

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

In the Matter of Petition Regarding the)
Actions of Certain Radio Broadcasters)
in Opposition to the Performance)
Rights Act)

MB Docket 09-143

**COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

| | | |
|-----|---|----|
| I. | The Petition Lacks Any Legal or Constitutional Basis Justifying a Commission Investigation or Other Action | 2 |
| A. | Broadcasters' Position on the PRA Is Consistent with the Public Interest in Sustaining the Viability of Free Radio Programming. | 4 |
| B. | The Remedies Envisioned by Petitioner Are Contrary to Specific Provisions of the Communications Act and Beyond the Commission's Authority..... | 10 |
| C. | Petitioner May Not Properly Contend It Has No Avenues to Make its Views Known | 17 |
| D. | The Petition Fails to Confront Settled First Amendment Principles Applicable to Broadcasters' Right to Engage in Political Speech. | 23 |
| 1. | Broadcasters Have Constitutionally Protected Rights to Air Programming and Advertisements That Oppose the PRA..... | 23 |
| 2. | The Commission Is Not and Should Not Be the National Arbiter of Truth for Political Advertising..... | 25 |
| 2. | Petitioner's Claims that the Radio Broadcast Industry Is Engaged in an Anti-Competitive Lobbying Effort Have No Basis and Are Legally Foreclosed..... | 32 |
| E. | Petitioner's Allegations of Political Broadcasting Violations Are Both Unsupported and Specious | 35 |
| II. | The Petition Lacks an Adequate Factual Basis to Justify a Commission Investigation or Other Action..... | 38 |

Attachments

EXECUTIVE SUMMARY

MusicFIRST's Request for Declaratory Ruling is a carefully crafted public relations document masquerading as a legal pleading. With the legislative debate on the Performance Rights Act ("PRA") becoming increasingly contentious, MusicFIRST seeks to recruit the Commission as a participant in its lobbying and public relations strategy in support of the PRA. It asks the Commission to declare that the "public interest" requires radio stations to air MusicFIRST's pro-PRA advertisements and to suspend broadcasters' efforts opposing the PRA – all because, in MusicFIRST's view, some broadcaster advertisements are "false" and broadcasters should not be allowed to oppose the legislation on air because of their "private" interest in the issue. The interest of broadcasters in opposing the PRA, of course, is to preserve the economic viability of free, over-the-air radio broadcasting for the public in the midst of a major economic recession. There is no basis for preventing broadcasters from promoting that interest.

In effect, MusicFIRST would have the Commission sail into uncharted (and wholly unconstitutional) waters—turning broadcast stations into common carriers by establishing a right of access for third-party political advertisers and using the license renewal process to undermine radio stations' prerogative to air political advertisements they themselves may support. Unfortunately for MusicFIRST, few principles are better enshrined in the annals of communications law and policy than a broadcaster's right to select and reject programming, including advertisements, without fear of governmental interference.

But MusicFIRST's constitutional affronts do not stop there. It would also have the Commission accept a role as "national arbiter of truth" for political programming—a

role the agency has long rejected and a role that stands in plain violation of speakers' political speech rights under the First Amendment. MusicFIRST also would quash broadcasters' bedrock First Amendment right to petition the government in opposition to the PRA.

As a public relations document, MusicFIRST's Petition employs style rather than substance and invective rather than evidence. It attempts to characterize the broadcast industry as monolithic and NAB as orchestrating a "campaign" to use "threats" and "intimidation" against artists and to air "false," "deceptive" and "malicious" advertisements. These accusations are wholly without merit. The actual proffered evidence is exceedingly scant and constructed largely from anonymous sources or isolated and exaggerated examples. For that reason alone, the Commission should dismiss MusicFIRST's request.

One only needs to peek behind the hyperbolic rhetoric to find the real—and often surreal—truth. For example, one of the five alleged anonymous station "intimidators" is actually a 100-watt high school radio station in Delaware. MusicFIRST also contends that it is false for broadcasters to assert that the PRA would subject all music played on the radio to new royalty payments because there is a very limited exemption for music played during broadcasts of religious services. These and other assertions offered by MusicFIRST's comprehensive media campaign against broadcasters make this Petition a true "pot-kettle" moment.

The Petition's facially invalid nature notwithstanding, NAB must take the Petition seriously, given the issues upon which the Commission has requested comment. NAB emphasizes at the outset that at no time did it orchestrate or coordinate any campaign

of intimidation or threats against any artists. And while NAB did offer stations spots in opposition to the PRA—which it had every right to do—it did not require any station to air any particular spot. Nor could it. The decision to broadcast or not broadcast a spot is always a matter left to the discretion of individual stations. Each NAB-produced spot complied with all applicable rules and regulations.

As explained in detail below, the declaratory relief requested by MusicFIRST—including the proposed interference with broadcasters' programming decisions—is barred by various provisions of the Communications Act and the Constitution, as interpreted by the Supreme Court and long-standing Commission precedent. MusicFIRST's request should be dismissed without further investigation or action.

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**COMMENTS OF THE
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The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Public Notice* (“Notice”)² seeking comments on various issues presented in the Request for Declaratory Ruling (“Petition”) filed June 9, 2009, by the MusicFIRST Coalition (“Petitioner”), an umbrella organization that advocates in support of the Performance Rights Act (“PRA”).³

The Petition asserts a vague claim for “a declaratory ruling that the actions by broadcasters . . . are contrary to the public interest” and asks the Commission to take “any and all appropriate action to cease these improper activities.”⁴ Chief among the “actions” complained of—and for which the *Notice* seeks comment—are conclusory allegations that broadcasters have “threatened” or “boycotted” artists who support the PRA, refused to air advertisements in support of the PRA, engaged in a campaign to air

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

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

³ H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

⁴ Petition at 16.

false statements about the PRA, and evaded public file requirements for advertisements opposing the PRA.

These specious allegations, designed to taint the broadcast industry as a whole, lack the specific and detailed factual basis required to justify any Commission inquiry. Perhaps more importantly, the Petition's effort to stifle broadcasters' speech and inject the Commission into stations' programming decisions violates long-standing Communications Act law and policy, well-settled Commission precedent and broadcasters' basic First Amendment rights.

For those reasons, described in greater detail below, the Commission should summarily dismiss the Petition and direct Petitioner's complaints back where they belong—the political arena on Capitol Hill.

I. The Petition Lacks Any Legal or Constitutional Basis Justifying a Commission Investigation or Other Action

Petitioner apparently wants the Commission to *prohibit* broadcasters from airing spots opposing the PRA; to *compel* them to air Petitioner's spots supporting the PRA; and to play music by pro-PRA artists as a condition of holding a radio license. Petitioner drapes its argument in the cloak of the public interest by attacking broadcasters' PRA spots as nefariously advancing their "private" interests or containing allegedly false or deceptive political statements.⁵ These groundless allegations cannot justify the Commission interfering with a station's statutory and constitutional right to select and reject programming content – particularly political speech.

⁵ Petition at 10-14.

There are a host of reasons why Petitioner's proposed remedies are beyond the Commission's authority and contrary to the First Amendment. First, broadcasters' views on the PRA are completely consistent with the public interest in promoting continued access by all Americans to free, over-the-air radio. Second, the Communications Act and the Constitution, as recognized by the Supreme Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, afford broadcasters the "widest journalistic freedom" to select or reject editorial programming or advertisements.⁶ Third, the First Amendment protects broadcasters' right to express their political views and petition the government to influence legislation. Finally, NAB's advertisements in opposition to the PRA are fully compliant with the Commission's rules governing political broadcasts.

Beyond these clear legal and constitutional protections, there are the practical difficulties of Commission entanglement in this contentious legislative debate. The Commission has consistently stated in a variety of contexts that it "is not the national arbiter of the truth."⁷ There is no reason for the Commission to abandon this long-standing precedent with respect to the PRA. Indeed, giving any credence to Petitioner's attempt to interfere with broadcasters' programming decisions will chill political speech

⁶ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973) ("*CBS v. DNC*").

⁷ *In re Application of American Broadcasting Companies, Inc.*, 86 FCC 2d 3, 5 (1981); *In re Complaints Covering CBS Program "Hunger in America,"* 20 FCC 2d 143, 150-51 (1969) (when addressing claims of news distortion against licensees, FCC will not attempt to resolve "a dispute" about "the truth" of reported events or statements, as "no Government agency can authenticate the news, or should try to do so"). *Accord In re Complaint by Alan S. Burstein, Syracuse, N.Y.*, 43 FCC 2d 590, 592 (1973); *In re Complaint of Robert DeVries*, 78 FCC 2d 552, 554 (1980) (FCC rejected the "role of national arbiter of the 'truth'" and declined to take action on claims that "false" ads were aired about a mayoral candidate and a state ballot proposition, respectively).

about important legislative and policy matters in violation of the First Amendment and the public interest.

A. Broadcasters' Position on the PRA Is Consistent with the Public Interest in Sustaining the Viability of Free Radio Programming

Perhaps the most offensive of Petitioner's claims is its self-serving notion that broadcasters' views on the PRA serve only their "private" interests while Petitioner's own views somehow serve a larger public interest.

Petitioner has a purely private financial interest in the adoption of the PRA by Congress. The PRA would divert money away from radio stations' operating budgets and into the pockets of record labels and artists. That much cannot be disputed. Petitioner has every right to advocate for that self-interested result and to promote its views to Congress and to the public. But it cannot credibly claim that it is advancing a "public" interest simply because its views are contrary to those of broadcasters. Indeed, the Petition does not explain how transferring station dollars to record labels and artists would somehow serve—rather than subvert—stations' ability to serve local communities through free, over-the-air broadcasting.

By contrast, broadcasters' interest in opposing the PRA is closely intertwined with their public interest mission. Radio stations serve local communities through a wide range of music and entertainment programming, local and national news, emergency information, weather and sports. They support local charities, help local civic and other organizations connect with their communities, promote innumerable local events and causes, donate airtime for important public service messages and serve as

a lifeline in times of crisis.⁸ As recognized in Section 1 of the Communications Act,⁹ this vital role underlies the very purpose of federal regulation of radio communications.

NAB also emphasizes that Congress is the ultimate arbiter of the public interest, and Congress, since 1932, has consistently considered and rejected attempts at imposing a performance fee or “tax,” as broadcasters characterize it.¹⁰ In 1995, after

⁸ Each year, broadcasters contribute billions of dollars to their local communities through direct fundraising, charitable giving and donated airtime. NAB’s last comprehensive survey of radio and television broadcasters’ community service in 2006 demonstrated that local radio and television stations provided over \$10.3 billion in community service in the previous calendar year. NAB, *National Report on Broadcasters’ Community Service* (June 2006). NAB invites the Commission to visit www.broadcastpublicservice.org for hundreds of specific examples and a state-by-state breakdown of the ways in which broadcasters serve their local communities every year. NAB has also described the service provided by local stations to their audiences and communities in other FCC proceedings. See, e.g., Comments of NAB in MB Docket No. 04-233 (filed April 28, 2008); Reply Comments of NAB in MB Docket No. 04-233 (filed June 11, 2008).

⁹ 47 U.S.C. § 151.

¹⁰ See, e.g., *The Performance Rights in Sound Recordings Act of 1995: Hearing Before the S. Comm. on the Judiciary on S. 227, 104th Cong.* (1995); *Digital Performance Right in Sound Recordings Act of 1995: Hearing Before the H. Subcomm. on the Judiciary on H.R. 1506, 104th Cong.* (1995); *Copyright Issues: Cable Television and Performance Rights: Hearing Before the H. Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary on Copyright Issues: Cable Television and the Compulsory License; and Performance Rights in Sound Recordings, 96th Cong.* (1979); *Performance Rights in Sound Recordings: Hearings Before the H. Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary on Performance Rights in Sound Recordings, 95th Cong.* (1978); *Copyright Law Revision: Hearings Before the H. Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary on H.R. 2223, 94th Cong.* (1975); *Performance Royalty: Hearings Before the S. Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary Pursuant to S. Res. 72 on S. 1111, 94th Cong.* (1975); *Copyright Law Revision: Hearings Before the S. Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary Pursuant to S. Res. 37 on S. 597, 90th Cong.* (1967); *Composer’s Royalty and Right of Copyright: Hearings Before the S. Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary, 80th Cong.* (1947); *Revisions of Copyright Laws: Hearings Before the H. Committee on Patents, 74th Cong.* (1936); *General Revision of the Copyright Law: Hearings Before the H. Comm. on Patents, 72nd Cong.* (1932);

yet again weighing the merits of a music industry-sponsored “performance fee,” Congress declined to “change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.”¹¹

As the Commission recognizes, the radio industry’s ability to serve the public interest “is fundamentally premised on its economic viability.”¹² And broadcasters’ economic viability is currently under particular stress, given the financial crisis and severe declines in the advertising market. Radio stations are currently experiencing double-digit declines in advertising revenue—with estimates of a 21 percent decline for 2009 for the industry as a whole.¹³ Stations are going dark or filing for bankruptcy protection.¹⁴ The Commission reports that as of August 19, 2009, 95 AM stations and 217 FM stations and translators had been silent over two months.¹⁵

Copyright Law Revision: Studies Prepared for the S. Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary Pursuant to S. Res. 240, Studies 26-28, 86th Cong. (1960).

¹¹ *Digital Performance Right in Sound Recordings Act of 1995*, House Report 104-274 (Oct. 11, 1995), at 13.

¹² *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2760 (1992).

¹³ *21 Percent Ad Decline Projected for Radio*, Radio Ink (July 13, 2009). See also Erik Sass, *News Analysis: Traditional Media Drops Exceed Expectations*, MediaPost News (June 2, 2009) (radio saw total revenues drop by 24 percent in the first quarter of 2009, compared to the first quarter of 2008, suggesting that full-year losses will be steeper than predicted); Jonathan Storm, *Cutbacks, Double Shifts: The Static of Hard Times*, philly.com (July 12, 2009) (radio revenue in Philadelphia fell 19 percent from 2004-2008, and BIA Advisory Services foresees poor financial trend for radio “continuing for at least two more years, and getting worse before it gets better”); Erik Sass, *Big Radio Reports Big Declines*, MediaPost News (Aug. 11, 2009) (radio groups reported double digit declines in second quarter of this year).

