsorship Identifications.* We will not at this time require new written disclosure of sponsorship identifications in the online public file, as proposed in the *FNPRM*. Section 317 of the Communications Act requires that broadcasters disclose to their listeners or viewers at the time of broadcast whether material was aired in exchange

for money, services, or other valuable consideration. The Commission's sponsorship identification rules implement these provisions and require that stations provide an on-air disclosure when content is paid for, furnished, or sponsored by an outside party. With the exception of sponsored political advertising, and certain issue advertising that must be disclosed in writing, these rules require that stations make an on-air disclosure only once during the programming and that the disclosure remain on the screen long enough to be read or heard by an average viewer. The implementing rule has long had an additional public file recordkeeping component for political and controversial issue announcements, as discussed further below. The *FNPRM* noted that the *INC Report* discussed examples of "pay-for-play" arrangements at local TV stations, where "advertisers have been allowed to dictate, shape or sculpt news or editorial content." Despite our decision not to add new reporting requirements, we continue to believe that issues pertaining to sponsorship identification and "pay-for-play" are important. We will continue to monitor the use of these practices, and enforce the statute as appropriate.

83. While we agree with commenters that additional written sponsorship disclosures—posted to a station's public file—would benefit the public by addressing the shortcomings of sometimes fleeting on-air disclosures and would provide valuable information that is otherwise difficult to collect, we are also persuaded that we lack sufficient information at this time to properly evaluate the burden that complying with this requirement would impose.

84. *Sharing Agreements.* We also decline to adopt the tentative conclusion that stations include sharing agreements in the online public file. In the *FNPRM*, the Commission asked whether sharing agreements among licensees, such as local news sharing and shared services agreements, should be available in the online public file.

Some broadcasters argue that the disclosure of sharing agreements is beyond the scope of this proceeding, and should be considered in a separate proceeding. They argue that the Commission must first solicit comment and determine the legal status of such agreements. They argue that there has been no determination that shared services agreements are relevant to compliance with any Commission rules or standards, unlike time brokerage agreements and joint sales agreements, which the Commission has deemed to

have attribution implications, and which are required to be placed in the public file. Some note that the recent 2010 Quadrennial Review seeks comment on sharing agreements, and argue that it would be premature to require disclosure of sharing agreements prior to the conclusion of that review. We disagree that the Commission must first address the appropriate regulatory status of such agreements prior to requiring their disclosure, as disclosure itself could inform those decisions and the Commission has wide latitude to impose such a requirement. Nonetheless, we decline to impose this new requirement on broadcasters as they transition to the online public file. We will continue to monitor this issue, and revisit a disclosure requirement either in this proceeding, or in the ownership proceeding, as suggested by broadcasters. Because we decline to adopt this requirement, we will not address comments pertaining to the scope of shared services agreements covered by this proposal.

#### D. Format of the Online Public File

85. We will not establish specific formatting requirements for documents posted to the online public file at this time. Some commenters promoted making the data well-structured, as searchable as possible, and downloadable. PIPAC argues that the online public file should be searchable by text within the documents, and also by station, state, date, element of the public file and any other metadata contained in the file. They further argue that the file should provide an easy-to-use graphic interface in addition to an API, as these both provide searching and downloading of documents and metadata en masse. We agree that certain information in the public file would be of much greater benefit to the public if made available in a structured or database-friendly format that can be aggregated, manipulated, and more easily analyzed; this continues to be our ultimate goal. We agree with PIPAC, however, that converting the files to this format would take time and money, and the online public file should not be delayed in order to make all of the material in it available in such a manner. PIPAC argues that this will likely result in the submission of documents in non-searchable, non-machine readable format, but it believes this proposal represents a reasonable trade-off between maximizing searchability and the need to expedite access to broadcasters' online public files. We agree that this trade-off is reasonable, and adopt the Commission's tentative conclusion that the benefits of

an online public file should not be delayed. At this time we therefore will not require broadcasters to undertake the burdens of altering the form of documents already in existence prior to posting them to the online public file. We observe, though, that even without mandating that documents be filed in a particular format, our creation of a centralized, orderly public file will facilitate search and analysis across all elements of stations' public files.

86. We adopt the *FNPRM*'s proposal to require stations to upload any electronic documents in their existing format to the extent feasible. For example, to the extent that a required document already exists in a searchable format—such as the Microsoft Word .doc format or non-copy protected text-searchable .pdf format for text filings, or native formats such as spreadsheets in Microsoft .xml format for non-text filings—broadcasters are expected to upload the filing in that format to the extent technically feasible. PIPAC agreed with our proposal to require stations to file documents in their native electronic format. We understand that it may be difficult for stations to provide older material that has been in the public file for some time in its native format. In those instances, we understand that stations may need to scan these materials for electronic upload into the online public file. We expect that the need to do this will diminish over time.

87. Also consistent with the *FNPRM*, the Commission will use optical character recognition on public file materials that are scanned, and by default are non-searchable. The Commission asked in the *FNPRM* whether, to the extent documents are posted in a non-searchable format, the Commission should digitize the documents and perform optical character recognition ("OCR") on them. PIPAC agrees with the Commission's suggestion that if a broadcaster posts a record in only a non-searchable format, the Commission should use an OCR tool to permit maximum searchability. PIPAC notes that commonly available document formats—including Microsoft Word .doc, .txt, .pdf or .odf—can be searched, and can easily be converted into a .pdf file that can be processed by an OCR tool so the contents can be loaded into a searchable database. But commenter Ryan Thornburg notes that OCR software is expensive and faulty, and prefers that the Commission require well-structured formats. For the reasons discussed above, we decline to do so at this time. We determine that, when appropriate, the Commission will use OCR. OCR will be used when text

cannot be extracted from the uploaded document format. When documents are uploaded to the online public file, documents that are not in recognized formats will be automatically pushed into OCR, which will scan the document to extract as much text as possible.

88. *Metadata*. We will not require stations to create or preserve metadata in the online public file. In the *FNPRM*, the Commission asked whether users should be able to determine when each item was uploaded to the file, whether the Commission should make available metadata about who uploaded the item, and if there were any concerns about metadata disclosures for confidential or privileged information. NAB anticipates that many stations may use software that removes metadata from its documents for reasons of confidentiality, privilege, or privacy, and does not see value in disclosing who uploaded a document, other than differentiating between documents uploaded by the Commission versus a station. The Sunlight Foundation noted that as long as each station provides contact information, there is no need for the metadata to identify the individual who uploads a filing. We agree, and determine that stations using software that removes metadata will not be required to make any modifications. Given that we will be requiring station contact information, as discussed above, we do not believe that it is necessary to make metadata information available as part of the online public file. However, the Sunlight Foundation also argues that being able to identify the time and date of a filing is important, as it helps to track the most recent version of a particular filing, and allows the user to create a timeline of submitted files. This information, which is captured by the system as files are uploaded, does not generate similar privacy concerns as the metadata contained within the documents uploaded by stations. Our system may present information on the date and time of a filing to users.

#### E. Implementation

89. Having concluded that broadcast television stations must upload the contents of their public file, other than the political file and letters from the public, to a Commission-hosted online public file, we next discuss issues relating to implementation of the new posting procedure. As with our consideration of all the issues covered by this Order, our resolution of implementation issues is guided by a commitment to creating an online public file experience that is not



burdensome for broadcasters, and is as useful as possible for the public.

90. *Cloud-Based Solution.* We plan to develop the online public file in accordance with the Federal Government's "Cloud First Policy" which directs agencies to default to scalable and elastic, cloud-based solutions for increased reliability at lower cost. The public file, consisting entirely of publicly disclosed material, is ideal for leveraging the cloud-based hosting solutions. We anticipate being able to design an online public file that is highly available, scalable, cloud-based, and eliminates any user wait times associated with processing documents after upload. We expect that this will enable stations to upload public file material in a timely fashion, including uploading political file material promptly even during times of increased traffic prior to elections.

91. We disagree with broadcasters who argue that their experiences trying to file the revised Form 323 ownership reports suggest a Commission-created database would suffer from implementation problems. These commenters represent that it can take hours to upload just one attachment to the revised Form 323, and that the political file contains similarly large documents. They argue that such delays would be unacceptable with respect to the political file, where timely access is so important. We agree that it is essential that stations are able to upload public file documents, and particularly political files, efficiently, and that the online public file should be able to handle many stations uploading documents at the same time even during an election season. We recognize problems stations have experienced uploading the revised Form 323 and are working to fix those problems. But we do not anticipate similar problems with respect to uploading the public file. The delays in the Form 323 uploading process stem from the time required in the current Form 323 filing application to validate the large spreadsheets that must be filed with Form 323, and the validation queuing process. Public file documentation will not be subject to the validation process that is required for the Form 323 spreadsheets, nor will we need to impose a similar queuing system necessitated by the validation process. Furthermore, Form 323 was launched and run on existing FCC infrastructure. Since then, the Commission has begun utilizing scalable cloud-based IT architecture solutions to enhance the agency's capabilities. In particular, the Commission anticipates using for online public files the same scalable

architecture that currently is being used successfully for the Customer Proprietary Network Information certification document filing system and the National Broadband Map.

92. *Back-up Files.* In lieu of requiring stations to maintain back-up copies of all public file materials, as proposed in the *FNPRM*, the Commission will generate copies of their online files. With respect to the political file, however, we will require stations to maintain local electronic back-up files to ensure that, in the event our online public file were to become temporarily unavailable, they can comply with their statutory obligation to make that information available to candidates, their representatives, non-candidate political time buyers and the public generally as soon as possible. To minimize any burden imposed by this requirement, we have developed tools to allow stations to easily copy mirrors of their online public files, which contain the political files.

93. In the *FNPRM*, the Commission proposed that stations retain electronic copies for back-up purposes of all public file items in the event the Commission's online public file were to become unavailable or disabled. The Commission also proposed that in such circumstances, stations would have to make these back-up files available to the public. We are persuaded by commenters, however, that requiring stations to maintain back-up copies of all public file materials and to make them routinely available directly to the public would reduce the efficiencies of placing the public file online. These commenters explain that such an approach would force stations to continue maintaining a separate complete public file on site so as to comply with the Commission's rules at a moment's notice.

94. To ensure that stations' public files are available even if the Commission's online public file were to become temporarily unavailable or in the event technical problems prevented broadcasters from accessing the Commission's online file, we will create "failover" backups of the online public file, including mirroring daily snapshots of the public file. That is, the Commission will make a mirror copy of each station's public file records daily to ensure that if the data in the online public file is compromised, the public files can be reconstituted using the back-up copy. Thus, the Commission will relieve stations of the burden of maintaining a back-up of the entire public file locally. In addition, with the exception of the political file, discussed below, will not make stations

responsible for making available to the public information from the public file in the event the Commission's online files become temporarily inaccessible; the mirroring approach will enable us to perform the back-up function ourselves. Although we will not require stations to maintain back-up copies of the public file, stations are free to maintain back-up materials and to continue to make the public file available locally or on their own Web site, in addition to on our Web site, if they choose to do so. To the extent the public may experience a delay in accessing the information due to the brief unavailability of the online file, we consider that delay (with the exception of the political file), on balance, to be acceptable in order not to burden broadcasters with the necessity of making public file materials available to the public at the station. If the Commission's online file becomes temporarily inaccessible to stations for the uploading of new documents, however, stations must maintain those documents and upload them to the online file once it becomes available again for upload. The Commission will also daily make the mirror copy of every station's public file available for the station or other interested parties to download so that, if they wish, they can periodically download a complete mirror of their public file or automate a periodic synchronization.

95. As suggested in the *FNPRM*, we conclude that additional steps should be taken to ensure that access to the political file is not compromised. Accordingly, if the Commission's online public file were to become temporarily unavailable, stations will be required to provide any information pertaining to the political file not just to candidates, their representatives and other political time buyers, but directly to any member of the public as well. The benefits of making such information available immediately outweigh the burdens of maintaining this limited back-up requirement. Given the short seven-day deadline for candidates to request equal opportunity appearances, it is essential to candidates' exercise of their rights under the Act that they have prompt access to political file information. Moreover, limiting that access to candidates and their representatives would be inconsistent with the Communications Act, which requires that political file information shall be "available for public inspection" and "placed in a political file as soon as possible." These requirements do not distinguish between candidates and their representatives and other members of the public. In addition, although only

candidates have rights to equal opportunities and lowest unit charge under Section 315, other members of the public may also have time-sensitive needs to access a station's political files. For example, a sponsor of a political issue advertisement may have a significant interest in ascertaining which candidates or other issue advertisement sponsors have bought time at a station.

96. The Commission is taking all steps necessary to ensure that the Commission-hosted online public file will not become unavailable, and we expect instances of unavailability to be both rare and of short duration. As a result, we do not expect the requirement to provide back-up access to the political file during any times of outages to be overly burdensome. In addition, we will allow stations to retain such information in whatever form is most convenient for them. Our making mirror copies of stations' public files available to stations, as described above, will enable stations to comply with the political file back-up requirement with little burden. That is, while not required, stations may choose to meet the political file back-up requirement by periodically downloading a mirror copy of the public file. When choosing this option, stations will need to ensure that they retain any political file records that have not been uploaded or were uploaded after their last download of a mirror copy of their online public file. This means that if a station decides to download a mirror copy of their online public file on a weekly basis, it will need to maintain at the station, in paper or electronic form, any documents that have not been uploaded or that it uploaded to the online political file after its last weekly download. If a station chooses to download a mirror copy of their online public file on a monthly basis, it will need to maintain at the station any documents that have not been uploaded or that it uploaded to the online political file after its last monthly download. If a station chooses not to download a mirror copy of their online public file, and does not otherwise satisfy the back-up requirement, it will need to maintain at the station all documents required to be in its online political file. We stress that stations will only be required to make these backups available if and during such time as the Commission's online public file is unavailable, which we believe will only happen in rare instances, such as national or localized emergencies, because the Commission will follow necessary protocols for creating failover backups of the online public file.