¹⁴ See, e.g., Randy J. Stine, *Are More Stations Going Silent?*, Radio World (March 19, 2009) (reporting that the numbers of AM and FM stations going dark at least temporarily is growing, and that in mid-February 2009, the FCC’s list of stations that had been silent for more than two months included more than 80 AMs and about 100 FM, excluding

Radio stations' future financial viability—and their ability to serve local communities and listeners—are further threatened by the PRA's proposal to siphon more dollars away from broadcasters' budgets. In today's economic environment, it is clear that any new, significant tax or fee imposed upon radio broadcasters would further damage their economic ability to serve the public. Listeners of music stations subject to higher governmentally-imposed fees would be particularly adversely affected,¹⁶ including stations in smaller markets.¹⁷ By making it significantly more expensive for free, over-the-air stations to play recorded music, the PRA will ultimately reduce

translators); Catherine Cheney, *Loudoun's Radio Station Signs Off*, Washington Post (Aug. 13, 2009) (AM station on air since 1958 stopped broadcasting); Matthew Flamm, *Radio Operator Files for Bankruptcy Protection*, Crain's New York Business (Aug. 11, 2009) (Brooklyn-based radio company filed for Chapter 11 bankruptcy); Erik Sass, *Radio Biz in Trouble*, MediaPost News (June 30, 2009) (reporting credit downgrades for certain radio station groups and "speculations of bankruptcy for big broadcasters"); Sarah McBride, *Radio Firms Beg Lenders for Mercy*, WSJ.com (Sept. 2, 2009) ("continuing slump in radio advertising has lenders breathing down the necks" of a number of radio station groups).

¹⁵ See <http://www.fcc.gov/mb/audio/status/silentFM.html> and <http://www.fcc.gov/mb/audio/status/silentAM.html>.

¹⁶ For example, if the new performance fees under the PRA are similar to the statutory royalty payments imposed on radio stations for streaming, then they could approach or even exceed the total revenues of stations. A large music station (*i.e.*, one with annual revenues over \$1.25 million) in Illinois, for instance, would be forced to pay \$2,002,536 in 2009 and \$2,113,788 in 2010, if PRA fees were based on the most recent webcasting royalty rates issued by the Copyright Royalty Board (which are based on audience size). A large music station in Maryland would be required to pay \$1,103,760 in 2009 and \$1,165,080 in 2010, and such a station in Virginia would have to pay \$883,008 in 2009 and \$932,064 in 2010.

¹⁷ According to BIA's Media Access Pro database, 68 percent of commercial radio stations in the U.S. are located in Arbitron markets ranked 101 or smaller. For example, George Chambers, owner-operator of KXIT in Dalhart, TX, states in this proceeding that, "as a very small business," his station is "struggling" and any "[e]xtra fees" on his station "may prevent us from playing music altogether." Comments of George Chambers (filed Aug. 18, 2009).

listeners' access to such programming, which is contrary to the public interest. To warn against this possibility, some radio stations have chosen to air advertisements and other programming about the PRA and its adverse impact on the free, over-the-air radio service available to listeners. As discussed *infra*, the fact that a broadcast station may have an economic interest in the speech it broadcasts does not mean that its viewpoint cannot also be concomitant with the public interest.

Petitioner also fails to properly define the scope of the “public interest”¹⁸ for purposes of scrutinizing a broadcast station’s license obligations. A licensee is “held accountable for the *totality* of its performance of public interest obligations”¹⁹ and not for its decision to air a particular program or advertisement.²⁰ Petitioner makes no allegation—and fails to provide any evidence—showing that any individual station’s “overall programming” has failed to serve its local community.²¹

¹⁸ 47 U.S.C. § 309(a) (Commission shall determine whether the “public interest, convenience, and necessity will be served by the granting” of broadcast license applications).

¹⁹ *CBS v. DNC*, 412 U.S. at 121 (emphasis added).

²⁰ See, e.g., *In re Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd 1503, 1507 (1992) (FCC found a petitioner’s allegations “focus[ing] on a single programming decision” of a radio licensee did “not indicate” that the stations’ “overall programming reflects any abuse of licensee discretion or failed to respond to community problems”) (“*Louisiana Broadcast Stations*”).

²¹ E.g., *In re Application of WGBH Educational Foundation*, 69 FCC 2d 1250, 1251 (1978) (in determining whether a licensee has served the public interest, “consideration of a licensee’s programming is and must be limited to determining whether the licensee’s *overall* programming has served its service area, and not whether any particular program is ‘appropriate’”) (emphasis in original); *Louisiana Broadcast Stations*, 7 FCC Rcd at 1507 (in determining during license renewal process whether a licensee served the public interest, the FCC “focuses on whether the licensee has made a reasonable effort in its overall programming”); *Commission En Banc Programming*

The Petition further opaquely refers to news staging and news distortion as being contrary to the public interest, but it does not specifically allege that any radio broadcaster has engaged in such conduct. Nor could it. The broadcast materials complained about in the Petition are advertisements, not news programming, and so the Commission's news distortion policies are inapposite.²² In any event, the Petition does not even come close to complying with the rigorous standard of "documented evidence showing deliberate misrepresentation" to state and support a claim of news distortion.²³ In the absence of "documented evidence" that a radio station has engaged in improper

Inquiry, 44 FCC 2303, 2307-8 (1960) (FCC must "determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve," and cannot base licensing decisions "upon its own subjective determination of what is or is not a good program"). The Petition's calls for "strengthening the license renewal process and shortening license terms" are inapposite as well. *Id.* at 16. The fact that an advocacy group such as MusicFIRST is distressed by some radio stations airing certain advertisements, and not airing others, is no reason to reconsider the appropriate length of all broadcast licenses and long-standing renewal standards for all television and radio stations. See 47 U.S.C. § 309(k). Especially given congressional directives as to broadcast license renewal standards, the Commission could only address such issues in a rulemaking, after appropriate notice and comment.

²² The FCC has specifically declined to apply its news distortion standards to non-news programming. *Louisiana Broadcast Stations*, 7 FCC Rcd at 1507 (rejecting a petitioner's "attempts to equate" its complaint about a live radio talk show and editorials to cases involving distortion of news programming, explaining that the "same considerations do not apply to the non-news programming at issue in the present case").

²³ FCC Consumer Facts, *Complaints About Broadcast Journalism* (Oct. 16, 2008), at 2 ("Broadcast Journalism Fact Sheet"). Accord FCC, *The Public and Broadcasting: How to Get the Most Service from Your Local Station* (July 2008), at 14 ("The Public and Broadcasting").

distortion or rigging of *news* programming, the Commission has repeatedly stated that it “cannot intervene.”²⁴

B. The Remedies Envisioned by Petitioner Are Contrary to Specific Provisions of the Communications Act and Beyond the Commission’s Authority

The ultimate relief envisioned by Petitioner—requiring radio stations to air pro-PRA spots and/or cease airing anti-PRA spots, forcing stations to play the music of artists vocally supporting the PRA, or denying license renewals to stations involved in the PRA debate²⁵—also violates fundamental principles of the Communications Act that

²⁴ *Broadcast Journalism Fact Sheet* at 1. *Accord American Broadcasting Companies*, 86 FCC 2d at 5-6 (news distortion claim warranted no FCC action where petitioner “failed to present substantial extrinsic evidence” (*i.e.*, “evidence outside the content of the program”) of “intentional falsification, distortion or slanting of the news which is attributable to [the] licensee or [station] management”); *Hunger in America*, 20 FCC 2d at 150 (FCC stated that it would not defer action on license renewals because of the pendency of news distortion complaints “unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention, involves the licensee, including its principals, top management, or news management”).

²⁵ The non-renewal (or even the threat not to renew) the licenses of stations that oppose the PRA is, in practical effect, the same as ordering stations to air MusicFIRST’s pro-PRA spots and/or cease airing anti-PRA advertisements. See Petition at 16 (“[a]s part of its investigation,” MusicFIRST urges the FCC to “determine whether, upon their renewal applications, licensees who have taken part in these activities can be entrusted to serve the public interest”). A Commission determination that a licensee’s actions opposing the PRA are contrary to the public interest, thus calling into question a station’s license renewal, is the regulatory equivalent of a direct order forbidding the licensee from engaging in those activities. No broadcaster will act in a manner that puts its license – upon which it depends to remain in business – at significant risk. See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998) (FCC guidelines that operate as a “screening device” for license renewal applications create for licensees a “strong incentive to meet the numerical goals,” because “[n]o rational firm – particularly one holding a government-issued license – welcomes a government audit.”); *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (observing that a “regulatory agency may be able to put pressure upon a regulated firm in a number of ways” and that the FCC “in particular has a long history of employing” a “variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content”). See also *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407 (D.C.

afford broadcasters the “widest journalistic freedom” to make programming decisions within their general and flexible duty to serve the public interest.²⁶ In *CBS v. DNC*, the Supreme Court found that such broad journalistic freedom is informed by Congress’s deliberate decision to “preserve values of private journalism” and to “firmly reject[]” the argument that private “broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.”²⁷ Congress’s decision in that regard is enshrined in Section 3 of the Communications Act rejecting common carrier status for broadcasters, the prohibition on governmental censorship found in Section 326 of the Act,²⁸ and a host of Commission decisions applying those principles.

Section 3 of the Act expressly provides that broadcasters shall not be deemed common carriers.²⁹ In *CBS v. DNC*, the Supreme Court interpreted this provision to hold that broadcast stations could, if they so choose, refuse to air editorial advertisements. The Court observed that “Congress pointedly refrained from divesting broadcasters of their control over the selection of voices,” and opined that Section 3 of the Act “stands as a firm congressional statement that broadcast licensees are not to be

Cir. 1975) (noting that radio licensees “are dependent on the FCC and the government for their economic well-being,” and observing that “licensee political or artistic expression is particularly vulnerable to the ‘raised eyebrow’ of the FCC; faced with the threat of economic injury, the licensee will choose in many cases to avoid controversial speech in order to forestall that injury”).

²⁶ *CBS v. DNC*, 412 U.S. at 110, 121-22.

²⁷ *Id.* at 105, 109.

²⁸ *Id.* at 105-110; 47 U.S.C. § 326 (“Nothing in this Act shall be understood or construed to give the Commission the power of censorship”).

²⁹ 47 U.S.C. § 153(10).

treated as common carriers, obliged to accept whatever is tendered by members of the public.”³⁰ Tellingly, Petitioner fails to even reference this landmark Supreme Court decision denying a right of access to non-candidate political or issue advertisers that is squarely on point here.

The Commission’s own citizen’s reference manual—*The Public and Broadcasting*—unequivocally informs the public that stations “are not required to broadcast everything that is offered or otherwise suggested to them.”³¹ Except as required by the Act (*i.e.*, the “use” of stations by federal candidates), “licensees have no obligation to allow any particular person or group to participate in a broadcast or to present that person or group’s remarks.”³² The Commission specifically applies this principle to advertising by stating that “station licensees have *full discretion* to accept or reject any advertising,” except for certain ads by political candidates.³³ Just last month

³⁰ *CBS v. DNC*, 412 U.S. at 116. In *FCC v. Midwest Video Corporation*, 440 U.S. 689, 705 (1979), the Court similarly found that the “language” of Section 3 of the Act is “unequivocal” in stipulating that “broadcasters shall not be treated as common carriers,” thus “foreclos[ing] any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems.”

³¹ *The Public and Broadcasting* at 13. *Accord Louisiana Broadcast Stations*, 7 FCC Rcd at 1507 (“Broadcasters are not common carriers, and therefore are not obliged to accept all programming offered by members of the public.”).

³² *The Public and Broadcasting* at 13.

³³ *Id.* at 21 (emphasis added). Citing *CBS v. DNC*, the FCC has explicitly recognized stations’ wide discretion to decline non-candidate political advertising, including advertising on political issues. See, *e.g.*, *In re Complaint of You Can’t Afford Dodd Committee*, 81 FCC 2d 579 (1980) (Act did not require broadcast station to air a political advertisement by an independent political committee regarding a federal candidate for office); *In re Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd 678, 682 (1991) (Section 3 of the “Act states that broadcast stations cannot be treated as common carriers with an obligation to accord access to any particular person, group, or entity.”). See also Letter to Andrew J. Schwartzman and Howard F. Jaeckel from Barbara A. Kreisman, Chief, Video Division, Media Bureau, *In re: Application for*

the Commission reaffirmed broadcasters' discretion to reject proffered programming by denying an objection against a station's license renewal based on the station having declined to broadcast funeral announcements.³⁴ In *CBS v. DNC*, the Supreme Court noted that "[t]he Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities,"³⁵ and yet such a command is precisely what Petitioner seeks here. Petitioner plainly has no right of access to require broadcasters to air its advertisements concerning the PRA.

The remedies envisioned by the Petition are also barred by Section 326 of the Act that forbids the Commission from engaging in "censorship" or from promulgating any regulation that "interfere[s] with the right of free speech by means of radio communication."³⁶ The broad textual prohibition in Section 326 precludes the Commission from regulating a broadcaster's decision to air—or not air—certain advertisements or music.³⁷

Renewal of License of Station WFOR-TV, Miami, Florida, DA 07-3532 (Aug. 7, 2007), at 2 (refusal to accept editorial advertisement is not prima facie inconsistent with the public interest).

³⁴ Letter to Vonne Blessman Anderson and James R. Lambley from Peter H. Doyle, Chief, Audio Division, Media Bureau, *In re: KSDZ(FM), Gordon, NE, DA 09-1769* (Aug. 7, 2009), at 2 ("no federal rule or law can compel a commercial broadcast licensee to broadcast funeral announcements either for a fee or for free as a 'public service announcement'").

³⁵ *CBS v. DNC*, 412 U.S. at 113.

³⁶ 47 U.S.C. § 326.

³⁷ See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650, 652 (1994) (quoting Section 326 to illustrate the "minimal extent to which the FCC" is allowed to "intrude into" or "influence the content of broadcast programming"); *CBS v. DNC*, 412 U.S. at 110 (citing Section 326 as evidence of congressional intent to preserve journalistic freedom).

The D.C. Circuit Court of Appeals has cited Section 326 to emphasize the strict limits on the Commission's authority to adopt regulatory requirements significantly affecting the content of broadcast programming. In *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002), the court found that no provision of the Communications Act (including Section 1) authorized the Commission to adopt video description requirements for television broadcasters because such regulations "significantly implicate[d] program content." The court explained that the "very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content" in order to "avoid potential First Amendment issues." *Id.* at 805. The court also noted that "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content." *Id.*³⁸ Because the remedies envisioned in the Petition obviously implicate "program content," the Commission cannot rely on its general regulatory authority to require stations to air specific advertisements or the music of particular artists, and no specific, detailed congressional authority to do so exists.³⁹

The Commission has time and time again acknowledged its "very limited authority to interfere with a licensee's discretion to select, reject, or change its mind about particular program material."⁴⁰ Addressing a complaint akin to Petitioner's

³⁸ The Court cited, for example, specific congressional delegations of authority authorizing the FCC to address obscenity and indecency (18 U.S.C. § 1464) and the provision of broadcast airtime to political candidates (47 U.S.C. § 315). *Motion Picture Association*, 309 F.3d at 805.

³⁹ *Motion Picture Association*, 309 F.3d at 805-807 (FCC's general powers under Sections 1, 2(a), 4(i) and 303(r) of the Act did not authorize the adoption of rules "about program content").

complaint here, the Commission rejected a right of access claim by an organization that sought to purchase issue advertisements on a CBS affiliate opposing certain promotional/editorial ads for the CBS Evening News:

The Commission is without authority to order the licensee to telecast FIM's advertisements. The Commission has consistently recognized the broad discretion that licensees have in determining whether the presentation of particular material will serve the public interest. Neither the Communications Act nor the first amendment requires a broadcaster to accept paid advertisements. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). In fact, the Communications Act explicitly states that broadcasting stations are not common carriers. Therefore, broadcasters have discretion to select what to broadcast and have responsibility for the material aired.⁴¹

Curiously, Petitioner asserts that it does not “seek[] to revive the Fairness Doctrine or otherwise dictate programming choices by broadcasters.”⁴² Yet that is precisely what the Petition seeks to do. By asking for a declaration that broadcasters’ actions violate the public interest, Petitioner wants nothing short of a compelled right-of-access for issue advertisers that is on par with the rights that Congress affords political candidates.⁴³ Worse, to suggest that stations must accept PRA spots simply because

⁴⁰ *Louisiana Broadcast Stations*, 7 FCC Rcd at 1507; *accord In re TVT License, Inc.*, 22 FCC Rcd 13591, 13595 (2007) (noting that “the First Amendment to the Constitution strictly limits the Commission's authority to interfere with the programming decisions of licensees”); *In re Application of National Broadcasting Co., Inc.*, 14 FCC Rcd 9026, 9031 (1999) (“Section 326 of the Communications Act and the First Amendment to the Constitution prohibit any Commission action which would improperly interfere with the programming decisions of licensees.”).

⁴¹ *In re Complaint of Fairness in Media against Television Station WTVD Durham, North Carolina*, FCC 86-370, 1986 WL 290793, ¶ 6 (1986) (“*Fairness in Media*”).

⁴² Petition at 2, 15.

they present an opposite viewpoint actually would go *further* than the Fairness Doctrine ever did. The Fairness Doctrine did not go so far as to mandate a specific right of access by a specific individual or organization to air a specific spot.⁴⁴ The Commission drew this very distinction in its *Fairness in Media* decision, explaining that “FIM’s Complaint, although denominated a Fairness Doctrine complaint, appears to be a complaint based on WTVD’s refusal to accept FIM’s advertisements.”⁴⁵

The consequences of requiring a broadcaster to accept the equivalent of a “right of reply” whenever it airs spots that could be characterized as in its own economic interest are as far-reaching as they would be debilitating to stations. Broadcast stations are business entities that are affected by general legislation of interest to all businesses and employers—from health care legislation to tax legislation to local land-use ordinances. The resulting whipsaw effect from a compelled right of reply—turning broadcasters into common carriers or forcing them to self-censor political speech—is statutorily and constitutionally unsupportable.⁴⁶

⁴³ See 47 U.S.C. § 315(a).

⁴⁴ *Fairness in Media*, 1986 WL 290793 at ¶ 6. See also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 n. 14 (1979); *In re You Can’t Afford Dodd Committee*, 81 FCC 2d at 583 (Fairness Doctrine did not create a general right of access).

⁴⁵ *Fairness in Media*, 1986 WL 290793 at ¶ 5.

⁴⁶ It would also be a practical nightmare if the FCC were to attempt to determine – as Petitioner apparently wants – whether it was acceptable for a station to either air or decline to air advertisement “A” (because the station’s motivation was deemed acceptable), but that it violated the public interest for the station to air or refuse to air advertisement “B” (because the station’s motivation was not sufficiently pure). Stations air or decline to air ads, including ads relating to public and political issues, for a wide variety of reasons. For example, some television stations in California recently declined to air advertisements calling for legalizing and taxing marijuana as a way to generate more revenue for the cash-strapped state, while other stations in Los Angeles,

C. Petitioner May Not Properly Contend It Has No Avenues to Make its Views Known

Petitioner can hardly complain that a radio station's refusal to air particular PRA advertisements will somehow cut off Petitioner's right to be heard on the PRA. If anything, the celebrity musicians who are supporters of the PRA are far *more* visible than opponents in the media and the public eye.

A simple measurement using the Google Trend tool reveals that news references for the term "performance right" (the term favored by PRA supporters) have substantially increased in volume in 2009, especially during the spring and summer – the time that Petitioner contends radio stations were somehow improperly controlling the debate over the PRA.⁴⁷ In contrast, news references for the term "performance tax" (the term favored by broadcasters opposing the PRA) have risen only slightly in 2009.⁴⁸ This result demonstrates that MusicFIRST and other supporters of a "performance right" have succeeded in placing their message before the public and receiving news coverage of their position.

As noted above, the music industry also uses the power of celebrity to advance the PRA. The famous artists who have publicly endorsed the PRA include such celebrities as Tony Bennett, Dionne Warwick, Nancy Sinatra, Bono, Billy Corgan, Sheryl

Sacramento and the San Francisco Bay area aired the ads. See Mike Daniels, *TV Ad: Marijuana Legalization Could Help California's Budget Deficit* (July 9, 2009), available at <http://www.ksq.com/global/story.asp?s=10667390&ClientType=Printable>. The FCC should not here suggest any willingness to delve into station determinations of this sort.

⁴⁷ See Attachment A, "*Performance Right*" versus "*Performance Tax*:" Which Term Gets More Publicity on the Web?, at 1.

⁴⁸ See Attachment A at 2.

Crow and Lyle Lovett.⁴⁹ There is no list of radio station owners or on-air music DJs that could command even a fraction of the attention that these artists do among members of the public, the media and members of Congress.⁵⁰ And these celebrity artists not only generate publicity and visibility for MusicFIRST's cause, they may also be capable of producing influence in the political arena.⁵¹ In short, "[c]elebrity sells,"⁵² and this power makes Petitioner's suggestion that radio broadcasters can dominate the PRA debate ring hollow.

It is also wrong to suggest that broadcast stations have uniformly refused to discuss "both sides" of the proposed PRA. Here are but a few examples of informational programming about the PRA that broadcasters have aired, even though

⁴⁹ See Attachment B, *The Power of Celebrity: MusicFIRST Uses Big Stars to Gain Access to the Big Stage in Media* (showing that celebrity supporters of the PRA have gained access to coveted editorial pages, hosted private performances for members of Congress and testified before congressional committees).

⁵⁰ See Attachment B at 2-3 (news reports about the stars that have appeared in the Capitol, noting that the "music industry can create an event like no one else").

⁵¹ Celebrity endorsements of political candidates, for example, "invariably provide attention" and "generate money, crowds and enthusiasm." Joshua Green, *Madonna Wants Me*, *The Atlantic Online* (March 2004). Also significantly, celebrity involvement in political campaigns generate "earned media" (*i.e.*, coverage that, "unlike political advertising, does not have to be paid for."). *Id.* This ability of celebrities to generate earned media may, at least in part, explain why MusicFIRST's preferred term "performance right" showed a pronounced spike in news reference volume in 2009. See Attachment A and discussion *supra*. A recent study further found that a celebrity endorsement of a presidential candidate (Oprah Winfrey's endorsement of Barack Obama) "generated a statistically and qualitatively significant increase in the number of votes Obama received as well as in the total number of votes cast." Craig Garthwaite and Timothy Moore, *The Role of Celebrity Endorsements in Politics: Oprah, Obama, and the 2008 Democratic Primary* (Sept. 2008), at 3. A number of celebrities actively promote a variety of causes and issues on Capitol Hill. See Attachment B at 3.

⁵² Julie Creswell, *Nothing Sells Like Celebrity*, *New York Times* (June 22, 2008).

stations are not required to address the PRA at all.⁵³ These programs include interviews and discussions with both supporters and opponents of the PRA, including congressional sponsors of the legislation. For instance, WLAC(AM) in Nashville hosted an interview on July 27, 2008, with Senator Orrin Hatch of Utah, the lead Republican co-sponsor of the PRA in the Senate, in which he discussed his goals in introducing the legislation and his views on the subject.

NAB, moreover, seriously doubts the underlying premise of Petitioner's argument that radio stations en masse are refusing to air its spots. NAB, with the assistance of the State Broadcast Associations, has inquired as to whether radio stations and station groups had received inquiries from Petitioner about the purchase of time for PRA advertisements. To date, our reports indicate that MusicFIRST has not approached a

⁵³ See, e.g., a one-hour show on the PRA featuring a guest representing each side of the issue airing on WRJD-AM, Durham, NC on June 11, 2009; a two-part feature airing on KFWB-AM in Los Angeles on July 24 and July 29, 2009 that provided equal time for both sides of the PRA issue; a segment on the debate produced by American Public Media's "Marketplace," which aired on NPR: http://marketplace.publicradio.org/display/web/2008/06/11/radio_royalties/; a 25-minute interview on the PRA on KUSU-FM on July 22, 2009, including both PRA supporters and opponents: <http://www.publicbroadcasting.net/upr/.jukebox/media/upr/850736/mp3/accessutah/podcast/359/850736.mp3>; and coverage offering both sides of the PRA issue by local television stations, including WTSP-TV http://www.tampabays10.com/video/default.aspx?maven_playerId=immersiveplayer&maven_referralPlaylistId=19ef553b178cf268ca5e9bb8e1ee73b5d0832d01&maven_referralObject=1208518470; WTOV-TV <http://www.wtov9.com/video/19495718/index.html>; KIAH-TV <http://www.39online.com/news/local/kiah-performance-rights-act-story,0,1074388.story>; KHOU-TV http://www.khou.com/business/stories/khou090620_mp_radio-stations-going-silent.10b11cb1.html; WLUK-TV http://www.fox11online.com/dpp/news/local_wluk_radio_stations_fight_performance_fees_20093262235_rev1; WWLP-TV http://www.wwlp.com/dpp/news/local/wwlp_local_musiciansmightgetpaidforairtime_200908031642

significant number of radio stations. For example, the owner of a mid-sized station group has reported that MusicFIRST has not contacted him about the airing of spots on any of his stations, including on his two 100,000-watt FM stations in “Music City” (Nashville) – which would seem a logical place for MusicFIRST to advocate for the PRA.

In fact, Petitioner has declined to purchase air time when offered by a leading station in Washington, DC. Steve Goldstein, Sales Manager for WTOP-FM and other stations in the Washington, DC area, states that he learned from trade press that MusicFIRST was seeking to air spots on broadcast stations. He contacted MusicFIRST and offered to air its spots on WTOP-FM for the same rate that the station had earlier aired NAB-purchased spots about the PRA. However, Petitioner turned down this opportunity to run its ads on this top-rated radio station covering the very center of the congressional debate on the PRA.⁵⁴ If Petitioner were truly concerned about its ability to convey its message, particularly to the crucial audience of members of Congress, one wonders why it declined WTOP-FM’s offer.

Petitioner’s implication that radio broadcasters can somehow improperly dominate the PRA debate must also fail in light of the numerous communications outlets available to MusicFIRST. The Petition does not, of course, mention whether MusicFIRST has even attempted to utilize other electronic media, such as broadcast television or cable and satellite television and radio. Supporters of the PRA in fact used CBS’s prime time audience reach during the 2008 Grammy Awards to call for passage

⁵⁴ Attachment C, Declaration of Steve Goldstein (Sept. 8, 2009).

of performance tax legislation.⁵⁵ The Petition does not discuss MusicFIRST's and other PRA supporters' use of the print media (including the editorial pages of The New York Times and other newspapers) to communicate its message.⁵⁶

Above all, the Petition fails to discuss how MusicFIRST, its members and related industry organizations that support the PRA spread their message and reach the American public and members of Congress through the vast resources of the internet. The MusicFIRST website features various information and resources, including letters that users can send online to congressional representatives.⁵⁷ MusicFIRST also has a Facebook page and a MySpace page, which features a blog badge that visitors can download to their own page. MusicFIRST has videos posted on YouTube, photos posted on flickr, and a presence on Twitter.

The MusicFIRST pro-PRA message is spread virally through a complex web of internet users and websites, including websites and blogs of news organizations,

⁵⁵ Andrew Noyes, Congress Daily, *Music Industry Uses Grammys To Push Change in Royalties* (Feb. 11, 2008) (during broadcast of Grammy Awards, Recording Academy President Neil Portnow vowed to fight to pass legislation imposing performance fee on radio).