97. *Compliance Dates.* In order to facilitate a smooth transition to the online public file, we will provide a phase-in period for stations to begin uploading files. Stations will be required to begin using the online public file after the effective date of this Order, which is 30 days after the Commission announces in the **Federal Register** that OMB has completed its review under the Paperwork Reduction Act and approved the collection.<sup>9</sup> After the effective date, if a station determines that any document must be placed in the public file, that document must be posted to the online public file. We refer to this as the requirement to post documents online "on a going-forward basis." In order to ensure that broadcasters have time to familiarize themselves with the online public file, the Commission will make a version available to the public soon after adoption of this item. We also instruct the staff to help educate broadcasters about the online public file and how it functions.

98. To ensure that existing public file materials—that is, the public file as it exists prior to the effective date—are uploaded to the online public file in an orderly manner, we will give broadcasters sufficient time to do so. Stations will be permitted to begin uploading existing public file materials immediately after the effective date, at the same time stations must also begin posting online documents on a going-forward basis. Stations must complete the process of uploading the existing public file within six months after the effective date, *i.e.*, six months after the Commission publishes a notice in the **Federal Register** announcing OMB approval under the Paperwork Reduction Act. We believe that giving stations six months to complete the upload of existing files will provide broadcasters adequate time and flexibility to undertake this process.

99. *Accessibility for People with Disabilities.* In the *FNPRM*, the Commission stated that it intended to ensure that the online public files, like the rest of the Commission's Web site, is accessible to people with disabilities. Under Section 508 of the Rehabilitation Act, federal agencies must ensure that

members of the public who have disabilities and who are seeking information or services from a federal agency "have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities." For federal agencies, including the Commission, this requires access by people with disabilities to the agencies' Web sites, including electronic filing systems, such as the Commission's ECFS. In the *FNPRM*, we sought comment on whether further actions were necessary to ensure compliance with respect to the online public file. No commenters raised concern about this issue. To assure compliance, the Commission will perform accessibility tests and address any known issues once the online public file has been created. We believe that Commission compliance with the requirements imposed by Section 508 of the Rehabilitation Act will be sufficient to ensure that the online public file is accessible to individuals with disabilities. If we learn of any problems with accessibility of the online public file, we will revisit this issue.

100. *Geographic Coverage Area.* The Commission's online public file will be available to anyone who has Internet access, regardless of their location. Two petitioners on reconsideration of the *2007 Report and Order* suggested that broadcasters should be permitted to limit online public file access to viewers within a station's geographic coverage area. The Commission concluded in the *FNPRM* that it saw no reason to limit online access to the public file, nor did it know of a workable mechanism for implementing and enforcing such a proposal. No commenter opposed this tentative conclusion, and commenters in support agreed that limiting access to a station's public file to viewers within a station's viewing area would be misguided. We believe it entirely consistent with Congressional intent in adopting Section 309 of the Act to enhance the ability of both those within and those beyond a station's service area to participate in the licensing process. We see no additional burdens, and several benefits, in providing full access to the public file of each station. We note, moreover, that such a restriction would reduce the scope of public access now provided by our rules—a result clearly at odds with our objective of increasing the transparency and availability of public records. We conclude that each station's online public file will not be limited to viewers within its geographic coverage area.

<sup>9</sup>Public Law 104–13. The Commission previously sought comment on the paperwork burden associated with these proposals. See 76 FR 72144 (Nov. 22, 2011). Because the Order today substantially adopts the item as proposed in the *FNPRM*, with the exception of a few proposed collections that we are declining to impose, a 30 day public comment cycle will be appropriate. 5 CFR 1320.11(h). The Commission will publish a notice in the **Federal Register** regarding the reduced paperwork burdens adopted in this Order. The OMB review process will then commence.

101. *Maintenance.* In order to keep each public file orderly, we conclude that stations must actively maintain their online public file, although the Commission will ensure that items filed in CDBS are updated in the public file as they are updated on CDBS. In the *FNPRM*, the Commission proposed that stations would be expected to maintain their online public files, ensuring that the files contain the information required by the public file rules and that items be removed once they no longer must be retained under our rules.<sup>10</sup> In response, APTS and PBS argue that it would be more efficient for the Commission automatically to replace old materials when new materials are imported into the public file. They argue that it is inefficient and burdensome for stations to be required to monitor the addition and deletion of materials. They also argue that the Commission should avoid introducing contradictory objectives by punishing stations for sharing information above and beyond what is required while still expecting the stations to increase disclosure so the public is informed of the station's broadcast services.

102. We believe it is important that stations maintain orderly public files. While one of our goals is increased disclosure, another is to be able to provide the public with relevant information in an efficient manner. We are concerned that if material is never removed from the online public file, it will be difficult for the public to find information that is relevant. We note that public file items have different document retention periods, and recommend that stations remove such items in a timely fashion. We do not require stations to remove each item at the end of its retention period, but note that stations are still required to maintain an orderly file. Each station's online public file should not become so overgrown with out-of-date documents that it is difficult to access relevant materials. To assist with this process, the Commission will strive to facilitate the identification and management of aging materials. The Commission will explore creating a mechanism to automatically identify documents that may be beyond their retention period, and flag such documents for station review. Some categories of documents, such as time brokerage agreements and joint sales agreements that need to be

retained for as long as the items are effective, will need active management on the part of the station. At a minimum, we will require stations to remove expired contracts when and if replacement agreements are uploaded. Materials in the online file will be disposed of consistent with the records schedule we will develop under the Federal Records Act.

103. *Certification.* We decline the request of two parties that the Commission remove a question on renewal Form 303-S that asks whether local public file documents have "been placed in the station's public inspection file at the appropriate times." The two parties argue that this certification will be unnecessary, since the online public file will be available for anyone to evaluate for completeness. We disagree. Although the Commission will be importing into the online public file all items that are filed with the Commission in CDBS, stations will still be responsible for uploading to the online public file all other items required under our rules. In order to upload information into its online public file, a station will need to log in with the same credentials used to file station applications and materials in CDBS. This will ensure that only station licensees will be able to post information to their files. As there will still be a requirement that stations maintain their public files, it is necessary that stations certify to their compliance with this requirement at the time of license renewal. This certification requirement is designed to promote voluntary rule compliance. In addition, as noted in the *FNPRM*, a successful upload of a station's public file on the Commission's Web site will not be considered agency approval of the material contained in the filing. The purpose of online hosting is to provide the public ready access to the material, although Commission staff may review the material placed in each station's online public file, just as Commission staff currently reviews station public files to determine compliance with Commission rules.

104. *Working Group and Pilot Program.* We decline to adopt NAB's proposal that the Commission create a joint Commission-broadcaster working group or a pilot program to address the implementation issues and technical challenges raised by the online public file. NAB argues that a working group, through which the Commission would work with broadcasters to design the online public file and develop rules for its use, would likely reduce overall costs and burdens for the Commission and stations by identifying more quickly

potential problems and their solutions. NAB and others also support a pilot program, through which a limited number of stations would test the online public file before the Commission requires broadcast stations to post files to it. Named State Broadcasters Association argues that a pilot program is an important way for the Commission to meet its statutory obligations under the Paperwork Reduction Act. We disagree with their argument that rules implementing the Paperwork Reduction Act require the Commission to test information collections a pilot program. These commenters argue that the Commission will gain valuable experience and insight if it conducts a pilot program involving the licensees of representative large, medium, and small market commercial and noncommercial educational television stations, and their trade association representatives. Other implementation suggestions include transition periods, phase-in approaches, and workshops.

105. For more than ten years the Commission has been exploring in this proceeding the best way to move broadcasters' public files online to make them more accessible. A broad group of commercial and noncommercial broadcasters has participated in every phase of the proceeding. We do not believe a working group or pilot program is necessary to ensure that the process of implementing an online public file is successful, and we believe that the creation of a working group as a condition precedent could unduly delay its implementation. One commenter claims that details of a "pilot program" were not properly raised in the *FNPRM*. To the extent these notice concerns relate to the phase-in approach we are adopting in this proceeding, we note that in the *FNPRM*, the Commission sought comment on whether we should "consider creating different requirements for small television broadcasters." In any event, the Commission has discretion to implement changes in a step-by-step fashion.

106. We are addressing the concerns expressed about implementation, however. The Commission is undertaking rigorous testing of the online public file to ensure a smooth user experience. We will provide opportunities for user testing and education before stations are required to upload their online public files. Because our rules will require stations simply to upload information to a Commission-hosted online public file, a process similar to uploading applications to CDBS—which licensees have been

<sup>10</sup> As required by the Federal Records Act, 44 U.S.C. 3301, *et seq.*, the Commission will create a records schedule to set the retention and disposal of the files. The schedule will require approval by the National Archives and Records Administration. The records schedule will govern our handling of the station files.



doing for more than ten years—we do not believe that this process demands the kind of groundwork that broadcasters advocate. As already discussed, only 200 stations, or approximately 11% of all stations, will be required to upload their political files for the first two years. While this is not a pilot program, we believe that this smaller group of stations, which as major-network affiliates are generally likely to be relatively capable and sophisticated users of technology, can assist in meeting NAB's stated goals of addressing implementation issues and technical challenges as they arise. In addition, as discussed above, we believe that the user testing and education we will provide will assist stations with any concerns they may have. Commission staff will be dedicated to assisting stations with any issues they may confront after implementation of the online public file. We will also explore the option of providing user or peer support groups to help stations identify and work through implementation issues. Such support groups can assist the Commission in identifying whether any issues are common to many users, or station-specific.

#### F. Announcements and Links

107. We decline to adopt the *FNPRM*'s proposal to require stations to make on-air announcements about the availability of the online public file, but do adopt the proposal that stations provide information about the online public file on their Web sites to the extent that they have them. In the *2007 Report and Order*, the Commission adopted a requirement that stations make twice-daily announcements about the online availability of the public file. On reconsideration, public television petitioners argued that this was unduly burdensome, and asked that the Commission reduce this requirement to a few times a week, at most. In the *FNPRM*, the Commission proposed that stations be required to notify viewers of the existence, location, and accessibility of a station's public file; it noted that if most viewers are unaware of the existence of the public file or how to access it, its usefulness would be greatly diminished.

108. The Commission has long required stations to identify both the call letters of their stations and the cities which they are primarily licensed to serve in order to enable the public to readily "identify the stations to which they are listening and, further, to identify the communities which they are primarily licensed to serve." APTS and PBS argue that stations should have

the option of making announcements regarding the online public file on their Web sites without having to also make an on-air announcement. APTS and PBS argue that on-air announcements are ineffective in informing the public because they are fleeting and might not reach all individuals within the community, whereas a notice on the station's Web site is more likely to be found by persons who are interested in accessing an online public file and can provide more detail. We are persuaded that providing information on a station's Web site about the existence and location of the online public file is a better means of ensuring that all viewers know about the availability of the online public file than requiring occasional on-air announcements. Stations will, however be required to revise their on-air pre- and post-filing renewal announcements to reflect the availability of a station's renewal application on the Commission's Web site, as reflected in Appendix A of the *Second Report and Order*.

109. We adopt the tentative conclusion that stations that have Web sites be required to place a link to the online public file on their home page. Common Frequency supports the proposal, and no commenter opposed it. Although we have concluded that posting station information to an online public file hosted by the Commission will make the information easily accessible by viewers, we want to ensure that those viewers who seek such information on a station's Web site are directed to the online public file, particularly since stations will not be required to broadcast on-air announcements regarding the change in location of their public file. In lieu of requiring stations to announce on their Web sites the availability of their correspondence files at their main studios, we will include language in the online public file that directs the public to the station's main studio to access letters and email from the public.

110. We also adopt the *FNPRM*'s proposed requirement that stations that have Web sites include on their home page contact information for a station representative that can assist any person with disabilities with issues related to the content of the public files. We note that if stations receive comments about the accessibility of the online public file system, it should direct those questions and concerns to the Commission. PIPAC noted that for a person with disabilities, "the burden of searching through several pages or levels becomes an insurmountable barrier." We will adopt the proposal, which no commenter opposed.