⁵⁶ See Attachment B at 1 (Nancy Sinatra Op-ed in The New York Times supporting the PRA). See also, e.g., *Don't Let Radio Cheat Musicians*, Providence Journal, Op-ed by Daryl P. Friedman, Vice President for the Recording Academy (Oct. 23, 2008); *A Fair Reward for Radio Artists*, Washington Post, Letter to the Editor by Kim Roberts-Hedgepeth, National Executive Director of American Federation of Television and Radio Artists and Neil Portnow, President/CEO of the National Academy of Recording Arts & Sciences (June 26, 2009); *Radio Should Pay to Play our Music*, Reno Gazette Journal, Op-ed by Sam Folio, Secretary-Treasurer of the American Federation of Musicians of the United States and Canada (July 28, 2008); Dick Armey, *Airing on Free Use*, Washington Times (March 7, 2008).

⁵⁷ www.musicfirstcoalition.org.

MusicFIRST members, record labels, artists and individuals.⁵⁸ For example, SoundExchange, the entity appointed by the Copyright Royalty Board to collect and distribute sound recording performance royalties, features pro-PRA advocacy materials on its website and blog, including an advertisement on the homepage itself.⁵⁹ MusicFIRST and member organizations send mass emails to their respective memberships, urging individuals to further spread the message and petition their members of Congress.⁶⁰ These websites and emails publicize various publications and events, such as *Capitol Tracks* (a regular publication for members of Congress), MusicFIRST Advocacy Day, GRAMMYs on the Hill, Recording Arts Day on Capitol Hill, town halls across the country, and multiple receptions, dinners and other events, which generate substantial press coverage. Thus, Petitioner cannot seriously contend that its pro-PRA message will not be heard unless the Commission acts contrary to the Communications Act and the First Amendment to force radio stations to air MusicFIRST approved content.

⁵⁸ MusicFIRST members such as the American Federation of Musicians (AFM), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the Recording Academy prominently feature advocacy materials about the PRA on their respective websites.

⁵⁹ www.soundexchange.com; www.soundexchangeblog.com.

⁶⁰ <http://www.capwiz.com/musicfirstcoalition/home/>.

D. The Petition Fails to Confront Settled First Amendment Principles Applicable to Broadcasters' Right to Engage in Political Speech

The *Notice* properly recognizes that “substantial First Amendment interests are involved in the examination of speech of any kind.”⁶¹ Indeed, the types of speech directly impacted by the Petition—the right to select or reject political or issue programming and the right to petition the government—are among the core protections afforded to broadcasters under the First Amendment. Yet Petitioner gives barely a passing nod to broadcasters' First Amendment interests before urging the Commission to inject itself into day-to-day programming decisions, become the national arbiter of truth for political programming, and curb broadcasters' right to petition Congress.

1. Broadcasters Have Constitutionally Protected Rights to Air Programming and Advertisements That Oppose the PRA

As the Supreme Court has made clear, broadcasters have wide discretion to air editorial programming or other material that reflects the station's viewpoint on public issues.⁶² This right flows from the underlying constitutional principle that political speech lies at the core of the First Amendment's free speech protections.⁶³ A prime example is the PRA spots aired by Cathy Hughes, the founder and chairwoman of

⁶¹ *Notice* at 2.

⁶² See *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down statute that forbade public stations from engaging in editorializing). As discussed above, broadcast stations also have the right to refuse to air editorials. *CBS v. DNC*, 412 U.S. at 121-22. See also *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (First Amendment protects “the decision of both what to say and what *not* to say”) (emphasis in original).

⁶³ See *League of Women Voters*, 468 U.S. at 381-82 (First Amendment embraces the “liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment”). See also *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Radio One. Petitioner certainly may not like the message of those editorials; they are hard-hitting spots that are adverse to Petitioner's interests. But Petitioner has no right to stifle her views. Ms. Hughes plainly is afforded her full First Amendment protection to speak out on the PRA and the impact it may have on her Radio One stations.⁶⁴

The fact that Radio One—or any broadcaster—has an economic interest in a particular viewpoint is not grounds to bar that viewpoint from being broadcast. The Commission will not address allegations that a station has placed its private interests above the public interest unless it has been clearly demonstrated that the station's private interest "poses a substantial risk of serious harm to listeners."⁶⁵ Here, as noted above, broadcasters' PRA spots do not reflect any nefarious private interest that would pose any risk of harm—much less "serious harm" to listeners. Quite the opposite. The PRA, as discussed in Section I.A, *supra*, would siphon revenue from stations' current operating budgets, further weakening the ability of stations to serve the public. Any so-called "private" interest that the station has in protecting its current operating budgets is symbiotic with the public's interest in a vibrant and viable local broadcasting industry.

The Commission has most commonly rejected similar "private interest" allegations during license renewal challenges. For example, the Commission has

⁶⁴ Radio One's 2008 Annual Report filed with the U.S. Securities and Exchange Commission expressed concern that "the costs of content and programming may change significantly if new performance royalties are imposed upon radio broadcasters or internet operators and such changes could have a material impact upon our business." Radio One, Annual Report 2008, at 13. It is also worth noting that other observers – rather than decrying Ms. Hughes' activities as somehow contrary to the public interest – have praised Ms. Hughes' "political activism" and urged others to emulate it. William Reed, *Pump up the Volume!*, Business Exchange (Sept. 3, 2009).

⁶⁵ *Louisiana Broadcast Stations*, 7 FCC Rcd at 1507.

rejected claims that a station aired editorials in opposition to a ballot initiative without disclosing that it had a financial interest in a local cable company affected by the outcome of the ballot measure.⁶⁶ The Commission concluded that, notwithstanding any private interest in the ballot measure, the station “exercised its good faith discretion in determining that the two editorials were relevant and important to the community it served.”⁶⁷ In another proceeding, a station’s license was challenged on the grounds that the station ran editorials critical of an individual who had made negative remarks about car dealers over-the-air and that the editorials were intended to placate local car dealers who were large advertising clients of the station. The Commission held that the station’s programming decision did “not indicate that [the station’s] overall programming reflects any abuse of licensee discretion or failed to respond to community problems.”⁶⁸

2. The Commission Is Not and Should Not Be the National Arbiter of Truth for Political Advertising

Petitioner’s attempt to inject the Commission deep into the realm of political advertising must fail. The Commission has repeatedly declined invitations to assume the role of a “national arbiter of truth” regarding the content of news or political advertisements.⁶⁹ The Commission explained the basis for its reluctance in *In re*

⁶⁶ Letter to Mr. Richard Young c/o Robert W. Braun, Esq., Dutton, Braun, Staack & Hellman, P.L.C. Kurt A. Wimmer, Esq. Covington & Burling from Barbara A. Kreisman, Chief, Video Division, Media Bureau, *In re: Application for Renewal of License of KWWL(TV)*, 21 FCC Rcd 6900, 6901-02 (2006) (“*In re KWWL(TV)*”).

⁶⁷ *In re KWWL(TV)* at 6902.

⁶⁸ *Louisiana Broadcast Stations*, 7 FCC Rcd at 1507.

⁶⁹ *E.g.*, *In re Complaint of Robert DeVries*, 78 FCC 2d at 554; Letter to Lynn J. Farris from Peter Doyle, Chief, Audio Division, Media Bureau, *In re: KNEL(AM), Brady, TX*, 22

Complaint by Hon. Ronald Reagan, where it rejected a request from then-Governor Reagan to encourage stations to screen out false or fraudulent materials in advertisements in support of a ballot initiative:

[E]ach licensee may exercise its own judgment as how best to serve the public interest by presenting contrasting views, and what particular material is to be presented. Intervention by the Commission regarding specific material being broadcast for or against a proposition, even to the limited degree you urge, might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being broadcast on either side of a currently controversial issue—a position which would be inappropriate for the governmental licensing agency.⁷⁰

Petitioner's effort to have the Commission investigate a station's "private" interest in its PRA spots or the "truth" of its political speech would both obstruct broadcasters' wide journalistic freedom and certainly lead to a risk that stations may self-censor their programming to avoid the "raised eyebrow" of regulators.⁷¹ Forcing stations to assure

FCC Rcd 11193, 11194-95 (2007); *In re Complaints Covering CBS Program "Hunger in America,"* 20 FCC at 151.

⁷⁰ 38 FCC 2d 314-15 (1972). The next year, the Commission's Broadcast Bureau applied the same principle in refusing to wade into another "truth" debate. *In re Alan S. Burstein*, 43 FCC 2d at 592 (FCC will not "attempt to judge whether statements broadcast on political or other controversial public issues are true or false or whether a licensee was justified in either broadcasting or rejecting them" because "[t]o do so would be to attempt to place the Commission itself, the government licensing agency, in the role of national arbiter of the 'truth'"). *Cf. In re Application of American Broadcasting Companies, Inc.*, 86 FCC 2d at 5 ("If the evidence does nothing more than indicate that there is a dispute about the truth of a reported event or statement, whether a particular event or statement should or should not have been reported, or the manner in which a news item was reported, the Commission will not intervene.").

some objective “truth” in political speech would cause insurmountable problems during political seasons when stations are flooded with issue advocacy advertisements that offer competing viewpoints on legislation, public policy and candidates’ voting records. Neither broadcasters nor the Commission are equipped to determine whether it is objectively “false” to say a vote against a tax cut is tantamount to support for a tax increase or that a vote for an energy bill is a vote to cut jobs. Yet Petitioner’s logic would require stations to analyze this very type of rhetoric to divine some fundamental element of “truth” within political speech—and would ultimately entangle the Commission in reviewing stations’ day-to-day programming determinations in a manner prohibited by the Supreme Court. In *CBS v. DNC*, the court observed:

Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters’ conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.⁷²

⁷¹ *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978); see also *Radio-Television News Directors Ass’n v. FCC*, 184 F.3d 872, 887 (1999) (Commission’s political editorial and personal attack rules “interfere with at least some journalistic judgment, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment”); *In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5050 (1987) (stations’ “fear of governmental sanction resulting from the [Fairness] doctrine creates a climate of timidity and fear, which deters the coverage of controversial issue programming”).

⁷² 412 U.S. at 126-7. These same risks are presented by MusicFIRST’s request, which could draw the FCC into detailed questions about station operation and programming, (e.g., whether a station reduced its airplay of songs by certain artists, whether a station has aired the music of an artist supportive of the PRA a sufficient number of times, or whether a station has aired too many anti-PRA spots and not enough pro-PRA spots).

The Petition's specific allegations of "untruthful," "false" or "deceptive" statements in broadcasters' spots demonstrate just how impractical it is to invoke the Commission's authority to determine the "truth" in political, issue or editorial speech.⁷³ Each side of a political debate has its own objective *and* subjective interpretations of data and terminology that are designed to more effectively advocate its position. That is the very art of political debate.

Yet Petitioner would have the Commission resolve, as a matter of political "truth," whether the PRA imposes a "tax" or a "fee."⁷⁴ Petitioner claims a "tax" must be paid to the government, but the definition of "tax" also includes a "heavy demand"⁷⁵ or "a burdensome or excessive demand [or] a strain."⁷⁶ The PRA has all the markings of a government obligation even if it is not paid directly to the federal government itself. The "tax" would be imposed by the federal government, disbursed as a government subsidy to the recording industry,⁷⁷ at a rate determined by a government-appointed panel (the

The government should not be "entangle[d]" in the "day-to-day operations of the media" in this manner. *RTNDA v. FCC*, 184 F.3d 872, 881 (D.C. Cir. 1999).

⁷³ Petition at 1, 7, 13. As a threshold matter, not all broadcasters' spots referenced in the Petition were produced by NAB, and NAB does not presume to speak to any specific charges made against individual broadcasters. But the fact that there may be differences in spots among NAB and other broadcasters merely underscores the fact that there is no monolithic, coordinated or orchestrated campaign.

⁷⁴ See Petition at 8 (claiming that broadcasters are being untruthful in referring to performance royalties imposed by the PRA as a "tax").

⁷⁵ See <http://www.merriam-webster.com/dictionary/tax>.

⁷⁶ See <http://www.thefreedictionary.com/tax>, from The American Heritage Dictionary of the English Language, Houghton Mifflin Company, Fourth Edition, 2000 (updated 2009).

⁷⁷ A tax is "[a] fee charged ('levied') by a government on a product, income, or activity." <http://www.investorwords.com/4879/tax.html>.

Copyright Royalty Board),⁷⁸ and paid into an organization appointed by that government panel.⁷⁹ In light of these unmistakable governmental trappings, it is eminently reasonable in the course of political and public debate to characterize the PRA as imposing a “tax” on broadcasters. By the same token, it is reasonable for Petitioner to choose a different terminology. What it is not reasonable is MusicFIRST’s attempt to engage the Commission to balance competing dictionary definitions against the legal and practical operation of the PRA. In effect, Petitioner asks the Commission to somehow “referee” the bounds of permissible political speech. Given that members of Congress and congressional witnesses have used everything from “tax” to “fee” to “royalty” to “rates” to “equity” during recent congressional hearings concerning the PRA, it is difficult to sustain the proposition that there is only one permissible term for the exaction the PRA would impose.

The same is true with respect to Petitioner’s objection to broadcasters’ characterization that half of the money from the PRA royalties would go to “foreign” recipients.⁸⁰ The proposed legislation indisputably provides that a full 50 percent of the fees distributed would be apportioned to “copyright owners,” which are, typically, record labels.⁸¹ The vast majority of the recording industry market belongs to four major

⁷⁸ The Copyright Royalty Board (“CRB”) is the institutional entity in the Library of Congress that houses the Copyright Royalty Judges, appointed pursuant to 17 U.S.C. 801(a), and their staff. 37 C.F.R. § 301.1.

⁷⁹ The “collective” is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2006–2010 license period, the Collective is SoundExchange, Inc. 37 C.F.R. § 380.2(c).

⁸⁰ Petition at 7.