#### G. Radio and Multichannel Video Programming Distributors

111. Consistent with the *FNPRM*, we limit this proceeding to television stations at this time. In the *FNPRM*, the Commission noted that this proceeding is directed toward television broadcasters, and that we may require radio licensees to abide by similar public file reforms at a later date. LUC Media Group asks that the Commission consider requiring radio and cable systems to also maintain an online public file. We disagree that we should extend the online public file rules to radio and cable systems (or other multichannel video programming distributors ("MVPDs")) at this time. First, because this proceeding has long focused only on television stations, we do not have a sufficient record concerning radio stations or MVPDs on which to consider possible new rules for those entities. Second, as discussed in the *FNPRM*, we anticipate that starting the online public file process with the much smaller number of television licensees, rather than with all broadcasters and MVPDs, will ease the initial implementation of the online public file.<sup>11</sup>

112. Public TV Licensees asks that we allow NCE radio stations, or at least those that are licensed to the same entity as, or under common control with, an NCE television station, to maintain their public inspection files online on the Commission's Web site on a voluntary basis. Public Television Licensees argues that this will allow radio stations that are jointly owned or operated with television stations to avoid duplicative efforts from having to maintain two separate public file systems, involving some of the same documents. It notes that with respect to the NCE rules, all of the requirements for radio stations are being included in the proposed online public file. We appreciate that commonly owned and operated radio stations may prefer an

<sup>11</sup> We reject arguments that requiring television broadcasters to place their political files online will put them at a disadvantage with respect to competitors, such as MVPDs and radio stations. As discussed above, to the extent competitors and potential advertisers have an economic incentive to access this information, they can already do so at the station; the online disclosure rule will not alter the economic incentives of these entities in any meaningful way. In any event, the Commission has discretion to implement changes in a multistep fashion. We further note that 75% of political advertising is spent on broadcast television, thus demonstrating a preference by media buyers to utilize broadcast television over other forms of available media to reach voters or customers. There is no evidence in the record to suggest that such advertising would shift to other forms of media simply because rate information, already public, will now be accessible online.

early transition to the online public file. In this initial phase of implementing the online public file, however, we are concerned about adding a significant number of additional entities to the universe of users. As we and the broadcasting industry gain more experience with the online public file we will revisit the possibility of allowing stations not required to use the online public file to use it on a voluntary basis. We delegate to Commission staff the authority to allow (but not require) radio stations to voluntarily post their public files at such time as staff determines that such an option is feasible and desirable; this will ensure that radio stations wishing to avail themselves of the online public file can do so promptly. We further authorize Commission staff to take into account common-ownership considerations if appropriate.

#### IV. Procedural Matters

##### A. Regulatory Flexibility Analysis

113. As required by the Regulatory Flexibility Act ("RFA"), an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Order on Reconsideration and Further Notice of Proposed Rulemaking (Further Notice)* in MB Docket 00-168. The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. We received comments from the North Carolina Association of Broadcasters *et al.* specifically directed toward the IRFA. These comments are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

##### Need for, and Objectives of, the Second Report and Order

114. One of a television broadcaster's fundamental public interest obligations is to air programming responsive to the needs and interests of its community of license. Broadcasters are afforded considerable flexibility in how they meet that obligation. Among other things, they are required to maintain a public inspection file, which gives the public access to information about the station's operations. The goal of this *Second Report and Order* is to modernize this public inspection file requirement, making the public file information more accessible to members of the public who cannot visit a station during business hours to review the public file.

115. The *Second Report and Order* adopts rule changes that will:

- Replace the requirement that television stations maintain a paper

public file at their main studios with a requirement to submit documents for inclusion in an online public file, including the political file, to be hosted by the Commission;

- Reduce the number of documents that television stations would be required to upload to an online public file, by automatically linking to information already collected by the Commission;
- Streamline the information required to be kept in the online file, such as by excluding letters and emails from the public; and
- Give the online public file a uniform organizational structure to allow consumers to more easily navigate the public files.

##### Legal Basis

116. The proposed action is authorized pursuant to Sections 1, 2, 4(i), 303, and 405 of the Communications Act, 47 U.S.C. 151, 152, 154(i), 303, and 405.

##### Summary of Significant Issues Raised by Public Comments in Response to the IRFA

117. In the IRFA, we stated that our purpose was to ensure that any changes to applicable rules would impose only minimal adverse impact on small entities. We also solicited comments on alternatives to the proposed rules that would minimize the impact that any changes to our rules might have on small entities. In their comments, North Carolina Association of Broadcasters *et al.* states that the IRFA has not "fully acknowledged, much less actually considered and developed any data to evaluate, the economic impacts of its proposals to require broadcasters to upload their political files to the FCC's servers and to require broadcasters to report all sponsorship identifications in the online public file." The North Carolina Association of Broadcasters *et al.* also states that "the Commission has underestimated the burden of creating, updating, and maintaining these materials", and has not analyzed the costs to the Commission, which it claims will "undoubtedly" be borne by small businesses via increased regulatory fees.

118. We disagree with these claims. The *FNPRM* and *Second Report and Order*, including the IRFA and this FRFA, consider the impacts of this revised recordkeeping requirement. Section III.B. of the *Second Report and Order* discusses how broadcasters' initial costs of compliance are minimized, and how the online public file will ultimately lead to cost savings. This section discusses the Commission's

cost analysis, including our determination that broadcaster's initial costs of compliance to upload their existing public file will average from \$80 to \$400 per station. We understand that North Carolina Association of Broadcasters *et al.* disagrees with our evaluation of the burdens that will be placed upon broadcasters in order to comply with these revised recordkeeping requirements as discussed in the *FNPRM*. Those arguments are considered in this *Second Report and Order*. We also disagree with North Carolina Association of Broadcasters *et al.*'s assertion that this Regulatory Flexibility Analysis must more fully consider costs to the Commission. We find that such a claim by the Association is based on purely speculative, and therefore spurious, grounds. In making the determinations reflected in the *Second Report and Order*, we have considered the impact of our actions on small entities, which is the requirement of the Regulatory Flexibility Act. In any event, the Commission is taking steps in this *Second Report and Order* to minimize burdens on small entities, by undertaking the automatic posting of several items that are required to be placed in the online public file, as discussed in Section E, *supra*. In addition, the Commission declined to adopt the proposal that stations report all sponsorship identifications, as discussed by the North Carolina Association of Broadcasters, and shared services agreements, along with weekly on-air announcements. Also, the Commission is providing an exemption from uploading the political file to all stations that are not in the top 50 DMAs and all stations not affiliated with the top four national television broadcast networks, regardless of the size of the market they serve, until July 1, 2014. This will enable small market and non-affiliated broadcasters to have two additional years to familiarize themselves with the online filing requirements before they need to begin uploading their political files on a going-forward basis.

##### Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

119. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term



“small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

120. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$14.0 million in annual receipts. Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.” The Commission has estimated the number of licensed commercial television stations to be 1,390. According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations in the United States have revenues of \$14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational (“NCE”) television stations to be 391. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

121. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our

estimates of small businesses to which they apply may be over-inclusive to this extent.

#### Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

122. The rule changes adopted in the *Second Report and Order* affect reporting, recordkeeping, or other compliance requirements. Television broadcasters are currently required to maintain a copy of their public inspection files at their main studios. The *Second Report and Order* requires stations to replace that requirement with a requirement to submit documents for inclusion in an online public file, including the political file, to be hosted on the Commission’s Web site. Items in the public file that must also be filed with the Commission, including FCC authorizations, applications and related materials, contour maps, ownership reports and related materials, portions of the equal employment opportunity file, the public and broadcasting manual, children’s television programming reports (Form 398), and DTV transition education reports (Form 388), will be automatically imported into the station’s online public file. Television stations will only be responsible for uploading and maintaining items that are not required to be filed with the Commission under any other rule. The *Second Report and Order* also excludes some items from the online public file requirement, such as the existing political file and letters and emails from the public, which will continue to be maintained at the station, and also declines to add other items to the online public file requirement, including sponsorship identifications and shared services agreements, and weekly announcements of the existence of the public file.

#### Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

123. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

124. The *Second Report and Order* seeks to minimize and modernize reporting requirements on all television broadcasters, by having the Commission host the online public file. The previous *Report and Order* in this proceeding, which has been vacated, required stations to host their own public file. Having the Commission host the public file will ease the administrative burdens on all broadcasters. More than one-third of the required contents of the public file already have to be filed with the Commission, and the *Second Report and Order* requires the Commission to import and update that information, creating efficiencies for broadcasters. North Carolina Association of Broadcasters *et al.* note that the estimate for the proportion of the public file that is already filed with the Commission is based on categories of filings, and not the overall amount of paperwork that needs to be filed.

125. Given the wide variations of most public files, we are not able to estimate the precise decrease in burdens that each station will undergo by no longer being responsible for placing in the public file items that are already filed by the Commission. But regardless whether the decrease in burdens is measured by category or by overall amount of paperwork, every station will have its burdens reduced by eliminating this duplicative requirement. We also understand that all stations will have an increased burden for the initial transition period from the paper public file to an online public file. We do not believe that this effort will be unduly burdensome on small entities, and we believe that any such burdens are trumped by the increased efficiencies that will result from such a transition.

126. In any event, the *Second Report and Order* does not require any station to upload its existing political files, instead allowing stations to retain such materials at the station until those files expire after their two year retention period. All stations will only be required to upload political file material on a going-forward basis. In addition, the Commission is exempting all stations that are not in the top 50 DMAs and all stations not affiliated with the top four national television broadcast networks, regardless of the size of the market they serve, from having to post new political file materials online until July 1, 2014 from including their political file material in the online public file. After that date, those stations will be required to upload new political file material on a going-forward basis. This will enable non-affiliated broadcasters and smaller market broadcasters to have additional time to

familiarize themselves with the online filing requirements before they need to begin uploading their political files.

127. Overall, in proposing rules governing an online public file requirement, we believe that we have appropriately balanced the interests of the public against the interests of the entities who will be subject to the rules, including those that are smaller entities.

#### Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

128. None.

#### B. Paperwork Reduction Act Analysis

129. This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995.<sup>12</sup> The Commission previously sought comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 or fewer employees.

130. The Commission will send a copy of this *Second Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

#### V. Ordering Clauses

131. Accordingly, *It is ordered* that, pursuant to the authority contained in sections 1, 2, 4(i), 303, 307, and 315 of the Communications Act, 47 U.S.C. 151, 152, 154(i), 303, 307, 315, this *Second Report and Order* is adopted.

132. *It is further ordered* that the requirement that stations place their new public inspection file documents on the Commission-hosted online public file shall be effective 30 days after the Commission publishes a notice in the **Federal Register** announcing OMB approval. Stations will be responsible for placing existing public file documents into the Commission-hosted online public file, with the exception of letters and emails from the public and the existing political file, as required by this *Second Report and Order*, within six months after the Commission publishes a notice in the **Federal Register** announcing OMB approval. Until July 1, 2014, stations not

in the top 50 DMAs and all stations not affiliated with the top four networks, regardless of the size of the market they serve, are exempt from the requirement, under 47 CFR 73.3526(b)(3) and 73.3527(b)(3), of filing their political file online.

133. *It is further ordered* that the proceeding in MM Docket No. 00–44 is terminated.

134. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects in 47 CFR Part 73

Television broadcasting.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

#### Final Rules

For the reasons stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

#### PART 73—RADIO BROADCAST SERVICES

■ 1. The Authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 307, and 554.

■ 2. Amend § 73.1212 by revising paragraph (e) to read as follows:

#### § 73.1212 Sponsorship identification; list retention; related requirements.

\* \* \* \* \*

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person or

persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, 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 at the location specified under § 73.3526. If the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under § 73.3526. Such lists shall be kept and made available for a period of two years.

\* \* \* \* \*

■ 3. Amend § 73.1943 by adding paragraph (d) to read as follows:

#### § 73.1943 Political file.

\* \* \* \* \*

(d) *Location of the file.* A television station licensee or applicant must post all of the contents added to its political file after the effective date of this paragraph in the political file component of its public file on the Commission's Web site. A television station must retain in its political file maintained at the station, at the location specified in §§ 73.3526(b) or 73.3527(b), all material required to be included in the political file and added to the file prior to the effective date of this paragraph. The online political file must be updated in the same manner as paragraph (c) of this section.

■ 4. Amend § 73.3526 by revising paragraph (b) to read as follows:

#### § 73.3526 Local public inspection file of commercial stations.

\* \* \* \* \*

(b) *Location of the file.* The public inspection file shall be located as follows:

(1) For radio licensees, a hard copy of the public inspection file shall be maintained at the main studio of the station. For television licensees, letters and emails from the public, as required by paragraph (e)(9) of this section, shall be maintained at the main studio of the station. An applicant for a new station or change of community shall maintain its file at an accessible place in the

<sup>12</sup> Public Law 104–13. The Commission previously sought comment on these proposals. See 76 FR 72144 (Nov. 22, 2011).

proposed community of license or at its proposed main studio.

(2) A television station licensee or applicant shall place the contents required by paragraph (e) of this section of its public inspection file on the Commission's Web site, with the exception of letters and emails from the public as required by paragraph (e)(9) of this section, which shall be retained at the station in the manner discussed in paragraph (b)(1) of this section; and the political file as required by paragraph (e)(6) of this section, as discussed in paragraph (b)(3) of this section. A station must provide a link to the public inspection file hosted on the Commission's Web site from the home page of its own Web site, if the station has a Web site, and provide contact information on its Web site for a station representative that can assist any person with disabilities with issues related to the content of the public files. A station also is required to include in the online public file the station's main studio address and telephone number, and the email address of the station's designated contact for questions about the public file. To the extent this section refers to the local public inspection file, it refers to the public file of an individual station, which is either maintained at the station or on the Commission's Web site, depending upon where the documents are required to be maintained under the Commission's rules.

(3) A television station licensee or applicant shall place the contents required by paragraph (e)(6) of this section of its political inspection file on the Commission's Web site. Political inspection file material in existence 30 days after the effective date of this provision shall continue to be retained at the station in the manner discussed in paragraph (b)(1) of this section until the end of its retention period. Any station not in the top 50 DMAs, and any station not affiliated with one of the top four broadcast networks, regardless of the size of the market it serves, shall continue to retain the political file at the station in the manner discussed in paragraph (b)(1) of this section until July 1, 2014. For these stations, effective July 1, 2014, any new political file material shall be placed on the Commission's Web site, while the material in the political file as of July 1, 2014, if not placed on the Commission's Web site, shall continue to be retained at the station in the manner discussed in paragraph (b)(1) of this section until the end of its retention period. However, any station that is not required to place its political file on the Commission's Web site before July 1, 2014 may choose

to do so, instead of retaining the political file at the station in the manner discussed in paragraph (b)(1) of this section.