⁸¹ Section 2 of H.R. 848 would place terrestrial broadcasting under the Section 114 compulsory license of the Copyright Act, section (g) of which designates that “50

groups: Universal Music Group (31.2 percent), Sony BMG Music Entertainment (24.8 percent), Warner Music Group (20.8 percent), and EMI Group (9.4 percent).⁸² Three of these companies (including the two largest) are multinational organizations headquartered overseas with complex networks of subsidiaries. Universal is wholly owned by Vivendi, which is headquartered in France.⁸³ Sony BMG Music Entertainment (now renamed Sony Music Entertainment) is a division of Sony Corporation, which is “a multinational conglomerate corporation headquartered in Minato, Tokyo, Japan, and one of the world’s largest media conglomerates.”⁸⁴ On August 17, 2007, EMI was acquired by Terra Firma, a private equity partnership headquartered in London.⁸⁵

percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording” 17 U.S.C. § 114(g)(2)(A). See Testimony of Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America, Hearing before the Committee on the Judiciary on H.R. 848, House of Representatives, 111th Congress, First Session (March 10, 2009), Serial No. 111-8, at 204 (“[I]t is 50 percent to the copyright holder – which is typically, but not always, a *label* – and 50 percent to the performer and the musician.”) (emphasis added).

⁸² Numerous small, independent record labels make up the remaining 13.9 percent of the market. Figures are from Nielsen SoundScan midway through 2008 (first six months of 2008).

⁸³ Vivendi Annual Report 2008, http://www.vivendi.com/vivendi/IMG/pdf/20090408_annual_report_en_080409.pdf; see also <http://new.umusic.com/overview.aspx>.

⁸⁴ <http://en.wikipedia.org/wiki/Sony>. Prior to October 1, 2008, Sony’s non-Japanese music entertainment business was conducted by SONY BMG Music Entertainment (SONY BMG), a 50 percent joint venture with Bertelsmann AG. On that date, Sony acquired Bertelsmann AG’s 50 percent stake in the company, and SONY BMG became a wholly owned subsidiary. As of January 1, 2009, Sony BMG Entertainment changed its name to Sony Music Entertainment. <http://www.sony.net/SonyInfo/IR/financial/ar/2009/index.html>.

⁸⁵ <http://www.emi.com/page/emi/AboutEMI>; www.terrafirma.com. EMI was delisted from the London Stock Exchange on 18 September 2007 and on 4 October 2007 ceased to

NAB can just as easily question the “truth” of Petitioner’s claim that “at least half” of the royalties would go to recording artists.⁸⁶ There is no objective way to measure how much of the proposed royalty would actually reach artists. The payments would be collected and distributed by an organization designated by the Copyright Royalty Board—most likely to be SoundExchange, which has had notable problems locating well-known artists and groups such as the Mormon Tabernacle Choir.⁸⁷ Although SoundExchange has been able to locate 31,000 performers as of third quarter 2007, it admits that there are 40,000 performers who have yet to be tracked down.⁸⁸ There is nothing to require SoundExchange to commit adequate resources to ensure that the appropriate artists are identified; nor are there any requirements that these artists be located and paid.⁸⁹ There is, in fact, every encouragement for SoundExchange not to locate artists because a regulation promulgated by the Copyright Royalty Judges permits all money held and undisbursed for three years to be forfeited to SoundExchange to use in its general budget.⁹⁰ Moreover, nothing in the law would

be a public limited company and became EMI Group Ltd. Maltby Capital Ltd Interim Review 2008/09 at <http://www.emi.com/staticFiles/c6/32/0,,12641~144070,00.pdf>.

⁸⁶ Petition at 7.

⁸⁷ Dan Mitchell, *Anyone Seen the Mormon Choir?* New York Times (Oct. 28, 2006), <http://www.nytimes.com/2006/10/28/business/28online.html>.

⁸⁸ According to John Simson, Executive Director of SoundExchange, speaking at Harvard Law School, see Christopher Herot’s Weblog, <http://herot.typepad.com/cherot/2008/04/john-simson-of.html>.

⁸⁹ See <http://www.loc.gov/crb/comments/2008-7/fred-wilhelms.pdf>

⁹⁰ “If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of

prohibit the record labels from requiring, as a condition of a recording contract, that all of the PRA royalties owed to an artist be assigned to the record label or be subtracted from other royalties owed the artist by its label.

NAB, however, does not suggest that the Commission wade into this debate about how to “truthfully” quantify the recipients of the proposed royalty. The difficulties in doing so simply underscores the wisdom of the Commission’s long-standing rejection of a role as “national arbiter of the truth” of political and editorial programming in violation of the First Amendment.

3. Petitioner’s Claims that the Radio Broadcast Industry Is Engaged in an Anti-Competitive Lobbying Effort Have No Basis and Are Legally Foreclosed

Petitioner falsely claims that radio broadcasters are engaged in an unfair and anti-competitive lobbying campaign against the PRA. It is not at all clear what anti-competitive result Petitioner sees. As explained above, the radio industry is opposed to the performance tax favored by the music industry. Broadcasters have exercised their rights under the First Amendment to petition their elected representatives in the House of Representatives and the Senate to explain the public policy ramifications of the PRA. To date, Congress has determined not to adopt a performance tax, but Congress is currently examining the question again. The Commission has no jurisdiction over the performance tax question. Petitioner’s efforts to manufacture an FCC issue out of a hard-fought debate over public policy are unavailing.

distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.” 37 C.F.R. § 380.8.

The claims made here by Petitioner are reminiscent of claims brought in the 1960s when, as today, contentious public policy issues arose in state and federal legislatures. The argument would be made that an industry (or its trade association) was unlawfully restraining trade under the antitrust laws by advocating for a particular policy approach in a legislative body. One such fight occurred between the railroad and trucking industries 50 years ago. In response, the Supreme Court rejected tactics such as those employed here by Petitioner. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court concluded that:

In a representative democracy . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. . . .

* * *

[This case is essentially] -- a 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income. Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. . . . [The Sherman] Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement.⁹¹

During the half-century since *Noerr* was decided, the Court has made plain that claims that industry lobbying efforts are anti-competitive have no merit. The *Noerr-Pennington* doctrine is now a well-established principle. Under the First Amendment, it

⁹¹ *Id.* at 137-38, 144-45 (footnotes omitted).

cannot be a violation of the federal antitrust laws for competitors to lobby the government to change the law.⁹² In *Noerr*, the Court held that “no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.”⁹³ Similarly, the Court wrote in *Pennington* that “[j]oint efforts to influence public officials do not violate the antitrust laws[.]”⁹⁴

It is therefore well settled that neither the Sherman Act nor the Communications Act prohibits broadcasters from collectively communicating their views as to appropriate public policy to their legislative representatives. In the current debate, broadcasters are arguing that the law relating to performance royalties should remain the same. Petitioner is advocating a position which would, if adopted, have the effect of inhibiting radio broadcasters’ ability to continue providing the service they currently provide to the public. It is properly the province of Congress to evaluate and respond to such

⁹² *Noerr*, 365 U.S. 127; *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). See also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

⁹³ *Noerr*, 365 U.S. at 135.

⁹⁴ *Pennington*, 381 U.S. at 670. Indeed, under the *Noerr-Pennington* doctrine, even joint lobbying efforts “intended to eliminate competition” are not a violation of the antitrust laws. *Id.* Since its enunciation, the principle has also been extended to confer immunity from a variety of tort claims, including claims of unfair competition, tortious interference and abuse of process. See, e.g., *Thermos Co. v. Igloo Products Corp.*, 1995 WL 745832, *6 (N.D. Ill.1995) (holding that “attempts to protect a valid and incontestable trademark” are privileged under the *Noerr-Pennington* doctrine); *Virtual Works, Inc. v. Network Solutions, Inc.*, 1999 WL 1074122 (E.D. Va.1999) (applying the *Noerr-Pennington* doctrine to tortious interference claims); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988) (recognizing applicability of the doctrine to abuse of process and other claims); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 81 F.Supp.2d 602, 620 (D. Md. 2000), *aff’d*, 237 F.3d 394 (4th Cir. 2001) (holding that *Noerr-Pennington* immunity applies to common law claims). The Ninth Circuit has held that *Noerr-Pennington* also protects against RICO claims when a defendant has sent thousands of demand letters threatening suit. *Sosa v. DirectTV, Inc.*, 437 F.3d 923, 935 (9th Cir. 2006).

contentions. The Petition raises the same shop-worn arguments that have been trotted out over the years by proponents of various “access” theories. But the jurisprudence pertaining to the right to petition the government is beyond dispute. And, of course, the same right to petition protects MusicFIRST’s right to argue for its view as to appropriate public policy as well.⁹⁵

E. Petitioner’s Allegations of Political Broadcasting Violations Are Both Unsupported and Specious

Petitioner makes vague and unsubstantiated claims that “in at least some instances” broadcasters are characterizing spots discussing the PRA as public service announcements (“PSAs”) in order “to evade the requirements of the Bipartisan Campaign Reform Act,” including “keep[ing] a public file” of the PRA spots they air.⁹⁶ Such vague and unspecific speculation about unidentified station recordkeeping practices is little more than an effort to create more “smoke” around Petitioner’s illusory claims.

All video and audio PRA spots produced by NAB included the appropriate sponsorship identification information required by the Commission for radio and television broadcasts. NAB made versions of these PRA spots available to stations for

⁹⁵ The Petitioner’s casual use of the term “monopoly” to buttress its baseless competition arguments adds nothing to the claim that any station in particular or broadcasters en masse have failed in their public interest duties. Petition at 2, 15 (referring to broadcasters’ “statutory duty” to use their supposed “monopoly” over the airwaves “responsibly”). As noted above, neither the Communications Act nor the Constitution suggests that “responsible” use of the airwaves would compel carriage of messages with which broadcasters strongly disagree and/or abridgement of broadcasters’ First Amendment rights to petition the government and speak out on issues of vital importance to them.

⁹⁶ Petition at 8-9.

free through a public website, www.noperformancetax.org/resources.asp. The content of these spots is thus a matter of public record.

To assist stations who might elect to broadcast NAB-produced spots with recordkeeping requirements, NAB provided stations a courtesy copy of a PB-16—NAB’s proprietary political agreement form that is the industry standard for public file disclosure. This form was posted on the noperformancetax.org website. NAB modified the PB-16 specifically to allow stations a means of disclosing any relevant information regarding spots discussing the PRA in order to comply with any applicable recordkeeping requirements.

The recordkeeping rules for certain issue advertisements are governed by both 47 C.F.R. § 73.1212(e) and Section 315(e) of the Communications Act (the latter of which was added by Section 504 of the Bipartisan Campaign Finance Reform Act of 2002 (“BCRA”)). Section 73.1212(e) requires a station to keep a record of the chief executive officers or members of the executive committee or board of directors of any corporation or association that paid for or “furnishes” any material that is a “political matter” or “matter involving the discussion of a controversial issue of public importance.” Section 315(e) requires stations to “maintain, and make available for public inspection, a complete record of a request to *purchase* broadcast time” for any advertisement that “communicates a message relating to any political matter of national importance,” including “a national legislative issue of public importance.”⁹⁷ The records required to be maintained include the name of the person or organization purchasing time, pertinent

⁹⁷ 47 U.S.C. § 315(e) (emphasis added).

contact information, and a list of chief executive officers or members of the executive committee or the board of directors.⁹⁸

The PB-16 form provided by NAB to stations that might elect to air its PRA spots includes information that would satisfy each of these recordkeeping requirements. Indeed, NAB's PB-16 actually *exceeds* these requirements because Section 315(e), on its face, applies only to the "purchase" of broadcast time,⁹⁹ and the spots available to stations via the noperformancetax.org website were aired voluntarily, free of charge.¹⁰⁰

Furthermore, not all material that stations may air discussing the PRA is subject to the recordkeeping requirements of Section 73.1212(e). For example, Section 73.1212(e) does not apply to any material that was not "furnished" to the station—*e.g.*, an editorial, news story, announcement or a station-produced spot featuring station personnel. And if a particular PRA-related spot does not contain material that directly pertains to the PRA itself—but, rather, extols the virtues of free, over-the-air broadcasting—that specific spot may not involve a "controversial issue of public importance" triggering recordkeeping rules under Section 73.1212(e).¹⁰¹ That

⁹⁸ *Id.*

⁹⁹ 47 U.S.C. § 315(e)(1) ("A licensee shall maintain, and make available for public inspection, a complete record of a request *to purchase* broadcast time that—") (emphasis added).

¹⁰⁰ NAB itself did purchase some advertising spots on a limited number of radio stations, which presented the broadcaster case against the PRA. All such spots were appropriately and separately tagged as "Paid for by the National Association of Broadcasters."

¹⁰¹ See *Barry G. Silverman v. Station KOOL-TV*, 59 FCC 2d 659 (1976), *upheld* 63 FCC 2d 507 (1977) (complainant failed to establish that a spot concerning the television industry's service to the public was in fact about a controversial issue of public importance to trigger sponsorship identification rules).

determination is initially vested with the good faith judgment of the station.¹⁰² In the end, without a factually specific complaint about a particular spot or script aired by a particular station, or a failure to keep specific information in that station's public file, it is impossible to determine whether any station has somehow violated any recordkeeping requirements. Here, as with other aspects of the Petition, the Petitioner's failure to provide any facts is fatal to its speculative and conclusory claim.

Because the NAB spots comply with the sponsorship identification rules and because its public file form complies with any applicable recordkeeping requirements, the question whether a particular spot is classified as a PSA, a commercial or otherwise is of no moment. The Commission neither defines what constitutes a PSA, nor has it enacted any regulatory requirement to air such announcements. In any event, Petitioner does not cite any particular spot or script aired by any particular station as being improperly characterized as a PSA.

Given the paucity of the allegations set forth by Petitioner and the fact that the NAB spots and disclosure forms are compliant with applicable law, there is simply no merit to the spurious allegations that NAB orchestrated or suggested ways for stations to avoid making required public disclosures.

II. The Petition Lacks an Adequate Factual Basis to Justify a Commission Investigation or Other Action

Due to its lack of specific factual allegations, the Petition fails to establish a *prima facie* case of licensee misconduct or any other behavior worthy of Commission investigation or action. Decades of administrative law makes this plain. The

¹⁰² *See id.*

Commission should apply its stringent standard for establishing a *prima facie* case of licensee misconduct to this case and summarily dismiss the Petition.

It is well-settled that a *prima facie* case of licensee misconduct requires “specific evidentiary facts, not ‘ultimate, conclusory facts or more general allegations.’”¹⁰³ This standard of specificity is the touchstone of the decisions of the D.C. Circuit and the Commission for determining whether further FCC inquiry is warranted. Time and time again, the Commission has rejected petitions such as MusicFIRST’s which contain only “speculative” or “generalized” allegations or a lack of “concrete [or] detailed” evidence.¹⁰⁴

¹⁰³ *United States of America v. FCC*, 652 F.2d 72, 89 (D.C. Cir. 1980) quoting S. Rep. No. 690, 86th Cong., 1st Sess. 3 (1959) and citing *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323 (D.C. Cir. 1974) (allegations of specific anticompetitive practices by the licensees, without specific factual support, failed to raise substantial questions of abuse by the licensees’ principals and were not sufficient to require a hearing). See also *Stone v. FCC*, 466 F.2d 316, 321-322 (D.C. Cir. 1972) (same); *In re Beasley Broadcast Group, Inc.*, 23 FCC Rcd 15949, 15955 (2008) (“It is the complainant’s burden to present evidence to substantiate and document a claim of harassment and intimidation.”); Letter to Chicago Media Action and Milwaukee Public Interest Media Coalition from Barbara A. Kreisman, Chief, Video Division, Media Bureau, 23 FCC Rcd 10608 (2008) (“CMA Reconsideration”); Letter to Chicago Media Action and Milwaukee Public Interest Media Coalition from Barbara A. Kreisman, Chief, Video Division, Media Bureau, 22 FCC Rcd 10877 (2007) (“CMA”); *In re Turquoise Broadcasting Company, LLC*, 23 FCC Rcd 2507, 2511 (2008).

¹⁰⁴ *Thomas K. Kurian, RF Data Inc.*, 18 FCC Rcd 21949, 21953-54 (WTB 2003) (petition for revocation “should be dismissed as unsubstantiated” because the allegations, among other things, were “speculative,” “lack the foundation that the Commission would require,” and were “generalized”); *Petition for Declaratory Ruling by Radio Call Corp.*, 92 FCC 2d 160, 164 (1982) (petition for declaratory ruling denied in part to the extent arguments were “speculative” and “not compelling”); *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 912 (1982) (petitions for reconsideration of a rulemaking decision denied because “predictions of overcommercialization” are “speculative and conjectural”); *Amendment of Section 74.202(b), Table of Allotments, FM Broadcast Stations (Nowata and Collinsville, Oklahoma)*, 10 FCC Rcd 7159, 7160 (1995) (Commission declines to initiate investigation regarding manipulation of FM allocation rules because the “speculative

The Commission has applied this strict standard of specificity in rejecting precisely the kind of requests for investigations or declaratory relief sought here,¹⁰⁵ as well as in various challenges to station license renewals. The *CMA* and *CMA Reconsideration* license renewal cases, *supra*, are good examples of the Commission's application of this standard to claims of editorial programming decisions. There, the Commission rejected claims that licensees had exercised their discretion over editorial programming in bad faith. The Commission found that a study submitted by petitioner to be insufficient because it concerned only one type of programming and did not show that television programming in the subject markets had *generally* been unresponsive.¹⁰⁶ That decision is instructive because the Petition also challenges stations' editorial decisions regarding advertisements and music, yet it does not contain any allegations—much less specific or concrete allegations—that any station's programming decisions were generally unresponsive to the community's needs.¹⁰⁷

allegations do not constitute evidence sufficient to warrant an investigation"); *see also Community Coalition for Media Change v. FCC*, 646 F.2d 613, 615 (D.C. Cir. 1980) (affidavits submitted by petitioner "contained no concrete, detailed allegations of actual discriminatory conduct by [the licensee]," and petitioner "alleged no facts which would establish misrepresentation or improper classification of employees").

¹⁰⁵ *See, e.g., Radio Call Corp.*, 92 FCC 2d at 164; *Referral of Questions from General Communication Incorporated vs. Alascom, Inc. in the United States District Court for the Western District of Washington*, 3 FCC Rcd 700, 702 (1988) (petition for declaratory ruling denied in part on issue where petitioner provided "no factual support . . . beyond its bald assertion that such general conduct violates the Act").

¹⁰⁶ *CMA*, 22 FCC Rcd at 10879.

¹⁰⁷ Cases relating to claims of anticompetitive conduct also are instructive in light of Petitioner's vague competition-related claims. In *U.S. v. FCC*, 652 F.2d at 89, 90, the D.C. Circuit upheld the FCC's denial of an evidentiary hearing into possible anticompetitive consequences from the grant of a license for a domestic satellite joint venture. The Court determined that the allegations consisted largely of generalized and

Viewed against the backdrop of these strict evidentiary standards, the Petition falls sharply short of the mark. The “actions” alleged by Petitioner consist largely of unsupported allegations of “intimidation,” “boycotts” and a “malicious” media campaign against PRA supporters. Long on invective and rhetoric but woefully short of specific facts, the Petition lacks any basis for further inquiry—especially in light of the “substantial First Amendment interests” involved.¹⁰⁸

The Petition’s shadow boxing allegations of a “pattern of threats and intimidation” against PRA supporters are based on five *anonymous* anecdotes that do not mention a single station or artist.¹⁰⁹ One of the anonymous stations—the “Delaware radio station” cited in Attachment 1, ¶ 19 of the Petition—engaging in “intimidation” of artists is apparently a 100-watt high school radio station that chose not to air certain performers for a month two years ago as a protest against performance fee legislation. Rather than threatening artists, this station’s general manager reports “endur[ing] an angry tirade from the MusicFIRST folks.”¹¹⁰ Despite the alleged vast conspiracy by radio

unsupported criticisms of the venture, supplemented by legal and economic conclusions concerning market structure, competitive effect and the public interest. The court concluded that “since these petitions and supporting affidavits manifestly do not contain ‘specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent’ with the public interest standard, the Commission was not obligated to schedule an evidentiary hearing on that ground.” *Id.* at 90.

¹⁰⁸ *Notice* at 2. The D.C. Circuit has expressly stated that “the FCC policy of requiring a substantial prima facie case before proceeding against a broadcaster . . . reflects an appropriate respect for First Amendment values.” *Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985).

¹⁰⁹ Petition at 5; Attachment 1, ¶¶15-23.

¹¹⁰ Attachment D, Eric Ruth, *A Small Signal, But a Battle Royal*, delawareonline (June 16, 2009) (reporting that the high school students were “outraged” by the proposed royalty fee legislation and that they were not “intimidated by the threats” from

broadcasters to intimidate artists supporting the PRA, NAB also notes, for example, that the Black Eyed Peas, whose frontman Will.i.am is a leading proponent of the PRA, continues to enjoy vast amounts of free radio airplay. Indeed, at the time that MusicFIRST filed its petition in June, the Billboard Pop 100 Airplay chart listed the Black Eyed Peas' single "Boom Boom Pow" as the most played song on free, local radio.

The Petition's allegations that broadcasters en masse have refused to air Petitioner's ads supporting the PRA also lack evidentiary support. Petitioner identifies only six stations' call letters.¹¹¹ And to support its claim of a coordinated "media campaign designed to spread malicious and untruthful information" about the PRA,¹¹² Petitioner cites nothing more than comments made by broadcasters engaged in political discourse.¹¹³ Given that there are 14,355 full-power radio stations in the United

MusicFIRST). See also www.WMPH.org for the station's description of its "educational boycott" two years ago.

¹¹¹ Petition at 6, 7; Attachment 2. Although Petitioner also suggests that Clear Channel stations did not air its PRA spots in a number of markets, it includes no mention of any specific station or market.

¹¹² Petition at 7.

¹¹³ See Section I.D.2. *supra* (explaining why FCC cannot be the national arbiter of truth of political advertising). The Petition cites (1) *one* example of one early broadcaster spot mentioning that royalty recipients are record companies but failing to mention that artists also would receive royalties; (2) *two* examples of spots (by one owner) claimed to contain false claims "to incite racial animosity about the PRA," where one spot claimed that legislative hearings on the PRA did not have any black ownership representation when in fact one African-American owner had testified and the other spot connected the sale of three black-owned stations to the PRA; (3) broadcasters' airing of spots referring to proposed government-required PRA fees as a "tax"; (4) broadcasters' airing of spots saying that portion of PRA royalties would go to "foreign" recipients; and (5) *one anonymous* example of one broadcaster association claiming to run anti-PRA spots as PSAs. See Petition at 7, 8; Attachment 1, ¶¶ 5-13.

States,¹¹⁴ these slim and unsubstantiated reeds proffered by Petitioner, even when cobbled together, cannot support any further inquiry into the “actions” of “all” broadcasters.

The Petition labors in vain to compensate for its paucity of specific evidence by launching generalized attacks on the broadcast industry as a whole, invoking the name of NAB as its centerpiece.¹¹⁵ The words “National Association” seem to constitute the sum total of Petitioner’s evidence for a broad conspiracy on the part of NAB and the broadcast industry. Petitioner claims, without a single shred of evidence, that “[t]he artist threats and boycotts, deceptive and misleading radio spots, and refusal to air

¹¹⁴ FCC News, *Broadcast Station Totals as of June 30, 2009* (Sept. 4, 2009).

¹¹⁵ Even when Petitioner occasionally refers to “certain” broadcasters or “some” broadcasters, it switches, often in the same sentence, to “broadcasters” generally. *Passim*. See “**broadcasters** are refusing to accept ads” Petition at 6; “**Broadcasters** have rejected the spots” *Id.*; “Again and again, **broadcasters** have rejected” *Id.*; “Third, **broadcasters**, in coordination with NAB are engaging” *Id.* at 7; “**Broadcasters** have repeatedly made false characterizations” *Id.*; “**broadcasters** have repeatedly aired false claims to incite racial animosity” *Id.*; “in at least some instances **broadcasters** are characterizing them as public service announcements.” *Id.* at 8; “calling them PSAs allows **broadcasters** to evade the requirements of” *Id.*; “By labeling their opposition to the PRA as a ‘public service announcement,’ **broadcasters** are undermining” *Id.* at 9; “**broadcasters** are violating their statutory obligation” *Id.* at 10; “the conduct of **broadcasters** described herein strikes at the heart” *Id.* at 11; “the actions of **broadcasters** to . . . warp the presentation of a public debate violate” *Id.* at 12; “**Broadcasters’** intimidation and threats” *Id.*; “**Broadcasters’** actions . . . repudiate this high standard.” *Id.*; “**Broadcasters’** actions have a chilling effect on all artist speech.” *Id.*; “the **broadcasters’** conduct harms the listening public. . . .” *Id.* at 13; “**Broadcasters** are acting contrary to the public interest” *Id.*; “**Broadcasters** have also repeatedly aired false claims” *Id.*; “**broadcasters’** refusal to air spots. . . .” *Id.* at 14; “**broadcasters’** characterization of their own spots as PSAs and their apparent failure to comply” *Id.*; “Collectively, these actions demonstrate that **broadcasters** are using their position. . . .” *Id.*; “The actions by **broadcasters** . . . are blatantly anticompetitive.” *Id.*; “By acting in concert. . . **broadcasters** are acting” *Id.* at 15; “issue a declaratory ruling that the actions by **broadcasters**” *Id.* at 16; “The actions of **broadcasters** described in this petition support calls for strengthening the license renewal process and shortening license terms” *Id.* (emphases added.)

other views all appear to be part of a coordinated campaign involving NAB.”¹¹⁶ The Petition fails to provide any evidence to substantiate its efforts to tie NAB to any artist threats or boycotts or to any broadcaster’s refusal to air MusicFIRST spots on the PRA because there is no such evidence.

Consistent with its role as a trade association, NAB makes available to its members material presenting the broadcasters’ perspective on the PRA. It does so through the noperformancetax.org website. The right to petition the government would be meaningless without the right to assemble (on the internet or in person) and discuss issues facing like-minded business operators. Each station makes its own choice about whether to air information about the PRA. NAB does not—and cannot—dictate to any broadcast stations the content of their programs or advertisements. NAB’s educational and advocacy efforts in opposition to the PRA are no different than the efforts of the Recording Industry Association of America or other trade associations promoting the views of record companies or artists. That is what trade associations do. What NAB does not do is orchestrate—or even ask—stations to “boycott” artists, “threaten” artists or compel stations to take any specific action relating to the PRA.

Perhaps the Petition’s most scurrilous allegation is that broadcasters have somehow made “false claims to incite racial animosity.”¹¹⁷ Organizations representing minority broadcasters—including the Spanish Radio Association, the Minority Media and Telecommunications Council, and the National Association of Black Owned Broadcasters—have expressed sound public policy concerns about the impact that the

¹¹⁶ Petition at 9.

¹¹⁷ Petition at 7.

PRA could have on minority-owned broadcast stations.¹¹⁸ Petitioner’s allegations of “racial animosity” apparently stem from statements by Radio One regarding the lack of minority representation at PRA hearings and the linking of approval of the PRA in the House Judiciary Committee to the sale of three African-American owned radio stations.¹¹⁹ It is one thing for Petitioner to mine one or two isolated statements among various advocacy communications to try and find potential inaccuracies.¹²⁰ But it is beyond the pale for Petitioner to claim that any such inaccuracies were not only intentionally false, but designed to “incite racial animosity.” In NAB’s view, comments like this one made by MusicFIRST can be fairly said to be closer to promoting “racial animosity”:

[M]any black musicians are penniless in old age because Radio One and Clear Channel don’t pay royalties. Performance rights is a civil rights issues, it is a workers’ rights issue. . . . This civil rights for musicians legislation guarantees fair pay for musicians. This is a rebuke of Radio

¹¹⁸ See, e.g., March 5, 2009 Letter to Congressional Hispanic Caucus from Spanish Radio Association; March 6, 2009 Letter to the Honorable Barbara Lee from National Association of Black Owned Broadcasters; MMTC Action Alert, *Why We Should Oppose Public Performance Royalty Legislation* (Aug. 3, 2009) (estimating that the passage of H.R. 848 would result in the bankruptcies of about a third of minority owned stations); see also June 8, 2009 Letter to the Honorable Nancy Pelosi from National Association of Media Brokers.