(4) The Commission will automatically link the following items to the electronic version of all licensee and applicant public inspection files, to the extent that the Commission has these items electronically: authorizations, applications, contour maps; ownership reports and related materials; portions of the Equal Employment Opportunity file held by the Commission; "The Public and Broadcasting"; Letters of Inquiry and other investigative information requests from the Commission, unless otherwise directed by the inquiry itself; Children's television programming reports; and DTV transition education reports. In the event that the online public file does not reflect such required information, the licensee will be responsible for posting such material.

\* \* \* \* \*

■ 5. Amend § 73.3527 by revising paragraph (b) to read as follows:

**§ 73.3527 Local public inspection file of noncommercial educational stations.**

\* \* \* \* \*

(b) *Location of the file.* The public inspection file shall be located as follows:

(1) For radio licensees, a hard copy of the public inspection file shall be maintained at the main studio of the station. An applicant for a new station or change of community shall maintain its file at an accessible place in the proposed community of license or at its proposed main studio.

(2) A noncommercial educational television station licensee or applicant shall place the contents required by paragraph (e) of this section of its public inspection file on the Commission's Web site, with the exception of the political file as required by paragraph (e)(5) of this section, which may be retained at the station in the manner discussed in paragraph (b)(1) of this section until July 1, 2014. Effective July 1, 2014, any new political file material shall be placed on the Commission's Web site, while the material in the political file as of July 1, 2014, if not placed on the Commission's Web site, shall continue to be retained at the station in the manner discussed in paragraph (b)(1) of this section until the end of its retention period. However, any noncommercial educational station that is not required to place its political file on the Commission's Web site before July 1, 2014 may choose to do so, instead of retaining the political file at the station in the manner discussed in

paragraph (b)(1) of this section. A station must provide a link to the public inspection file hosted on the Commission's Web site from the home page of its own Web site, if the station has a Web site, and provide contact information for a station representative on its Web site that can assist any person with disabilities with issues related to the content of the public files. A station also is required to include in the online public file the station's main studio address and telephone number, and the email address of the station's designated contact for questions about the public file. To the extent this section refers to the local public inspection file, it refers to the public file of an individual station, which is either maintained at the station or on the Commission's Web site, depending upon where the documents are required to be maintained under the Commission's rules.

(3) The Commission will automatically link the following items to the electronic version of all licensee and applicant public inspection files, to the extent that the Commission has these items electronically: Authorizations; applications; contour maps; ownership reports and related materials; portions of the Equal Employment Opportunity file held by the Commission; and "The Public and Broadcasting".

\* \* \* \* \*

■ 6. Amend § 73.3580 by revising paragraphs (d)(4)(i) introductory text and script and (d)(4)(ii) introductory text and script to read as follows:

**§ 73.3580 Local public notice of filing of broadcast applications.**

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

(i) *Pre-filing announcements.* During the period and beginning on the first day of the sixth calendar month prior to the expiration of the license, and continuing to the date on which the application is filed, the following announcement shall be broadcast on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

*Radio announcement:* On (date of last renewal grant) (Station's call letters) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (expiration date).

Our license will expire on (date). We must file an application for renewal with the FCC (date four calendar months prior to expiration date). When filed, a copy of this application will be



available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (*period of time covered by the application*). Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (*date first day of last full calendar month prior to the month of expiration*).

Further information concerning the FCC's broadcast license renewal process is available at (*address of location of the station's public inspection file*) or may be obtained from the FCC, Washington, DC 20554.

*Television announcement:* On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).

Our license will expire on (*date*). We must file an application for renewal with the FCC (*date four calendar months prior to expiration date*). When filed, a copy of this application will be available for public inspection at [www.fcc.gov](http://www.fcc.gov). It contains information concerning this station's performance during the last (*period of time covered by the application*).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (*date first day of last full*

*calendar month prior to the month of expiration*).

Further information concerning the FCC's broadcast license renewal process is available at (*address of location of the station*) or may be obtained from the FCC, Washington, DC 20554.

\* \* \* \* \*

(ii) *Post-filing announcements.* During the period beginning on the date on which the renewal application is filed to the sixteenth day of the next to last full calendar month prior to the expiration of the license, all applications for renewal of broadcast station licenses shall broadcast the following announcement on the 1st and 16th day of each calendar month. Stations broadcasting primarily in a foreign language should broadcast the announcements in that language.

*Television announcement:* On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).

Our license will expire on (*date*). We have filed an application for renewal with the FCC.

A copy of this application is available for public inspection at [www.fcc.gov](http://www.fcc.gov). It contains information concerning this station's performance during the last (*period of time covered by application*).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (*date first day of last full*

*calendar month prior to the month of expiration*).

Further information concerning the FCC's broadcast license renewal process is available at (*address of location of the station*) or may be obtained from the FCC, Washington, DC 20554.

*Radio announcement:* On (*date of last renewal grant*) (*Station's call letters*) was granted a license by the Federal Communications Commission to serve the public interest as a public trustee until (*expiration date*).

Our license will expire on (*date*). We have filed an application for renewal with the FCC.

A copy of this application is available for public inspection during our regular business hours. It contains information concerning this station's performance during the last (*period of time covered by application*).

Individuals who wish to advise the FCC of facts relating to our renewal application and to whether this station has operated in the public interest should file comments and petitions with the FCC by (*date first day of last full calendar month prior to the month of expiration*).

Further information concerning the FCC's broadcast license renewal process is available at (*address of location of the station's public inspection file*) or may be obtained from the FCC, Washington, DC 20554.

\* \* \* \* \*

[FR Doc. 2012-11065 Filed 5-10-12; 8:45 am]

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**EXHIBIT 2:**

Reply Comments of Network Station Owners,  
MM Dkt. No. 00-168 (filed Jan. 17, 2012)

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

|                                     |   |                  |
|-------------------------------------|---|------------------|
| In the Matter of                    | ) |                  |
|                                     | ) |                  |
| Enhanced Disclosure                 | ) | MB Docket 00-168 |
| Requirements for Broadcast Licensee | ) |                  |
| Public Interest Obligations         | ) |                  |

**REPLY COMMENTS OF CBS CORPORATION, ABC TELEVISION STATIONS,  
FOX TELEVISION STATIONS, INC., NBC OWNED TELEVISION STATIONS  
AND TELEMUNDO STATIONS, AND UNIVISION TELEVISION GROUP, INC.**

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January 17, 2012

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
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**REPLY COMMENTS OF CBS CORPORATION, ABC TELEVISION STATIONS,  
FOX TELEVISION STATIONS, INC., NBC OWNED TELEVISION STATIONS  
AND TELEMUNDO STATIONS, AND UNIVISION TELEVISION GROUP, INC.**

CBS Corporation (“CBS”), ABC Television Stations, Fox Television Stations, Inc., NBC Owned Television Stations and Telemundo Stations, and Univision Television Group, Inc. (“Network Station Owners”) hereby respectfully submit their reply comments concerning the Commission’s *Further Notice of Proposed Rulemaking* (“*Further Notice*”) in the above docket, concerning the online availability of public file materials.

Although the Commission’s proposals may appear modest at first blush – and have been endorsed by non-broadcasters who will have no role in their implementation<sup>1</sup> –

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<sup>1</sup> See, e.g., *Comments of Public Airwaves Public Interest Coalition*, MB Docket 00-168 (filed December 22, 2011); *Comments of Brennan Center for Justice at NYU Law School*, MB Docket 00-168 (filed December 22, 2011); *Comments of LUC Media Group, Inc.*, MB Docket 00-168 (filed December 22, 2011) (“*LUC Media Comments*”); *Comments of U.S. Conference of Catholic Bishops*, MB Docket 00-168 (filed December 22, 2011).



several will in fact impose significant new administrative burdens on television stations.

As discussed below, those proposals should not be adopted.

### **INTRODUCTION AND SUMMARY**

On July 11, 2011, President Obama issued an executive order asking independent federal regulatory agencies to join the administration's effort to eliminate regulations that unnecessarily burden business.<sup>2</sup> In commenting on the order, which was not technically binding on the independent agencies, the Office of Management and Budget stressed that the agencies had expressed their willingness to comply, noting particularly that the Federal Communications Commission was already taking steps to eliminate burdensome rules.<sup>3</sup> In furtherance of that effort, the FCC recently requested comment on its preliminary plan for regulatory review, as well as on additional steps the Commission should take "to identify rules that should be changed, streamlined, consolidated, or removed."<sup>4</sup>

The Commission's commitment to a review of its existing rules to determine their continued necessity is to be applauded. However, it is equally critical that the FCC searchingly scrutinize new proposals that would add to the already formidable compliance obligations that encumber broadcasters. In so doing, the Commission should

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<sup>2</sup> See, Lisa Rein, "Obama order calls for agencies to cut red tape," *The Washington Post*, July 14, 2011, p.B04; Jared A. Favole, "New Order to Nix Bad Regulations," *The Wall Street Journal*, July 11, 2011.

<sup>3</sup> See, Jared A. Favole, "New Order to Nix Bad Regulations," *The Wall Street Journal*, July 11, 2011.

<sup>4</sup> See, *Public Notice*, "Commission Seeks Comment on Preliminary Plan for Retrospective Analysis of Existing Rules," DA 11-2002, GC Docket No. 11-199 (released December 8, 2011).

consider not only the discrete burden of each individual new requirement, but the cumulative effect of an accretion of mandates that seems ever to increase, the agency's periodic homage to deregulatory goals notwithstanding.

Within just the last year, either the Commission or the Congress has imposed on broadcasters new and detailed obligations with respect to the loudness of commercials,<sup>5</sup> captioning of television programming that appears online,<sup>6</sup> and the narration of video portions of television programs for the visually impaired.<sup>7</sup> The objectives of each of these mandates may be laudable, but their complexity is reflected by the multiple meetings that have already taken place between broadcasters and Commission staff concerning the details of compliance. All of these requirements are, of course, in addition to the panoply of existing regulations and pending Commission proposals that would impose new obligations on broadcasters with respect to "localism"<sup>8</sup> and the categorization and reporting of their programming.<sup>9</sup>

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<sup>5</sup> See, *Report and Order*, MB Docket No. 11-93, *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, 2011 FCC LEXIS 5171 (released December 13, 2011).

<sup>6</sup> See, *Notice of Proposed Rulemaking*, MB Docket No. 11-154, *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 13734 (2011).

<sup>7</sup> See, *Report and Order*, MB Docket No. 11-43, *In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, 26 FCC Rcd 11847 (2011).

<sup>8</sup> See, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, MB Docket No. 04-233, 23 FCC Rcd 1324 (2008).

<sup>9</sup> See, *Notice of Inquiry*, MB Docket No. 11-189, *Standardizing Program Reporting Requirements for Broadcast Licensees*, 2011 FCC LEXIS 4629 (released November 14, 2011); *Report and Order*, MM Docket No. 00-168, *Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd 1274 (2007).

This is the context, we respectfully submit, in which the Commission should consider its proposals to adopt new requirements as to the maintenance of broadcasters' public inspection files. These proposals are badly out of step with the spirit of President Obama's deregulatory mandate.

Given that the *Further Notice* contemplates that the FCC will host those portions of the file that broadcasters will be required to make available online, the Network Station Owners have no general objection to this aspect of the Commission's proposal. However, we submit that the Commission was correct when it found, in last visiting this subject just four years ago, that the posting requirement should not apply to political file materials. While the burden of making political file materials immediately available on the Internet may seem minimal to those framing the requirement, we submit it would be decidedly non-trivial to the station account executives on whom the task would fall, and who are already more than fully occupied during frenetic campaign periods with taking orders and revisions to orders, monitoring lowest unit rate and effective selling level, dealing with preemptions and make goods, and calculating, issuing and recording credits and rebates. Moreover, making political file information –including price information – easily accessible online to advertising agencies, other television stations and cable competitors would put broadcasters at a distinct negotiating disadvantage.

Requiring broadcasters to place a notation in the public file (and upload it to the Internet) every time a sponsor identification announcement is necessary would also be

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(“Enhanced Disclosure Order”), vacated, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, MB Docket No. 00-168, FCC 11-162 (released October 27, 2011).



vastly more burdensome than it might immediately appear. Pursuant to contractual and other legal requirements, such announcements are routinely included in credits by the producers and distributors of television programs when goods or services have been provided without charge for use in connection with a television program on the understanding that the broadcast will include some audio or visual “mention,” usually fleeting, of the product or service in question. To require station personnel to make a notation in the public file of all of these garden-variety arrangements, which are fully disclosed in end credits, would entail a tremendous amount of paperwork for no general public benefit.

The Commission should adhere to its previous and correct decision declining to mandate that viewer correspondence be posted online, without adopting purposeless requirements that such correspondence be counted or categorized. Nor should the list of materials required to be placed in the public file be expanded to include local news-sharing agreements, an action that would imply FCC disapproval of such entirely legitimate arrangements without serving any legitimate regulatory objective.

Finally, while Network Station Owners have no objection to the Commission’s making most public file materials available on the Internet, we oppose the suggestion in the *Further Notice* that broadcasters may ultimately be required to submit these materials to the Commission in “machine-readable,” “searchable” or “native” formats such as Microsoft Word or Excel. In our view, the fact that having a searchable data base of a station’s public file materials may be convenient to academic researchers -- or to advocacy groups eager to litigate claims that broadcasters are not serving the public interest as they perceive it -- is not sufficient to justify saddling broadcasters with the

additional costs of converting documents from the form in which they exist to formats that would ideally serve the interests of such parties.