¹¹⁹ Petition at 7-8.

¹²⁰ While MusicFirst may “believe the sale had nothing to do with PRA,” Petition at Attachment 1, ¶ 11, the broker involved in the sale of these three African-American owned stations stated that the owners of those stations “had an opinion of what” the PRA “would do to radio stations and that it wouldn’t be good. For stations like theirs, it would have cost them a lot of money.” Jeffrey Yorke, *Sheridan/Pittsburgh Buyer Leap-Frogged into Deal*, Radio & Records (May 18, 2009). In fact, even before the PRA was first introduced in December 2007, commentators had expressed concern that the threat of a performance fee could be of “real concern” to stations’ financial health and that investors would seek “sexier” investments. www.broadcastlawblog.com, post dated May 16, 2007.

One and Clear Channel for exploiting musicians and smearing members of the Congressional Black Caucus.”¹²¹

This rhetoric—while disappointing—is consistent with Petitioner’s larger exaggerated public relations broadside against radio broadcasters.¹²² The notion that local radio stations are somehow responsible for the financial status of unspecified “penniless” black musicians is ludicrous. Petitioner’s reference to a 100-watt high school radio station as an agent of “artist intimidation” is truly ridiculous. Petitioner stretches even further when it cites the music played during broadcasts of religious services as support for claiming that not all music played over-the-air would be subject to the PRA.¹²³ These absurd assertions betray Petitioner’s true motives in filing this Petition for use as a public relations vehicle, rather than a serious request for legal relief.

¹²¹ Sean Glover, spokesperson for the MusicFIRST Coalition, MusicFIRST press release (July 14, 2009).

¹²² For example, Martin Machowsky, a MusicFIRST spokesman, has labeled radio broadcasting as “piracy” for playing the music of artists without paying a performance fee. David Kravets, *Recording Industry Decries AM-FM Broadcasting as ‘A Form of Piracy,’* wired.com (June 23, 2008). Other observers have noted the hypocrisy in this claim, in light of MusicFIRST’s Petition requesting that the FCC investigate radio stations’ supposed boycotts of musicians who support the PRA. Michael Masnick, *Why Is the FCC Even Giving the Time of Day to RIAA’s Bogus Radio Witchhunt?* (Aug. 11, 2009), available at <http://www.techdirt.com/articles/20090811/0152565837.shtml> (article summarizes MusicFIRST’s position as, “if a radio station *does* play” artists supporting the PRA, “it’s piracy,” but “if it *doesn’t* play these artists, it requires an FCC investigation”).

¹²³ Petition at Attachment 1, ¶ 12.

CONCLUSION

For the reasons set forth above, the Commission should summarily dismiss the Petition.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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Jane E. Mago
Jerianne Timmerman
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September 8, 2009

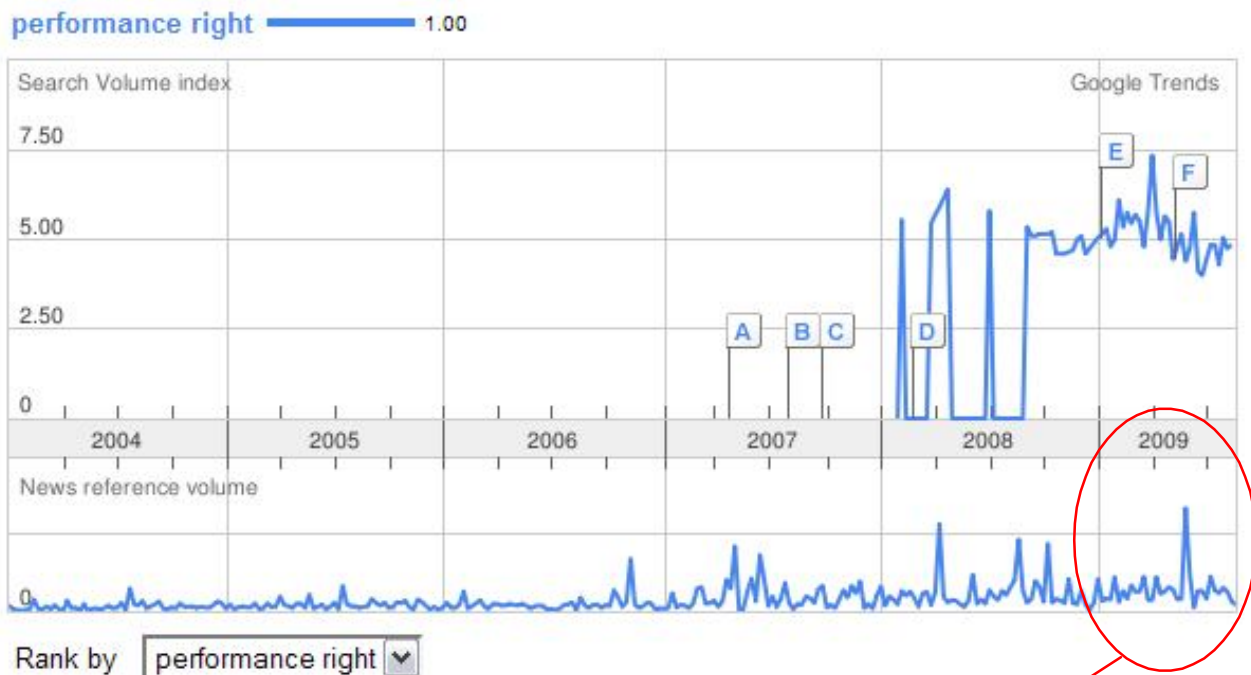
Attachment A

"Performance Right" versus "Performance Tax"

Which Term Gets More Publicity on the Web?

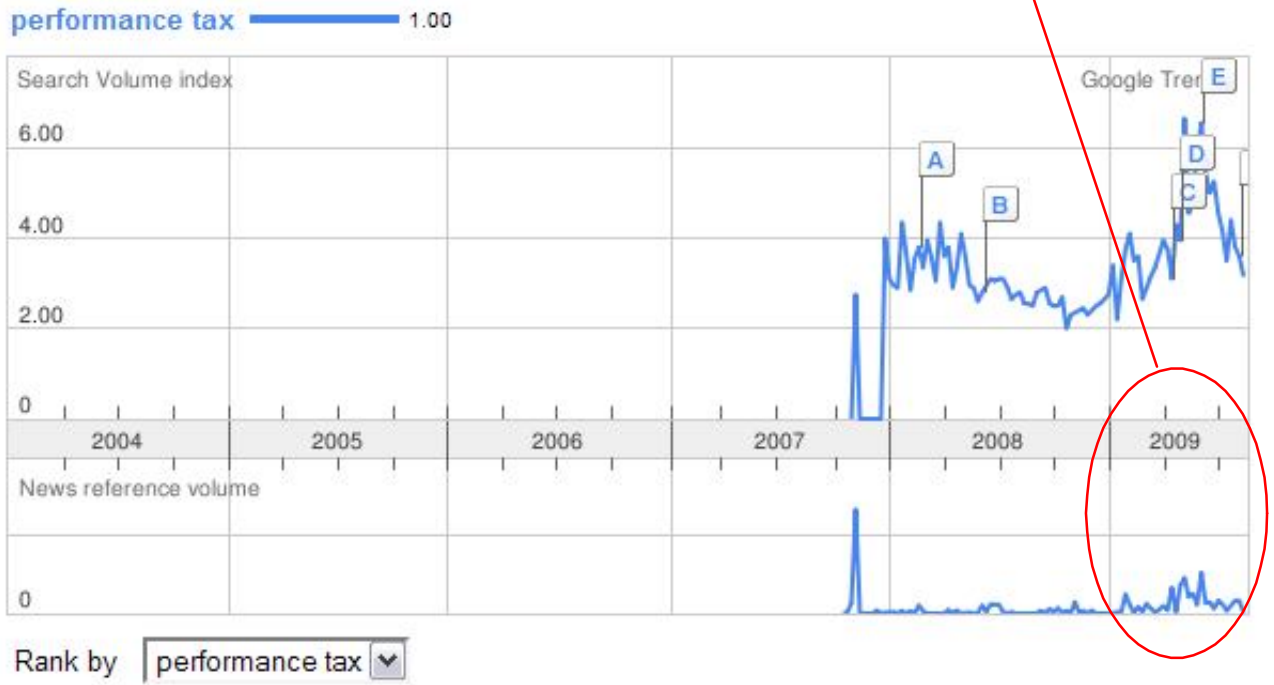
MusicFIRST has complained that some radio stations are using the airwaves to dominate the debate over a new performance fee, and that, as a result, the recording industry cannot get publicity for its side of the story. This claim can actually be tested because it is now relatively easy to at least estimate the impact of publicity if you have two distinct variables to compare. Using the Google Trend tool, NAB measured the "Search Volume Index" and "News Reference Volume" of two terms that represent opposite sides of the debate - Performance Right versus Performance Tax. MusicFIRST and the record labels prefer the term "performance right," while broadcasters use the term "performance tax."

The first graph below shows the search volume and news reference volume, as measured by appearances in Google News, of the term "performance right." It shows that both searches for the term and news references have been trending upwards, especially this spring and summer. The second graph shows search and news trends for the term "performance tax." While it shows that search volume for "performance tax" has also increased in 2009, news references have risen only slightly. If MusicFIRST's complaints about broadcasters controlling the public debate were to be believed, it would be logical that the term "performance tax," favored by broadcasters, would be showing greater increases in both search volume and news reference. But as these graphs show, MusicFIRST's use of the term "performance right" is common, especially in news reports, despite their accusation that radio stations have somehow cut them out of the debate.



News Reference volume for 2009 shows a spike for the term "performance right." This coincides with the time that MusicFIRST contends radio stations have been monopolizing the debate on PRA.

In contrast, news reference volume has risen only slightly for the broadcaster-favored term "performance tax."



Attachment B

The Power of Celebrity

MusicFIRST Uses Big Stars To Gain Access to the Big Stage in Media

Tony Bennett, Nancy Sinatra, Sheryl Crow and Bono - just a small sampling of the stars MusicFIRST has used to generate publicity about their fight for performance fees on radio stations. MusicFIRST has used the power of celebrity to gain access to the most coveted editorial pages, both in print and on the Web. Stars have hosted private performances for members of Congress and have testified before congressional committees. Press conferences with music stars have generated substantial publicity. And yet MusicFIRST complains that broadcasters are somehow unfairly tipping the balance of the debate by running advertisements on some radio stations. This disingenuous argument ignores the inherent publicity advantage record labels have to gain access - often for free - to some of the most influential platforms in media.

Here is a sampling of the Power of Celebrity that MusicFIRST can wield:



Big Radio's Attacks on Me Aren't Surprising

Radio Free America

By NANCY SINATRA



August 4, 2009

WHEN I hear great American standards on the radio, I think of all the songwriters, artists and musicians whom my father, brother and I have worked with over the years. It reminds me that every recording has two parts, the composition and the performance. It also reminds me how many wonderful artists and musicians have not been paid fairly for their work.

Note the celebrities in these sample stories:



HOH's One-Minute Recess: A Renaissance Crooner

April 29, 2009, 12:08 p.m.

By Emily Heil and Elizabeth Brotherton

Roll Call Staff

Legendary performer Tony Bennett may have left his heart in San Francisco, but he's sure taking the nation's capital by storm.

Bennett presented his personal portrait of Duke Ellington to the National Portrait Gallery this morning, where it was installed in the museum's "New Arrivals" gallery. Today marks the 110th anniversary of Ellington's birth, and Bennett's watercolor tribute will hang in the gallery throughout the summer.

HOH met up with Bennett in the Capitol Visitor Center last night, just after he performed "The Good Life" for Members and special guests. And while Bennett said he was honored by the gallery's selection of his work, he noted that the Ellington portrait is actually the third piece that he has presented to the Smithsonian Institution.

"I can't ask for more success when it comes to my artwork," he said.

Art wasn't the only thing on Bennett's mind, however. During his trip to Capitol Hill on Tuesday, Bennett urged Members to support legislation compensating artists when their songs are played on the radio.

He certainly had an audience — dozens of Members came out to pose for photos with the singer, including Sens. Dianne Feinstein (D-Calif.) and Bob Bennett (R-Utah), as well as Reps. John Conyers (D-Mich.), Brad Sherman (D-Calif.), Steve Cohen (D-Tenn.) and Marsha Blackburn (R-Tenn.).

But it was Sen. Patrick Leahy (the sponsor of the artist compensation bill) who had the honor of introducing the singer. The Vermont Democrat noted that while he has a very Irish name, his mother was an Italian American — and a very big fan of the crooner. With his introduction of Bennett, Leahy said, "she would admit that I finally amounted to something." Not that Leahy isn't a big Bennett fan himself.

"I have a number of your songs on my iPod," Leahy told the singer. "I listen to it, especially when I'm traveling ... and want to relax."



Musicians seeking pay for play

BY DAVID HINCKLEY

Wednesday, June 11th 2008, 4:00 AM

A parade of singing stars will follow Nancy Sinatra's boots into a congressional hearing room today to argue that artists should be paid when their music is played on the radio.

Sounding a counternote at the 2 p.m. subcommittee hearing, called by Rep. Howard Berman (D-Calif.), will be Charles Warfield of Inner City Broadcasting. Berman will argue that artists are compensated - that the promotional value of radio airplay drives recorded music and concert ticket sales.