## DISCUSSION

1. **The Commission Should Not Require Broadcasters to Post Their Political Files to the Internet.**

A. **A requirement to place the political file online would unduly burden broadcasters.**

Only four years ago, the Commission decided to exempt political file materials from a general requirement that licensees post their public inspection files on the Internet.<sup>10</sup> Quoting from its earlier decision not to require broadcasters to honor telephone requests for copies of political file materials – as was required as to other components of the public file for stations having their main studios outside their communities – the Commission noted that the information kept in the political file was “in flux throughout each day of the campaign.”<sup>11</sup> The FCC found the same concern

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<sup>10</sup> The rule concerning Internet posting of the public file was adopted as part of the Commission’s *Enhanced Disclosure Order*, *supra*, 23 FCC Red 1274, which also promulgated extensive requirements for quarterly reporting by licensees on their programming. The *Enhanced Disclosure Order* was the subject of multiple petitions for FCC reconsideration, as well as a court challenge filed by broadcasters with the United States Court of Appeals for the D.C. Circuit. Accordingly, the requirement for placing a station’s public inspection file on the Internet never went into effect, and was ultimately vacated, together with other aspects of the *Enhanced Disclosure Order*, by the Commission order giving rise to the instant proceeding. *Order on Reconsideration and Further Notice of Proposed Rulemaking*, MB Docket No. 00-168, FCC 11-162, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations* (released October 27, 2011) (“*Further Notice*”).

<sup>11</sup> *Enhanced Disclosure Order*, *supra*, 23 FCC Red. at 1282, quoting, *Report and Order*, MM Docket No. 97-138, *Review of the Commission's Rules Regarding the Main Studio*



applicable to a possible requirement that licensees make political file materials available online, observing that “if the volume of material is too great, the station may not be able to update the Internet file quickly enough.” In this regard, the Commission noted that its rules required that records be placed in the political file “immediately” absent unusual circumstances. This requirement, the Commission recognized, could require “multiple updates each day during peak periods of the election season.” Finding that the “[r]esources available to political candidates likely provide them with greater access to the station . . . [than] . . . members of the general public,” the Commission concluded that “the burden of placing this material on the Internet outweighs the benefits.”<sup>12</sup> Notably, the FCC’s calculus was not altered by the possibility that Internet access “would obviate the need for physical access to each station,” thereby “free[ing] station personnel from having to assist candidates and their political committees.”<sup>13</sup>

The *Further Notice* cites little reason for its departure from this analysis. The *Further Notice* observes that “the vast majority of television stations [now] handle political advertising transactions electronically,” but fails to explicate the relevance of this fact to the issue of burden.<sup>14</sup> Nor is it at all clear what significance the Commission attaches in this context to its statement that the “purchase of advertising time and the receipt of equal time requests would continue to be handled by the station.”<sup>15</sup> The

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*and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691 (1998), *recon. granted in part*, 14 FCC Rcd 11113 (1999).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Further Notice* at ¶ 23.

<sup>15</sup> *Id.*

*Further Notice* also fails to elucidate why the Commission now finds persuasive the assertion of the Public Interest, Public Airwaves Coalition (“PIPAC”) that “placing political file information online will reduce the burden on broadcasters”<sup>16</sup> by obviating the need for “multiple daily in-person requests to access . . . information,” when it so recently found this consideration of little significance.<sup>17</sup>

We respectfully submit that the Commission reached the correct conclusion as to the question of burden the first time. To assert that station account executives will be untroubled by the necessity of scanning and uploading voluminous paper to the Commission’s web site on a same-day basis is to betray a lack of familiarity with their work during election seasons. At the same time as the Commission’s proposal would have these personnel posting documents to the Internet, they are dealing with urgent demands for access from political time buyers, handling changes to orders and copy, reviewing stations logs to ensure candidates have received the station’s lowest unit rate for multiple classes of time, attending to preemptions and make goods (which must of course be recorded in the file), and arranging for rebates, credits, and the reinvestment of proceeds (which also require public file notations). During campaign periods, it is not uncommon for political sales personnel to work late into the evening to ensure that the day’s change orders, preemptions, make goods and credits due to lowest unit charge discrepancies are correctly reflected in the station’s *on-site* political file. The additional step of scanning and uploading political file entries, which will of necessity require the input of CDBS identification numbers and passwords – as well as calls to IT personnel

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<sup>16</sup> *Id.* at ¶ 22.

<sup>17</sup> *Enhanced Disclosure Order, supra*, 23 FCC Red. at 1282.

and Commission staff for assistance when the inevitable difficulties with upload occur – will unquestionably be burdensome. The Commission’s mandate that the file be updated “immediately” – together with its expectation that political file information will be uploaded “in an organized manner” so that “the sheer number of filings” does not make it “difficult to navigate”<sup>18</sup> – can only add to the stressfulness of the process for the people actually doing the job.

None of this is necessary to meet the legitimate needs of either candidates or the public. It is already the practice of many television stations to voluntarily provide candidate representatives with “dates and dollars” information – that is, the amount of money an opposing candidate has spent on the station during a particular period -- over the phone. This competitive information is usually sufficient for a political time buyer to make immediate purchasing decisions. Thus, while stations generally do not make the exact programs, dayparts and frequencies purchased by an opponent available in response to telephone inquiries, “dates and dollars” information allows political time buyers (who obviously have on hand the station’s pricing information) to make a very good estimate as to what the opposition has bought. The tasks for which more detailed information is necessary – for instance, auditing the fairness of rotations afforded to competing candidates and compliance with the lowest unit rate law – are tasks for the post-election period, and for which requiring a visit to the station by industry professionals does not seem unreasonable.<sup>19</sup>

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<sup>18</sup> *Further Notice* at ¶ 24.

<sup>19</sup> In stressing the need for “immediacy” in the uploading of a station’s political file, the *Further Notice* observes that “a candidate has only seven days from the date of his opponent’s appearance to request equal opportunities.” *Further Notice* at ¶ 23. It is the experience of Network Station Owners that requests for “equal opportunities” – with



Network Station Owners would have no objection to a rule requiring that “dates and dollars” information be provided to candidate representatives over the phone during campaign periods. Such information should suffice to serve the immediate requirements of those with the greatest need for real time data about political purchases of advertising time. But it may be questioned whether any rule at all is necessary to accomplish that end. Certainly there has been no groundswell among political time buyers to the effect that they cannot get from television stations the information they need to make intelligent purchasing decisions without burdensome visits to station public files. Indeed, we are aware of no recent complaints made to the FCC by advertising agencies in this regard, and only one political agency bothered to file comments supporting the Commission’s proposal in this proceeding.<sup>20</sup>

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regard to both paid and unpaid candidate appearances – have grown increasingly rare. In purchasing time, federal candidates of course have resort to the “reasonable access” law, thus making requests to match what their opponent has purchased largely irrelevant. And in almost all instances, state and local candidates also make their inventory requests without reference to what has been sold to opponents in particular programs and dayparts. As to unpaid candidate appearances in station programming, the Commission’s expansive interpretation of the news exemptions to Section 315 of the Communications Act have mostly made “equal time” demands a thing of the past. In this connection, we note that since 2004 there have been only three reported Commission decisions concerning “equal opportunities” requests by political candidates, which respectively involved a presidential debate, an appearance of a gubernatorial candidate on “The Tonight Show with Jay Leno,” and an appearance made pursuant to a station gift of free time to various Republican candidates. *See, Emergency Complaint of Dennis J. Kucinich*, 23 FCC Rcd 482 (2008); *Complaint of Angelides For Governor Campaign*, 21 FCC Rcd 11919 (2006); *Complaint of Nicole Parra Against Pappas Telecasting Companies*, 19 FCC Rcd 21944 (2004). In none of these cases was there any indication that the complainant learned of his opponent’s appearance by inspecting the station’s political file. The Commission should not place additional burdens on broadcasters to aid candidates in the enforcement of a rule that has fallen into desuetude of its own weight.

<sup>20</sup>

That shop, LUC Media Group, Inc. (“LUC Media”), was founded by lawyers who made something of a cottage-industry of bringing complaints against broadcasters for lowest unit charge violations in the early 1990s, prior to the FCC’s clarification of various

Of course, researchers and scholars – and indeed average citizens – also have a legitimate interest in political spending. But their need for the information is not immediate and can be satisfied by visiting the station either during or after the election campaign. If it is objected that this is an inconvenience that such persons cannot rightly be expected to bear, we would observe that research by its nature requires the expenditure of effort and that many primary sources indispensable to serious scholarship are not

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aspects of that complex law. See, Amy Keller, *Roll Call*, May 30, 1996: The Insider, “Too busy to sue,” *Electronic Media*, February 12, 1996; Doug Halonen, “More stations face suit over political ads,” *Electronic Media*, September 16, 1991; *Report and Order*, MM Docket 91-168, *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, *Memorandum and Order on Reconsideration*, 7 FCC Rcd 4611 (1992). Notably, the reasons cited by LUC Media in support of a requirement that the political file be posted on the Internet – i.e., that the file contains information “relevant to determining whether candidates are getting favorable or unfavorable treatment in the placement and cost of spots” -- involve issues that will generally be too complex for resolution during a campaign and are best handled by a post-election audit. *LUC Media Comments* at 3; see discussion at page 10, *supra*. Moreover, despite LUC Media’s cynical assertion that broadcasters only object to a posting requirement “because they make money by denying public access to their political file,” the facts seem more in accord with its grudging acknowledgement that since the 1990s “some stations . . . have stopped trying to play games with their advertising inventory and pricing when it comes to candidate advertising.” To be sure, LUC Media states that “some still do try,” but a comprehensive Lexis search (see Exhibit A for search terms utilized) covering the period from January 1, 2004 to the present turns up only one instance in which LUC Media has had occasion to complain to the FCC about the political broadcast practices of *any* station. (That case involved an AM radio station that provided *no* political file materials to an LUC Media representative who visited the station, see *Letter to William M. Rodgers et al.*, 21 FCC Rcd 3451(2006).) Thus, for all of the aspersions it casts on broadcasters’ integrity and good faith, LUC Media provides no concrete justification for the adoption of new and burdensome paperwork requirements.



available online. We respectfully submit that, absent compelling public necessity, it is not the province of this Commission to promote academic research at the cost of unduly burdening the conduct of ordinary business by its regulated industries.

We also note the role of the press as surrogates for the public in providing information about campaign spending. Like political advertising agencies, news organizations have the resources to make a certain amount of leg work eminently practical. Reporters, we submit, are better positioned to visit a station's public file in the course of reporting the news – which is their primary professional function – than are television sales executives to perform additional clerical tasks unrelated to their main job, which is to sell advertising and service the needs of their clients.

In its evaluation of proposals that would impose new duties on broadcasters, the Commission's inquiry should not be whether the new regulations might provide some benefit to somebody, but whether the public interest so compellingly requires the proposed rules as to outweigh any additional burden on licensees. With respect to the placement of political file information on the Internet, we believe the answer to this question is clearly in the negative.

**B. A requirement to place the political file online would make sensitive price information easily available to advertising agencies and competing stations, thus putting broadcasters at a negotiating disadvantage and facilitating parallelism in pricing.**

In addition to the unwarranted burden it would impose on sales personnel, requiring that the entire political file be placed online would have another highly negative effect – it would make sensitive price information available to a television station's customers and competitors at the click of a mouse. This proprietary information would

be available to commercial as well as political advertisers, to other local stations, and to competing advertising media such as cable operators, newspapers and web sites.

Additionally, the online posting of such sensitive pricing information would raise potential antitrust issues. One must ask: If government authorities would look askance, as they surely would, at sales executives from competing television stations gathering in a conference room to share this information, why would the government require that the same information be made so easily accessible online?

The political file will, of course, contain information on the station's lowest rates for particular programs and rotations. But since the Commission's rules also provide that stations may offer candidates a non-preemptible class of time at a discount from their effective selling levels – that is, the going rate for a particular spot at the time of purchase – information in the file as to the prices paid by candidates for non-preemptible time will provide considerable information as to the rates a station will accept for a commercial in a given daypart at a particular time. And since preemption and make-good information must also be kept in the political file, a time buyer will likewise be able to garner valuable data concerning the rates at which a spot is likely to clear. While licensees are required by Commission rule to provide good-faith estimates of the probability of clearance at various rates to legally-qualified candidates, they are not required to be so accommodating of other advertisers.

Thus, in addition to making information regarding political sales more easily available to candidate representatives, as the Commission intends, the proposed rule would afford a significant intelligence advantage to one side in private commercial negotiations. Armed with political file information, the shrewd time buyer's ability to

drive the hardest possible bargain would be greatly enhanced by data allowing him to estimate the station's bottom line. One poker player would, in effect, have had at least a partial glance at the other's hand.

Television stations would also have competitors' rates at their fingertips. Such information might be used to undersell the competition, but might also serve as a signal to a station that it was pricing its inventory too cheaply. Readily available political file information would give television stations a convenient and completely legal way to act with "conscious parallelism" to put a floor under rates during election seasons. The Commission's proposal would thus seem at odds with the commonsense view that the sharing of price information among rival sellers is unhealthy for competition.

The Commission's proposed rule would also advantage certain industry segments at the expense of others. Cable systems, which have the technological ability to target particular geographic areas more narrowly than television stations – and thus may be particularly attractive to candidates seeking to reach swing voters – are making an aggressive push for a greater share of the political ad market.<sup>21</sup> But although cable systems, like television stations, must keep information as to candidate purchases in their public inspection files, they are not included in the Commission's proposed requirement that this information be made available online. System executives seeking to persuade political time buyers to move more of their dollars from broadcast to cable will thus have

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<sup>21</sup> See, e.g., "Cable Campaigns For Candidate Cash; Local stations expect to retain lion's share of spending," *Broadcasting and Cable*, October 3, 2011; Holly Sanders Ware, "Cable sees ad-growth potential in midterms," *New York Post*, June 28, 2010; David Lieberman, "Fight is on for campaign TV ad dollars," *USA Today*, August 6, 2007.



extensive information about their competitors' pricing, while their counterparts at television stations will not have similar data.

Of course, stations' public files are just that – public – and all of this information could be obtained by determined commercial clients and competitors by making a visit to a station's studio. But it is one thing to travel to a station's office across town during a hectic business day – a trip that would have to be frequently repeated to keep current with rapidly changing market conditions – and quite another to have the desired information instantly available without leaving one's desk. The former scenario places practical limits on the use of the political file for purposes not intended by the rule; the latter almost guarantees that consulting this information for business reasons unrelated to any election campaign will soon become routine.

The wholesale disclosure of timely proprietary information is unnecessary to satisfy either the immediate practical needs of candidate representatives or the public's important (but less immediate) interest in having the fullest information possible about a vital part of the political process. The disclosure of "dates and dollars" information over the phone -- together with the access to full public file information that will remain available to ad agencies, journalists and members of the public at the station -- should certainly be sufficient for these purposes. The Commission should exempt political file materials from any general rule requiring that stations' public files be posted on the Internet.



2. **Requiring Television Stations to File Notations Regarding Sponsor Identification Announcements in Their Public Files Would Greatly Burden Broadcasters for No Significant Public Benefit.**

The practice of paid sponsorship for the inclusion of certain on-air material in broadcast programs dates back to the dawn of radio, as does government regulation requiring that such sponsorship be identified on-air.<sup>22</sup> End credits in television programs reflecting these longstanding practices are exceedingly common.

A hotel allows a scene in a dramatic series to be shot on its premises with the understanding that the program will include an establishing shot of the hotel's façade; an airline provides transportation for the cast and crew of a reality show in exchange for the inclusion of a shot of its plane taking off; a computer manufacturer that provides equipment to be featured on the set of a show with a high-tech theme asks for and is granted a brief shot of one of its laptops with the company's logo visible. Each of these video "mentions" will require sponsor identification – a so-called "317 announcement." Even where there is no explicit understanding that there will be an identification of the product or service in the program – and a sponsor-identification announcement would therefore be unnecessary as to a "reasonably related" use of the product in the broadcast – an end credit for the supplier will often be included as a courtesy or out of an excess of legal caution.

The Commission now proposes that these commonplace transactions be noted in the public file, saying that it "do[es] not propose to limit disclosure to certain types of programming, but to include all sponsorships that require a special on-air disclosure."<sup>23</sup>

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<sup>22</sup> See, *Applicability of Sponsorship Identification Rules*, 40 Fed Reg. No. 175 (1975).

<sup>23</sup> *Further Notice* at ¶ 34.

This would be vastly burdensome for television stations. The kinds of disclosures discussed above are – quite naturally– generally handled by the *producers* of both network and first-run syndicated programming that constitute the bulk of non-news television station programming. They are the ones who are aware of the product placements that their shows contain, and stations quite properly rely on their program suppliers to include the necessary disclosures in the programs they provide. A public file requirement would necessitate having a station employee fast-forward to the end of virtually every non-local program aired by the station in order to view the sponsor identification announcements that appear there, note them down, and fill out a form for placement in the file. Or, in the alternative, stations would seek to pass the burden on to networks and syndicators, which are not entities subject to direct Commission regulation.

The task would be complicated by the fact, noted above, that not all end credits that appear to be sponsor identification announcements reflect the kind of *quid pro quo* that the statute is intended to reach. The FCC has made clear, for example, that Section 317 does not require sponsorship identification of products supplied for free for use in a broadcast “where there is neither payment in consideration for broadcast exposure of the service or property, nor an agreement for identification of such service or property beyond its mere use on the program.”<sup>24</sup> In examples used to illustrate this principle, the Commission has indicated that no 317 announcement would be required where a refrigerator was furnished for free for inclusion on a set, a Coca-Cola dispenser was provided without consideration for use in a drugstore scene, or a car was loaned to a production without cost for filming of an automobile chase. Yet courtesy credits in such

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<sup>24</sup> *Applicability of Sponsorship Identification Rules*, 40 Fed Reg. No. 175 (1975) (Illustration C et seq.).

situations are often provided – either because such a credit has been specifically requested by the provider of the product or because the broadcaster or producer has chosen to be over-inclusive with regard to 317 announcements in order to avoid consultation with lawyers or possible later second-guessing. A precise listing of credits actually mandated by Section 317 would thus require an extensive legal review of all credits included for each program to determine what should and what should not be listed.

What purpose would any of this serve? Product placements in theatrical movies are so numerous that the Commission's rules specifically *exempt* their broadcast from the sponsor identification<sup>25</sup> requirement because the required disclosures would be so extensive. Are moviegoers unaware of “by whom they are being persuaded”? And if so, how dire is the consequence?

We would venture that most adults assume that when a Coke bottle appears on the big screen, it may well be adding an element of profit, as well as verisimilitude, to the production. Those who are truly interested in the question regarding a particular product they observe in a television program can simply wait until the end of the program they are already watching and look to the credits for the desired information. This type of swift, efficient disclosure has been deemed sufficient to serve the public's interest in this information for almost a century, and neither Congress nor the FCC has ever seen a need to require that the information be placed in the public file, much less that it be posted as part of a government database. There is no basis for concluding that suddenly this longstanding procedure is inadequate. After all, how many viewers are going to log on to

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<sup>25</sup> 47 CFR § 73.1212 (h).



their computers, navigate the FCC's web site, and search a government database to find out if the United Airlines plane they just saw conveying a dramatic hero to his next adventure was expressly bargained for, when they could obtain the same information by simply waiting for the credits?

"Pay-for-play" arrangements that affect the editorial content of informational or news programming are obviously a more troubling matter, and warrant full disclosure to viewers when they occur. But the press has hardly been remiss in bringing allegations of such practices to the attention of the public,<sup>26</sup> and the Commission has been vigorous in pursuing perceived violations of disclosure requirements.<sup>27</sup> A public file requirement will not assist the average viewer in discerning when content that appears to reflect a station's editorial judgment has actually been aired at least in part due to value received. And a viewer skeptical enough to think to check the station's public file for this information is in any event unlikely to be unduly influenced by what he has just seen.

It seems clear, then, that increasing broadcasters' paperwork by requiring that 317 disclosures be noted in their public files will not benefit ordinary viewers. That being the

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<sup>26</sup> See, e.g., Paul Farhi, "FCC seeks news transparency," *The Washington Post*, January 4, 2012, p.CO1; Paul Farhi, "Is it news, or is it product placement," *The Washington Post*, December 7, 2011, p.AO1; Amy Gahrn, "FCC report: Regulations out of sync with online news media changes," CNN.com, June 10, 2011; James Rainey, "Bad news, these pitches," *Los Angeles Times*, September 15, 2010, p.D1.

<sup>27</sup> See, *In re Fox Television Stations, Inc.*, 26 FCC Rcd 9485 (2011); *In re Sonshine Family TV, Inc.*, 24 FCC Rcd 14830 (2009); *In re Comcast Corporation*, 22 FCC Rcd 17474 (2007). Our citation of these cases is intended to illustrate the vigor of the Commission's enforcement program in this area, not to indicate agreement with the legal conclusions reached by the agency in these proceedings.



case, there is insufficient basis for a new regulation that would be highly burdensome to broadcasters.

3. **The Further Notice Correctly Concludes that Viewer Mail Should Not be Made Available Online.**

Reconsidering the rule originally adopted by the Commission in 2007 requiring that viewer e-mails (as opposed to letters) be posted to the Internet, the *Further Notice* concludes that this should not be done, agreeing with the concerns expressed by broadcasters about burden and viewer privacy. This conclusion is clearly correct and the Commission should adhere to it. It should also refrain from adopting any of the new proposals regarding viewer mail referred to in the *Further Notice*.

It is questionable what purpose the existing requirement to keep viewer mail in the public file serves. Individuals and groups are capable of evaluating for themselves the quality of a station's programming and public service without reading what others have had to say. But certainly the existing requirement should not be expanded.

What, for instance, would be the point of requiring a station employee to count the number of communications received from the public for the purpose of recording the grand total in the public file? While the number would in itself be meaningless, compelling stations to compile a "brief summary" of the letters received would be even worse, because it would be very burdensome. And with all due deference to the brave new world of social media, the suggestion that stations be required to "retain" in the file comments left on sites such as Facebook borders on the absurd. Merely editing out inappropriate postings could well be a full time job.

If anything, the viewer mail requirement should be eliminated entirely. It should not be enlarged.

4. **A New Online Public File Requirement to Post All Local News Sharing Agreements Is An Unnecessary Additional Obligation on Broadcasters That Would Serve No Legitimate Regulatory Purpose.**

Noting that some licensees have begun entering into cooperative newsgathering arrangements, the *Further Notice* seeks comment on a proposal to add a new public file obligation to post all such sharing agreements.<sup>28</sup> There is no justification for such an expansion of the public file rule.

It is certainly the case that in recent years numerous news organizations have entered local news sharing agreements under which they have pooled camera crews to cover routine events, such as public officials' news conferences. Instead of each station's sending its own crew, a single crew provides footage of these events to all, thereby freeing resources to be used to cover other aspects of the same story or pursue other enterprise reporting. Similarly, stations have shared the massive cost of helicopter rental to provide a common source of aerial footage, which is used – like footage from other pooled events – as determined in each station's editorial judgment.

Immediately after referring to these cooperative newsgathering arrangements, the *Further Notice* states in a footnote that sharing agreements “can affect at [sic] the Commission's attribution rules, which define what interests are counted for purposes of applying the Commission's broadcast ownership rules.”<sup>29</sup> Although there are sharing arrangements that can have a bearing on the attribution of ownership – such as time

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<sup>28</sup> *Further Notice* at ¶ 35.

<sup>29</sup> *Id.* at n.105.

brokerage and joint sales agreements<sup>30</sup> – the Commission’s rules already require that those agreements be included in the public file.<sup>31</sup> While Network Station Owners have no objection to posting these agreements online, there is no legitimate basis for expanding the current rule to cover local newsgathering agreements. Such arrangements are lawful, have no bearing on attribution of ownership, and free station resources for original reporting rather than duplicative coverage of the same event. Contrary to PIPAC’s claim, they do not affect control of a station.<sup>32</sup>

Requiring that news sharing agreements be included in a station’s public inspection file would thus serve no proper regulatory objective of the FCC<sup>33</sup> and should not be adopted by the Commission.

**5. Broadcasters Should Not be Required to Alter the Form of Public File Documents Uploaded to the Internet.**

Recognizing that implementing the recommendations of the Commission’s *Information Needs of Communities Report*<sup>34</sup> concerning public file materials – specifically, that they be made available in “standardized, machine readable and

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<sup>30</sup> See, 47 CFR § 73.3555 (j) (2), (k).

<sup>31</sup> *Further Notice* at ¶ 35 and n. 107.

<sup>32</sup> There is, accordingly, no occasion for the raised Commission eyebrow that would be implicit in its adoption of PIPAC’s proposal that such agreements be posted online so that community groups and the FCC may “learn” of them. See, *Further Notice* at ¶ 35.

<sup>33</sup> Significantly, the Paper Work Reduction Act, 44 USC § 3501, *et seq.*, mandates that the Office of Management and Budget, prior to approving an information collection requirement proposed by an administrative agency, determine whether the information collection is “necessary for the proper performance of the agency’s functions,” and must “consider whether the burden of the collection of information is justified by its practical utility.” 44 USC § 3507.

<sup>34</sup> “The Information Needs of Communities: The Changing Media Landscape in a Broadband Age,” by Steven Waldman and the Working Group on Information Needs of Communities (June 2011), available at [www.fcc.gov/infoneedsreport](http://www.fcc.gov/infoneedsreport).



structured formats” – would involve the expenditure of time and money, the *Further Notice* declines to propose that broadcasters be required to alter the existing form of documents before posting them online “at this time.”<sup>35</sup> However, the Commission’s acknowledgement that this is its “ultimate goal” is seriously disturbing.

As noted, the Commission concedes that the requirements it envisions would impose significant costs on broadcasters. Yet it asks whether it should nonetheless impose them, given its belief that this could “increase usability and facilitate text searches.”<sup>36</sup>

We return to what is by now a familiar theme: The purposes for which government may properly impose costs and burdens on regulated industries. We do not believe that facilitating the efforts of researchers and scholars – let alone the industry’s critics – are among those proper purposes. Whatever documents broadcasters are required to place in the public file or post on the Internet, their only obligation should pertain to the document “as is.”

### CONCLUSION

In order for the federal government to consider a regulation “economically significant,” it must impose in excess of \$100 million in costs on the American economy.<sup>37</sup> By that standard, the proposals of the *Further Notice* discussed in these Reply Comments may seem like small beer.

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<sup>35</sup> *Further Notice* at ¶ 37.

<sup>36</sup> *Id.*

<sup>37</sup> Executive Order 12866, Section 3 (f) (1), 58 Fed. Reg. No. 190 (1993).



But if there is to be progress toward the goal of eliminating regulations that unnecessarily burden business, government agencies must not only consider the costs and benefits of the most significant rules, but whether ones imposing more modest, but still real, costs serve any real public purpose.