The current royalty rules, written into copyright law eight decades ago, give airplay royalties to songwriters, but not artists. The music industry thinks it's time that changed.

"I think most people recognize this as a basic issue of fairness," says Tod Donhauser, a spokesman for the MusicFirst Coalition that is pushing for royalties. "When someone uses your intellectual property, you should be compensated." He notes that satellite radio, Internet radio and cable TV radio all pay airplay royalties to artists, as does radio in every other Western democracy.

The National Association of Broadcasters (NAB), which calls royalties a "performance tax," says airplay royalties could cost radio \$6 billion to \$7 billion a year and cripple many stations.

The NAB yesterday issued a study placing the promotional value of radio airplay at \$1.5 billion to \$2.4 billion a year, exclusive of concert tickets. The NAB also argues that much of any royalty fee would go to "record companies that sue grandmothers for downloading music."

Donhauser says royalties would compensate not just primary artists, but session players and backup singers who often never received anything.

Donhauser says MusicFirst is "very optimistic" that royalty legislation will eventually pass, despite the fact that 208 U.S. representatives have signed an NAB petition opposing it.

"I don't think it will happen this year," says Tom Taylor, editor of the newsletter Radio-Info.com. "But the issue isn't going away. This will be a multiyear fight."

Besides Sinatra, whose father, Frank, was a big backer of airplay royalties, today's witnesses are set to include Dan Navarro, the Sugarhill Gang, Kristine W and Whodini.

Past hearings have featured artists like Judy Collins, who sang "Amazing Grace" with new lyrics about royalty payments.

"The music industry can create an event like no one else," says Taylor. "Here's a whole panel of elected officials who probably remember those 1960s Nancy Sinatra album covers."

Even Julia Roberts Didn't Love Him Like That

By Dana Milbank

Wednesday, November 14, 2007; A02

Fresh from his appearance Monday night at the Birchmere, Lyle Lovett had a gig at the Senate Judiciary Committee yesterday -- and the stage proved uncomfortably crowded with performers.

The Grammy-winning singer-songwriter, movie actor and ex-husband of Julia Roberts had come to testify about music copyrights. But the lawmakers, in the presence of a captive celebrity audience, turned the hearing room into an amateur talent show.

"My parents forced upon me trombone lessons," Sen. John Cornyn (R-Tex.) informed the country music star. "I learned how to play the guitar," he added, because "the opposite sex was not attracted to trombone."

"I gave the keynote address at the ASCAP national convention one year," Sen. Orrin Hatch (R-Utah), a writer of patriotic Christian hymns, told Lovett. "The place went wild. I mean, they screamed and shouted and stood on chairs."

Though nobody asked, Chairman Pat Leahy (D-Vt.) disclosed that he, too, is "a big music fan."

"We all enjoy the music," seconded Sen. Arlen Specter (R-Pa.). Still, he couldn't help but wonder whether "we might have a better public response if we let the performers perform as opposed to hearing the senators do too much talking."

Not a chance of that happening.

Lovett and his warm-up act, Chicago singer-songwriter Alice Peacock, wanted a law requiring radio stations to pay royalties to singers. To help her case, Peacock grabbed an acoustic guitar and, from the witness table, sang a love song to the four men on the dais: "Baby, I've never felt so alive/It's joy, it's ecstasy, it's truth, it's destiny."

Peacock's rich voice and Lovett's famous visage distracted the senators from copyrights. The star-struck lawmakers competed to display their musical savvy.

"Texas has produced a large number of our nation's most famous musicians," Cornyn announced, and then proceeded to misidentify the father of Texas swing, the late Bob Wills of the Texas Playboys, as "Bob Willis." Murmurs spread through the crowd. "Excuse me! I don't know why I said Bob Willis," the embarrassed lawmaker apologized, before recovering enough to ask Lovett whether the singer Robert Earl Keen "was your housemate at Texas A&M?"

"We lived down the street from one another," Lovett testified. Without objection, this salient fact was entered into the record.

Lovett must have known he was in for some idol worship. Senators, celebrities in Washington only, love to have the attention of actual celebrities. This explains the stream of recent visitors through the Capitol: Bono to talk about foreign aid; Richard Gere to see the Dalai Lama; Bonnie Raitt, Jackson Browne and Graham Nash to talk nukes; and, to highlight various issues, Sheryl Crow, Kate Bosworth, Drew Barrymore and even porn star Jenna Jameson. Even as Lovett testified yesterday, Bo Derek was spotted in the same building.

A couple of hours after Lovett departed the congressional stage, Stevie Van Zandt (of Springsteen and "Sopranos" fame) entered the Capitol escorted by Sens. Frank Lautenberg and Bob Menendez (D-N.J.). The two told Van Zandt, who had come to promote music education, about how they sang Sinatra at a chamber of commerce dinner. "I know that you've got a good front man in the band, but if he gets sick or wants to take a day off, call us," Menendez proposed.

"Anybody going to invite us to sing as a group?" Lautenberg asked reporters.

"Last year, I had Dionne Warwick visit with me," boasted Menendez, pronouncing her name "Diane."

Van Zandt, luckily, had to indulge senators' banter for only a few minutes; Lovett had to do it all morning. "My staff heard you last night at the Birchmere and gave you rave reviews," Leahy, chairman of the Lovett fan club, told the witness. Lovett, wearing a black business suit and reading glasses low on his nose, smiled politely.

When Peacock supplemented her opening statement with a few lines of music, Leahy wondered aloud how the stenographer would get that into the hearing record. "The last time somebody spent part of their testimony in a hearing like that was my late friend Harry Chapin, and it brings back memories," he told Peacock.

"There hasn't been [a hearing] I've enjoyed personally as much in a long time," Cornyn, who singled out singer Ray Benson of Asleep at the Wheel, sitting in the first row and wearing a white cowboy hat.

Hatch -- the chamber's reigning musician since the departure of John "Let the Eagle Soar" Ashcroft -- made clear that, "as a songwriter," he felt a special bond with the other artists in the room. Hatch -- author of the famous lyrics "Heal our land/Please keep us safe and free/Watch over all who understand the need for liberty" -- recalled the delirious reception he received at the songwriters convention when he showed them his first royalty check, for \$57.

Specter couldn't resist needling his colleague. "Ms. Peacock, you say you perform for passion, not for money -- sort of like senators," he said, putting his arm around Hatch.

Hatch wasn't amused. "Can I interrupt?" he later asked Specter. "I have one gold and one platinum record, but I've been told I would have more if it wasn't for piracy."

Lovett was duly awed by the senators. "It's really quite impressive," he said after the hearing. "What brilliant speakers they are." And what does Lovett think of Hatch's music? The songwriter laughed, then stammered. "Ah," he finally said. "Music is such a subjective thing."

Attachment C

DECLARATION

1. My name is Steve Goldstein. I am Sales Manager for FM radio stations WTOP-FM, WWWT-FM, and WTLP(FM) ("WTOP") and AM radio stations WFED(AM) and WWFD(AM) ("WFED") in the Washington, D.C. area.
2. During the period from April 21, 2009 through June 26, 2009, WTOP broadcast a paid advertising schedule for the National Association of Broadcasters ("NAB") regarding the Performance Rights Act.
3. Prior to July 31, 2009, WTOP and WFED were never contacted by the MusicFIRST Coalition ("MusicFIRST"), or its media representative, regarding the broadcast of MusicFIRST radio spots.
4. On July 31, 2009, I learned from trade press that MusicFIRST was seeking to air spots on broadcast stations. I identified and contacted Mr. Martin Machowsky, MusicFIRST's media representative, concerning any interest MusicFIRST might have in purchasing radio advertising on WTOP. I had several conversations with Mr. Machowsky on that date.
5. During those conversations, I informed Mr. Machowsky that WTOP would air MusicFIRST spots and would provide MusicFIRST with the same rate paid by NAB for its schedule. Mr. Machowsky declined to place an order to broadcast MusicFIRST spots on WTOP and indicated that MusicFIRST preferred to advertise when NAB is on the air.
6. Subsequently on August 6, 2009, I sent an email to Mr. Machowsky noting that when we first discussed airing MusicFIRST spots on WTOP, I neglected to mention WFED. I indicated that, should MusicFIRST decide to advertise with us, I hoped he would consider WFED in addition to WTOP. Mr. Machowsky did not reply to my email.
7. WTOP and WFED continue to be willing to work with Mr. Machowsky and MusicFIRST on the purchase of advertising time for MusicFIRST's spots.

I, Steve Goldstein, declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge and belief.



Steve Goldstein

September 8, 2009

Attachment D



June 16, 2009

A small signal, but a battle royal

Delaware high school radio station draws the wrath of recording industry after boycotting proposed royalty fees

By *ERIC RUTH*
The News Journal

As radio stations go, Mount Pleasant High School's WMPH is full of earnest endeavor, but hardly noticed on a radio dial crowded by its more powerful neighbors.

Not anymore.

This 100-watt flicker of a station has attracted the wrath of the global recording industry for having the temerity to boycott certain performers in response to legislation that would allow record companies to begin charging stations a royalty fee.

Never mind that the monthlong boycott was two years ago, and that on good days WMPH's signal peters out just past Newark. Last week, a recording industry group called the MusicFirst Coalition asked the Federal Communications Commission to investigate and "take action against radio stations for abusing their license to use the airwaves."

MusicFirst singled out the Mount Pleasant station and two other stations -- in Florida and Texas -- in its filing with the FCC, charging that moves like WMPH's are an unfair attempt to intimidate artists into reversing their support for musician fees.

Among other harm inflicted or threatened, the Florida radio station left one artist's recordings off its playlist and the "Delaware radio station boycotted all artists affiliated with MusicFirst for an entire month," MusicFirst Executive Director Jennifer Bendall said in a release that accompanied the FCC filing.

"These are the cases we know about," Bendall said. "We can only imagine what may be happening under the cover of silence."

WMPH's ongoing stand against the Performance Rights Act is prominently detailed on its Web site. General manager Clint Dantine, who endured an angry tirade from the MusicFirst folks while the boycott was under way, said his students aren't intimidated by the threats.

Their reaction to the royalty fee legislation, which is now wending its way through Congress, was another story.

"The students were outraged," he said. "They get really fired up about an injustice."

For WMPH and other radio stations in Delaware, the issue is also seen as the betrayal of a longtime partner in the music business -- and a potential threat to their survival. For 50 years, record companies allowed stations to play songs free of charge, giving the radio industry a product, allowing new acts to gain popularity, and bringing listeners a dynamic musical culture.

Then came downloading, MP3 players and the global recession, an evolutionary storm that threw recording industry profits into the compact disc remainder bin. If the global recording industry's attempt to boost profits succeeds, radio station managers say, they will be forced to take action, whether that means changing to a talk format or something more aggressive.

Paying the fee is not an option, said Pete Booker, president and CEO of Delmarva Broadcasting, which owns and operates eleven stations in Delaware and eastern Maryland.

"We couldn't do that," he said. "Economically, it would kill."

The filing by MusicFirst accuses the stations that staged boycotts of unlawfully putting those financial interests above their obligation to serve the public. Satellite radio, Internet radio and cable TV music channels already pay fees to performers and musicians, along with songwriter royalties. AM and FM radio stations pay songwriters only, not performers.

The songwriter royalties paid by Delmarva Broadcasting amount to half a million dollars a year, Booker said.

"We're looking at the potential of six to 10 times that much, which is ridiculous," he said.

By cutting more deeply into station revenues, the recording industry would be killing the golden goose, radio managers contend. It would certainly mean fewer resources for hiring staffers that could serve community needs by gathering news and providing information, said Jane Bartsch, vice president and general manager of WJBR in Wilmington.

To the artists such as Bonnie Raitt, Natasha Bedingfield, will.i.am and the Dave Matthews Band, the fees are simply long-overdue compensation. Radio stations counter that they have been compensating artists and record makers indirectly for years, through concert promotions and airtime. Booker estimates that in 2008, at the going rate for advertising airtime, his stations have provided artists with the equivalent of \$46 million.

"We do a lot to promote the artist," said Mount Pleasant's Dantine. "Not just play the song, but promote tour dates. We don't get paid for that."

Asking for 'a handout'

The Mount Pleasant station, which serves as a broadcasting classroom for students from Mount Pleasant, Brandywine and Concord high schools, celebrated its 40th anniversary this year. Students hit the airwaves after school, in the evening and during summer.

While the royalty legislation moves through the House, WMPH is urging listeners to petition Congress.

"The international record labels are asking Congress for a handout -- and they want to take it from your local radio stations," WMPH says on its Web site. The exact same phrase is posted on radio sites in New Jersey, Boston and by other members of the National Association of Broadcasters. "That may mean stations like WMPH would have to cut back on the music we play or the community services we provide."

The Performance Rights Act would serve to limit the variety of music listeners hear, stations contend. "My big bone of contention ... is if it wasn't for [W]JBR, the other stations around, they wouldn't know who Natasha Bedingfield is, who Linkin Park is," Bartsch said. "We actually break this music."

"From the days of Bill Haley and Elvis Presley and the Beatles, if radio stations never played their music, we would never know who they were," Booker said.

The House legislation, which is opposed by Delaware's sole representative, Republican Mike Castle, is coming at a particularly perilous economic time for stations.

"If this happens, first of all, it's going to put a strain between the radio stations and the record companies," said Tony Quartarone, owner and general manager of WJKS in Wilmington, who believes that some stations -- including his own -- will simply retaliate by charging the record companies an airtime fee.

"I'm gonna charge 'em right back," he said. "And it's legal. ... I'm gonna treat them the same way. So I'm not worried about it."

Such hardball tactics would take the dustup far beyond a short boycott by a tiny high school radio station.

"When you have a multibillion-dollar international industry worrying about what a high school radio station in Delaware is doing, to me that represents a really, really desperate position," he said. "I think it's really, really dredging deep."

Additional Facts

TODAY'S POLL

Do you watch WHY?

yes

no