Although the proposals we have opposed in this filing have been enthusiastically endorsed by certain groups with very particular interests, we respectfully submit they cannot meet this test. Therefore, they should not be adopted.

Respectfully submitted,

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**UNIVISION TELEVISION GROUP, INC.**

Christopher Wood  
Senior Vice President/Assistant General Counsel  
Univision Communications Inc.  
5999 Center Drive  
Los Angeles, CA 90045

January 17, 2012

**EXHIBIT 3:**

Declaration of Janene Drafs

2. KOMO-TV is a television broadcast station operating in the Seattle-Tacoma Nielsen Designated Market Area (“DMA”), which is the 12<sup>th</sup> largest DMA. Fisher Broadcasting – Seattle TV, L.L.C. is an indirect wholly-owned subsidiary of Fisher Communications, Inc.



3. KOMO-TV regularly sells political advertising time to candidates, campaigns, and individuals or groups that air independent expenditure, issue advocacy, or electioneering communications. In the fall 2008 general election season, KOMO-TV aired approximately 4,805 local, state, and federal political advertisements during the 60-day window preceding the November 2008 general election. In the fall 2010 general election season, KOMO-TV aired approximately 6,716 local, state, and federal political advertisements during the 60-day window preceding the November 2010 general election. To date, KOMO-TV has booked approximately 710 local, state, and federal political advertisements in 2012 relating to primary and general elections.

4. A typical request made to KOMO-TV for the purchase of political time involves the following steps:

- a. A call or email comes to the station and is directed to a member of the station's Political team.
- b. An advertising inquiry form is completed to the extent possible by a member of the station's Political team based on the information provide in the initial request.
- c. A return call is made or email is sent by a member of KOMO-TV's Political team to determine dates, dayparts, programs, and class(es) and lengths of advertising time sought.

- d. An assessment of inventory is done by the station's Political team to determine the rate needed based on time parameters, programs, dayparts, class(es) of time, and whether the requesting party is a legally-qualified candidate or a non-candidate.
- e. Rates are submitted.
- f. An advertising inquiry form is placed in the station's public file.
- g. A copy of the email (if email was used as the communications medium) with details is filed internally for reference and follow-up.
- h. The order is sent and evaluated; if changes to the requested order needed to be made as a result of a sell-out situation, those changes are sent.
- i. The final order is entered.
- j. National Association of Broadcasters ("NAB") Form PB-17 (or other, equivalent form) is filled out and filed in the station's public file.
- k. A confirmation is sent to the buyer via email or national electronic data entry system.

- l. A copy of the final order is placed in the station's public file.
- m. Weekly invoices are placed in the station's public file, as well as any revisions. Long-standing Commission precedent permits KOMO-TV to initially provide in its public file the information regarding the advertising as ordered by the candidate along with a notation that the station will, upon request, provide immediate assistance and access to the station logs or other definitive information concerning actual air time. The weekly invoices that KOMO-TV places in the public file reconcile information regarding the actual, as-aired advertising with the information contained in the advertising order. To bridge the gap between the order and the weekly invoices, notation is made in KOMO-TV political file offering assistance and access to more definitive information regarding the as-aired schedule in instances where the weekly invoice has not yet been placed, in due course, in the public file.

5. The rate quoted for a political time request depends on whether the requester is a candidate, an issue-advertiser, or another advertiser, as well as the number of days left before the election, the availability of inventory and the class(es) of such inventory, relative demand, and other market conditions at the

time the request is made. If the requester is a legally qualified candidate and the request is made during the 45 days preceding a primary election or the 60 days preceding a general election, the requester is quoted the lowest charge for the relevant class and amount of time. If the requester is not a legally qualified candidate or the request is made more than 45 days preceding a primary election or 60 days preceding a general election, the requester is typically quoted the general commercial advertising rate.

6. Requests for political time are handled both telephonically and electronically. For approximately 80 percent of the station's requests, correspondence and negotiations are done electronically via email. Communications and negotiations for the remainder (approximately 20 percent) are accomplished via phone or fax. It is not uncommon for the station or buyer to use the phone in following-up on communications that were initiated by email, and the 80-20 approximation accounts for such telephonic communication as well.

7. Estimated conservatively, for a typical political time request or order, KOMO-TV currently devotes 1-2 hours to filing relevant documents in the station's paper political file. In periods preceding elections, KOMO-TV will receive as many as 15 political time requests or revisions per day. Not only is the station's political file updated on a near-continuous basis during these periods to account for new requests and orders that are placed, but it is also regularly updated



to account for the weekly reconciliation process that updates each order, as necessary, to specify the actual, as-aired schedule, rates, times, days, and dayparts, as described above.

8. Uploading information kept in the station's political file to an FCC-hosted website will require the following additional steps:

- a. All documents need to be printed.
- b. Documents need to be scanned for uniform conversion to PDF format.
- c. PDF version of documents need to be reviewed to ensure legibility, completeness, and that no pages were stuck together, folded, or skewed during the scanning process.
- d. Documents need to be uploaded to FCC site.

9. KOMO-TV estimates that these additional steps will increase the time devoted to maintaining the station's political file with respect to a typical political time request or order by approximately 30 minutes. We expect that this same time would be required for each revision of an order and again for weekly reconciliation. It is common for orders to be revised as many as 3 to 4 times daily in the days leading up to an election. This would essentially double the time and cost devoted to maintaining the station's political file.

10. In order to upload political file information to an FCC-hosted online public file, KOMO-TV will incur both ongoing and one-time expenses. One-time expenses of approximately \$4,000 include the need to invest in a new personal computer, dedicated scanner and fax machine. (As with all communications hardware, these expenses are not really one-time expenses but rather will be cyclical expenses that are repeated perhaps as often as once every 5 years or so.) In addition, in terms of ongoing expenses, in order for KOMO-TV to upload political file information in a timely manner, the station will need to hire up to one additional staff person at a minimum of 30 hours per week plus benefits, depending on the proximity to the election, and install an additional dedicated phone line with recurring monthly charges of approximately \$350 or more. These ongoing needs translate to an additional expenditure of approximately \$45,000 in personnel cost and \$4,200 in phone fees, for total additional, ongoing annual expenses of approximately \$49,200.

11. Given the asymmetrical nature of the FCC's new requirements, posting detailed advertising rate information immediately to an FCC-hosted website will result in a substantial loss in advertising revenue to KOMO-TV. This is particularly true in any political selling season and especially in the months leading up to a presidential election.

12. KOMO-TV competes with cable and satellite television operators, as well as other media, in advertising markets. If KOMO-TV is forced to disclose its political advertising rates on the Internet in real time, its competitors will be able to undercut these rates. This will place KOMO-TV at a competitive disadvantage in political advertising markets. KOMO-TV will not know the rates offered by its competitors, but its competitors will know the rates offered by KOMO-TV.

13. When the lowest unit charge is not required by law because the request is made either by a non-candidate or more than 45 days before a primary election or 60 days before a general election, KOMO-TV typically charges requesters the prevailing commercial advertising rate for political time. The requirement that KOMO-TV post political advertising rate information in real-time on the Internet will allow KOMO-TV's competitors to infer in real-time the general commercial advertising rate offered by KOMO-TV. This will place KOMO-TV at a severe competitive disadvantage in selling general commercial advertising spots.

14. Advertising revenues are critical to sustaining KOMO-TV's financial viability. Advertisers that become aware of the lowest unit charge rates will seek to pay the same rates for general commercial advertising. The "lowest unit charge" is the lowest rate for each class of time that KOMO-TV charges its best commercial advertisers who purchase the greatest volume of advertising, thereby

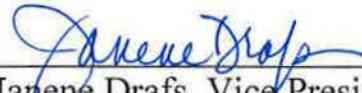
earning the highest volume discount for such advertising. A one-time-only advertiser or other minimal-volume customer that has access to this kind of information would use this knowledge to exert pressure on KOMO-TV to obtain lower advertising rates with discount privileges similar to those afforded to KOMO-TV's highest-volume customers but without offering similar purchasing volume. As a result, we expect KOMO-TV to experience both (i) pressure to meet the lowest unit charge for all advertisers, and (ii) losses to competing advertising outlets that learn of and undercut KOMO-TV's rates. KOMO-TV expects these circumstances to affect its average advertising rates and cause them to be depressed by up to 15 percent. Thus, if the new rule goes into effect, by our estimates KOMO-TV's annual revenues will decline by up to 15 percent, which translates into a loss of up to approximately \$8.1 million annually for KOMO-TV.

**[signature on following page]**



I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29<sup>th</sup> day of June, 2012, in Seattle, Washington.



Janene Drafts, Vice President, Station  
Manager & General Sales Manager,  
Fisher Broadcasting – Seattle TV,  
L.L.C. (licensee of KOMO-TV)

**EXHIBIT 4:**

Declaration of Jonathan Tamerlano

2. KATU is a television broadcast station operating in the Portland, Oregon, Nielsen Designated Market Area (“DMA”), which is the 22<sup>nd</sup> largest DMA. Fisher Broadcasting – Portland TV, L.L.C. is an indirect wholly-owned subsidiary of Fisher Communications, Inc.

3. KATU regularly sells political advertising time to candidates, campaigns, and individuals or groups that air independent expenditure, issue advocacy, or electioneering communications. In the fall 2008 general election season, KATU aired approximately 7,442 local, state, and federal political advertisements during the 60-day window preceding the November 2008 general election. In the fall 2010 general election season, KATU aired approximately 8,898 local, state, and federal political advertisements during the 60-day window preceding the November 2010 general election.

4. A typical request made to KATU for the purchase of political advertising time involves the following steps:

- a. A call or email comes to the station and is directed to a member of the station's Political team.
- b. An advertising inquiry form is completed to the extent possible by a member of the station's Political team based on the information provided in the initial request.
- c. A return call is made or email is sent by a member of KATU's Political team to determine dates, dayparts, programs, and class(es) and lengths of advertising time requested.
- d. An assessment of inventory is done by the station's Political team to determine the rate needed based on time parameters,



programs, dayparts, class(es) of time, and whether the requesting party is a legally-qualified candidate or a non-candidate.

- e. Rates are submitted.
- f. An advertising inquiry form is placed in the station's public file.
- g. A copy of the email (if email was used as the communications medium) with details is filed internally for reference and follow-up.
- h. The order is sent and evaluated; if changes to the requested order needed to be made as a result of a sell-out situation, those changes are sent.
- i. The final order is entered.
- j. National Association of Broadcasters ("NAB") Form PB-17 (or other, equivalent form) is filled out and filed in the station's public file.
- k. A confirmation is sent to the buyer via email or national electronic data entry system.
- l. A copy of the final order is placed in the station's public file.

m. Weekly invoices are placed in the station's public file as well as any revisions. Long-standing Commission precedent permits KATU to initially provide in its public file the information regarding the advertising *as ordered* by the candidate along with a notation that the station will, upon request, provide immediate assistance and access to the station logs or other definitive information concerning actual air time. The weekly invoices that KATU places in the public file reconcile information regarding the *actual, as-aired advertising* with the information contained in the advertising *order*. To bridge the gap between the order and the weekly invoices, notation is made in KATU political file offering assistance and access to more definitive information regarding the as-aired schedule in instances where the weekly invoice has not yet been placed, in due course, in the public file.

5. The rate quoted for a political time request depends on whether the requester is a candidate, an issue-advertiser, or another advertiser, as well as the number of days left before the election, the availability of inventory and the class(es) of such inventory, relative demand, and other market conditions at the time the request is made. If the requester is a legally qualified candidate and the

request is made during the 45 days preceding a primary election or the 60 days preceding a general election, the requester is quoted the lowest charge for the relevant class and amount of time. If the requester is not a legally qualified candidate or the request is made more than 45 days preceding a primary election or 60 days preceding a general election, the requester is typically quoted the general commercial advertising rate.

6. Requests for political time are handled both telephonically and electronically. For approximately 80 percent of the station's requests, correspondence and negotiations are done electronically via email. Communications and negotiations for the remainder (approximately 20 percent) are accomplished via phone or fax. It is not uncommon for the station or buyer to use the phone in following-up on communications that were initiated by email, and the 80-20 approximation accounts for such telephonic communication as well.

7. Estimated conservatively, for a typical political time request or order, KATU currently devotes 1-2 hours to filing relevant documents in the station's paper political file. In periods preceding elections, KATU will receive as many as 15 political time requests or revisions per day. Not only is the station's political file updated on a near-continuous basis during these periods to account for new requests and orders that are placed, but it is also regularly updated to account for

the weekly reconciliation process that updates each order, as necessary, to specify the actual, as-aired schedule, rates, times, days, and dayparts, as described above.

8. Uploading information kept in the station's political file to an FCC-hosted website will require the following additional steps:

- a. All documents need to be printed.
- b. Documents need to be scanned for uniform conversion to PDF format.
- c. PDF version of documents need to be reviewed to ensure legibility, completeness, and that no pages were stuck together, folded, or skewed during the scanning process.
- d. Documents need to be uploaded to FCC site.

9. KATU estimates that these additional steps will increase the time devoted to maintaining the station's political file with respect to a typical political time request or order by approximately 30 minutes. We expect that this same time would be required for each revision of an order and again for weekly reconciliation. It is common for orders to be revised as many as 3 to 4 times daily in the days leading up to an election. This would essentially double the time and cost devoted to maintaining the political file.

10. In order to upload political file information to an FCC-hosted online public file, KATU will incur both ongoing and one-time expenses. One-time



expenses of approximately \$4,000 include the need to invest in a new personal computer, dedicated scanner and fax machine. (As with all communications hardware, these expenses are not really one-time expenses but rather will be cyclical expenses that are repeated perhaps as often as once every 5 years or so.) In addition, in terms of ongoing expenses, in order for KATU to upload political file information in a timely manner, the station will need to hire up to one additional staff person at a minimum of 30 hours per week plus benefits, depending on the proximity to the election, and install an additional dedicated phone line with recurring monthly charges of approximately \$350 or more. These ongoing needs translate to an additional expenditure of approximately \$44,100 in personnel cost and \$4,200 in phone fees, for total additional, ongoing annual expenses of approximately \$48,300.

11. Given the asymmetrical nature of the FCC's new requirements, posting detailed advertising rate information immediately to an FCC-hosted website will result in a substantial loss in advertising revenue to KATU. This is particularly true in any political selling season and especially in the months leading up to a presidential election.

12. KATU competes with cable and satellite television operators, as well as other media, in advertising markets. If KATU is forced to disclose its political advertising rates on the Internet in real time, its competitors will be able to

undercut these rates. This will place KATU at a competitive disadvantage in political advertising markets. KATU will not know the rates offered by its competitors, but its competitors will know the rates offered by KATU.

13. When the lowest unit charge is not required by law because the request is made either by a non-candidate or more than 45 days before a primary election or 60 days before a general election, KATU typically charges requesters the prevailing commercial advertising rate for political time. The requirement that KATU post political advertising rate information in real-time on the Internet will allow KATU's competitors to infer in real-time the general commercial advertising rate offered by KATU. This will place KATU at a severe competitive disadvantage in selling general commercial advertising spots.

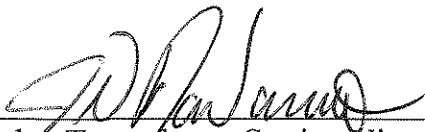
14. Advertising revenues are critical to sustaining KATU's financial viability. Advertisers that become aware of the lowest unit charge rates will seek to pay the same rates for general commercial advertising. The "lowest unit charge" is the lowest rate for each class of time that KATU charges its best commercial advertisers who purchase the greatest volume of advertising, thereby earning the highest volume discount for such advertising. A one-time-only advertiser or other minimal-volume customer that has access to this kind of information would use this knowledge to exert pressure on KATU to obtain lower advertising rates with discount privileges similar to those afforded to KATU's

highest-volume customers but without offering similar purchasing volume. As a result, we expect KATU to experience both (i) pressure to meet the lowest unit charge for all advertisers, and (ii) losses to competing advertising outlets that learn of and undercut KATU's rates. KATU expects these circumstances to affect its average advertising rates and cause them to be depressed by up to 15 percent. Thus, if the new rule goes into effect, by our estimates KATU's annual revenues will decline by up to 15 percent, which translates into a loss of up to approximately \$4.4 million annually for KATU.

**[signature on following page]**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29<sup>th</sup> day of June, 2012, in Portland, Oregon.



---

John Tamerlano, Senior Vice  
President, General Manager, Fisher  
Broadcasting – Portland TV, L.L.C.  
(licensee of KATU)



**EXHIBIT 5:**

Declaration of Pamela Baratta

3. Media General regularly sells political advertising time to candidates, campaigns, and individuals or groups that air independent expenditure, issue

advocacy, or electioneering communications. In the fall 2008 general election season, fourteen of Media General's broadcast stations aired approximately 36,924 local, state, and federal political advertisements during the 60-day window preceding the November 2008 general election. In the fall 2010 general election season, Media General aired approximately 60,603 local, state, and federal political advertisements during the 60-day window preceding the November 2010 general election. To date, Media General has aired approximately 27,004 local, state, and federal political advertisements in 2012 relating to primary and general elections.

4. A typical request for political time involves the two-step process of documentation of the request for the political file, as well as fulfillment of the necessary information requested by the advertiser. Upon receipt of a request for political advertising, the station receiving the request immediately prepares a Record of Request form that fully documents that a political advertising time request has been made by a candidate intending to advertise on the station. This form is then filed in the station's public file as quickly as possible. Upon completion of filing the form, the station assembles all necessary information that the political advertiser has requested. This information typically includes the station's contact information, political disclosure policies, and programming information, including specified dates, times, and programming specials.

Furthermore, the station provides requested ratings that demonstrate specific demographic audience information for each specified program as well as the corresponding rates by program. When advertising time is purchased, the station also will request that the political advertiser fill out the standard NAB Form and return it to the station.

5. The rate quoted for the political time request depends on the identity of the requester and the number of days left before the election. If the requester is a legally qualified candidate and the request is made during the 45 days preceding a primary election or the 60 days preceding a general election, the requester is quoted the lowest charge for the relevant class of time and spot duration. If the requester is not a legally qualified candidate or the request is made more than 45 days preceding a primary election or 60 days preceding a general election, the requester is typically quoted the general commercial advertising rate.

6. Requests for political time are handled both telephonically and electronically, and are handled in the same manner in either case. Approximately ninety percent (90%) of all political requests are handled electronically. Electronic requests are typically more time consuming due to incomplete information from the requestor of advertising time. This results in additional emails and, in most cases, follow-up telephone calls until all information for the political process is gathered and all steps are completed.

7. In periods preceding elections, a Media General station may receive several hundred political time requests, resulting in as many as two hundred sixty (260) orders for political time. The political file is updated on a near-continuous basis during these periods.

8. Currently, the political file contains the Record of Request, the standard NAB form, a copy of the payment, a hard copy of the broadcast order, and all revisions to the order that are then attached to the original order in descending order by revision date. Each order is revised an average of four (4) times. Uploading information kept in the political file to an FCC-hosted website will require each of these documents to be manually scanned and accurately filed in the correct electronic folder or subfolder on the website. In addition to manual scans of the information noted above, the stations will need to scan each of the individual documents that currently are generated by the station's invoicing and contracting systems, because those systems are not compatible with an online version of the political file. As an example, using the technology currently available to the Media General stations, it takes approximately five (5) minutes to convert one contract into a .pdf file to be uploaded to the website. This process must be performed manually on a document-by-document basis.

9. Estimated conservatively, these additional steps will increase the time devoted to maintaining the political file with respect to a typical political time



request or order by thirty (30) minutes. Using data from 2010 (a year without a presidential election), this process would add an estimated one hundred (100) hours of work per week across all Media General stations during the sixteen weeks prior to an election.

10. In order to upload political file information in a timely manner, Media General may need to acquire additional bandwidth and hire up to 16 additional temporary staff persons, depending on the proximity to the election.

11. Posting detailed advertising rate information immediately to an FCC-hosted website will result in a substantial loss in advertising revenue to Media General and cause irreparable harm. This is particularly true in the months leading up to a presidential election.

12. Media General competes with cable and satellite television operators, as well as other media, in advertising markets. If Media General is forced to disclose its political advertising rates on the Internet in real time, it will place Media General at a competitive disadvantage in political advertising markets. Media General will not know the rates offered by its competitors, but its competitors will know the rates offered by Media General.

13. When the lowest unit charge is not required by law because the request is made either by a non-candidate or more than 45 days before a primary election or 60 days before a general election, Media General typically charges

requesters the prevailing commercial advertising rate for political time. This will allow Media General's competitors to infer in real-time the general commercial advertising rate offered by Media General. This will place Media General at a severe competitive disadvantage in selling general commercial advertising spots.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2 day of July, 2012, in Richmond, Virginia.

  
Pamela Baratta

**EXHIBIT 6:**

Declaration of Steve Wexler

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,

Respondents.

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Case No. 12-1225

DECLARATION

IN SUPPORT OF

PETITIONER'S

MOTION TO STAY

**DECLARATION OF STEVE WEXLER**

I, Steve Wexler, declare as follows pursuant to Federal Rules of Appellate Procedure 18(a)(2)(B)(ii) and 27(a)(2)(B), and 28 U.S.C. § 1746:

1. I am an Executive Vice President of Journal Broadcast Group. I have personal knowledge of, and am competent to testify to, the matters set forth herein.

2. Journal operates fourteen television stations including Station WTMJ-TV, an NBC affiliate serving the Milwaukee Wisconsin DMA and Station KTNV-TV, an ABC affiliate serving the Las Vegas Nevada DMA (referred to herein individually as a "Journal Station" and collectively as the "Journal Stations"). According to reports prepared by the Nielsen Company, Milwaukee is the 34<sup>th</sup> largest DMA and Las Vegas is the 40<sup>th</sup> largest DMA.



3. The Journal Stations sell substantial amounts of political advertising time to candidates, campaigns, and individuals or groups that air independent expenditure, issue advocacy, or electioneering communications. In the fall 2010 general election season, Station WTMJ-TV aired approximately 3413 advertisements for local, state, and federal political candidates during the 60-day window preceding the November 2010 general election (September 3 –November 2, 2010) and approximately 1920 political issue advertisements during the same window. Station KTNV-TV aired approximately 6054 advertisements for local, state, and federal political candidates and approximately 2561 political issue advertisements during this 60-day window. During the two weeks prior to the general election in 2010, political candidate and issue advertisements accounted for approximately 76 percent of Station KTNV-TV's revenues and approximately 46 percent of Station WTMJ-TV's revenues.

4. A typical request for political time involves the following steps.
- a. Calls or emails from political candidate and issue advertisers or their representatives are directed to sales managers and reviewed.
  - b. A copy of the Journal Station's political disclosure statement and current political rate card is sent by mail or email to the advertiser or its agency and the advertiser is requested to sign the political disclosure statement.
  - c. The signed disclosure statement is returned to the station.
  - d. Numerous calls and/or emails are exchanged between the Journal Stations' sales managers and the representative or agent of the political or issue advertiser to determine the dates, programs, and

classes of time the advertiser wishes to purchase and the Journal Station's available inventory.

- e. An order form is completed and reviewed by the Journal Station's sales manager and the political advertiser is requested to complete an NAB PB-17 form.
- f. The NAB PB-17 form is reviewed by the Journal Station's sales manager and if necessary, additional information is requested.
- g. The final order is entered.
- h. Frequently changes to the order are made by the political advertiser to request different dates, times and classes of time.
- i. If a Journal Station's political rate card is updated, a new rate card is sent to the political advertiser and the process described in (d) and (e) above is repeated.
- j. The signed political disclosure statement, order form and NAB PB-17 form for each order (as well as any revisions to the order) are placed in the Journal Station's public file.
- k. Following the issuance of invoices for political buys, the invoices are also placed in the Journal Station's public file.

5. The rate quoted for the political time request depends on the identity of the advertiser and the number of days left before the election. If the advertiser is a legally qualified candidate and the request is made during the 45 days preceding a primary election or the 60 days preceding a general election, the advertiser is quoted the lowest charge for the relevant class and amount of time. If the advertiser is not a legally qualified candidate or the request is made more than 45 days preceding a primary election or 60 days preceding a general election, the advertiser is typically quoted the general commercial advertising rate.

6. Requests for political time are handled both telephonically and electronically depending on whom the candidate is and/or what agency is representing the candidate or issue advertiser.

7. Estimated conservatively, the Journal Stations currently devote on average at least 2 hours per day to filing relevant documents in the paper political file. This time commitment can increase significantly during the last two weeks preceding an election because of the number of political advertisements that are ordered and aired. In the Fall of 2010, during the week before the general election Station KTNV-TV aired as many as 175 political advertisements per day for political candidates and additional advertisements for issue advertisers. The political file is updated on a near-continuous basis during these periods and requires one person devoting at least five or six hours per day.

8. Uploading information kept in the political file to an FCC-hosted website will require the following additional steps:

- a. All Orders, Order revisions, NAB PB-17 forms and invoices will need to be scanned for conversion to PDFs.
- b. PDF documents need to be reviewed to ensure that they have been scanned accurately.
- c. Candidate folders and subfolders need to be set up on the FCC's electronic public file site.
- d. Scanned PDF documents need to be uploaded into the correct folders and subfolders on the FCC's electronic public file site.

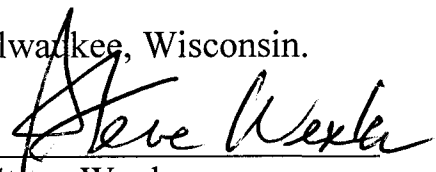
9. Estimated conservatively, these additional steps will require an additional one to two hours per day and likely three to four hours per day during the two week period prior to an election. This would essentially double the time and cost devoted to maintaining the political file.

10. In order to upload political file information in a timely manner, each of the Journal Stations would need to hire at least one additional staff person to work at least thirty hours per week, and, depending on the proximity to the election, would anticipate having to pay overtime to other current employees. The Journal Stations estimate that the cost of compensation and benefits for an additional employee and overtime to existing employees would be approximately \$40,000 to \$50,000 per year for each of the Journal Stations.

11. The Journal Stations compete with cable and satellite television operators, as well as other media, in advertising markets. If the Journal Stations are forced to disclose their political advertising rates on the Internet in real time, their competitors will be able to undercut these rates. This will place the Journal Stations at a competitive disadvantage in political advertising markets.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2nd day of July, 2012, in Milwaukee, Wisconsin.

  
Steve Wexler

**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 2012, I electronically filed the foregoing Emergency Motion for a Stay Pending Judicial Review, Final Rule, Reply Comments of Network Station Owners, and Declarations of Janene Drafts, Jonathan Tamerlano, Pamela Baratta, and Steve Wexler with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Robert A. Long, Jr.

Robert A. Long, Jr.

*Counsel for Petitioner/Movant NAB*