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

In the Matters of	)	
	)	
Broadcast Localism	)	MB Docket No. 04-233
	)	
Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service	)	MB Docket No. 99-325

To: Office of the Secretary
Attention: The Commission

COMMENTS OF CATHOLIC RADIO ASSOCIATION

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SUMMARY

In the *Localism NPRM*, the FCC proposes to: (1) revert to the old requirement that a main studio be located within a broadcaster's community of license; (2) require that licensees must staff their main studios during all times of operation; (3) restore ascertainment burdens in the form of permanent "community advisory boards" or other compelled audience surveys, town hall meetings, and the like; and (4) establish minimum levels of locally-originated programming to be used to evaluating the responsiveness of a licensee's programming to local community concerns, while tying compliance to the license renewal process.

None of these proposals merits adoption. The FCC has no evidence that the changes would actually generate improvements in station performance. Most troublingly, a review of the *Localism NPRM* suggests that the current Commission has scant understanding of the hardscrabble nature of the broadcast industry in 2008 in smaller communities. Those who will have the greatest difficulty complying with these requirements are those who operate outside of well-served major metropolitan areas, and especially those serving niche audiences. The economic base simply does not exist for thousands of stations across America to be able to expand their payrolls and other operating costs as necessary to comply with the proposed rules. Finally, certain of the proposed rules conflict with important constitutional and statutory protections.

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The Catholic Radio Association ("CRA"), by counsel, hereby submits its Comments in response to the *Report on Broadcast Localism and Notice of Proposed Rulemaking*[1] (the "*Localism NPRM*"), in which the Commission announced it is considering several sweeping changes to its Rules. The FCC has not established any causal link between the proposed changes and the agency's espoused policy aims, *i.e.*, responsiveness to the local community concerns. Moreover, the *Localism NPRM* fails to recognize that the burdens of compliance would fall most heavily on many of the very broadcasters who are providing the most effective public service presently, and on new entrants. Notably, these increased regulatory burdens contemplated would endanger the financial viability of Catholic broadcasters whose unique programming formats are distinctly responsive to the needs of local communities. Furthermore, the proposed

[1] *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism and Notice of Proposed Rulemaking, FCC 07-218 (2008). Pursuant to the Commission's request that comments on the Staffing Proposal (defined below) as it pertains to radio be filed in the *Digital Audio NPRM*, CRA is filing a copy of these Comments in that proceeding, as well. *Localism NPRM* at ¶¶28-29, citing *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Broadcast Service,* Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, MB Docket No. 99-325, 22 FCC Rcd 10344, 10391 ¶119 (2007) (hereinafter "*Digital Audio NPRM*").

changes in the Rules pose problematic burdens on broadcasters, and especially Catholic broadcasters, pursuant to constitutional and legislative provisions. Accordingly, CRA urges the Commission to reject these overly intrusive regulations, in order to avoid their potentially disastrous consequences.

BACKGROUND

CRA serves as the trade association for radio station licensees who provide Catholic programming in their local communities. Just a few years ago, very few radio stations offered substantial amounts of Catholic programming. Today, roughly 130 members of CRA now operate in communities across America. Hundreds of additional CRA members (and potential members) recently participated in the October 2007 filing window for those seeking permits to build new noncommercial educational ("NCE") FM stations. These applicants anticipate launching new Catholic radio stations as soon as the FCC processing of their applications allows. Moreover, in urban markets where congested spectrum bars the authorization of new radio stations, many Catholic radio apostolates are attempting to launch Catholic formats on existing stations, thus diversifying programming formats in their respective communities. The phenomenal growth of Catholic radio reflects an enthusiastic response to the 1997 observation of Pope John Paul the Great that "Radio offers perhaps the closest equivalent to what Jesus was able to do with large groups through his preaching."

Working on behalf of official Church institutions, as well as ministries founded and operated by lay members, CRA supports the efforts of Catholic radio programming producers, distributors, and broadcasters alike. Association members include not only broadcast licensees but also program providers, the U.S. Conference of Catholic Bishops,

and several Archdioceses. A nine member Episcopal Advisory Board supports CRA's efforts to operate in a manner true to the inherited body of authoritative Catholic teachings (the "Magisterium").

* * *

"The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'" -- Ronald W. Reagan

ARGUMENT

As suggested by the nation's 40th president, well-intended actions by government agencies may hurt more than help. Any agency considering a new a regulatory prescription must ensure that the proposed cure is not worse than the disease. Medical students are taught *primum non nocere*; that is, "first, do no harm." The phrase applies to regulation as well as to medicine. Intervention should be avoided where it poses potential dangers, despite the attraction of less certain benefits. Unintended harm will often outweigh any intended good.

In the instant context, the Commission contemplates certain changes in regulatory burdens on broadcasters. We focus here on the following proposed changes: (1) reversion to the old requirement that a main studio be located within a broadcaster's community of license (the "Studio Proposal");[2] (2) expansion of staffing requirements so that a licensee must staff a main studio during all times of operation (the "Staffing Proposal");[3] (3) restoration of ascertainment burdens in the form of permanent "community advisory boards" or other compelled audience surveys, town hall meetings,

[2] *Localism NPRM* at ¶ 41.

[3] *Id.* at ¶¶28-29, citing *Digital Audio NPRM* at ¶119.

and the like (the "Advisory Board Proposal);[4] and (4) establishment of minimum levels of locally-originated programming, as opposed to heavy reliance on network or syndicated programming, for evaluating the responsiveness of a licensee's programming to local community concerns (and tying compliance with such thresholds to the license renewal process) (the "Origination Proposal).[5] We sometimes refer to these below collectively as the "Proposals."

The agency speculates that the Proposals *might* increase local production of programming, which in turn *might* prove more reflective of the diverse needs and interests of local communities. Notice, however, that these projected benefits are entirely speculative.[6] The potential harm, on the other hand, is much more certain. First, the increased costs involved in each Proposal would endanger the financial viability of small independent stations. Where the added costs do not destroy the station altogether, they will frequently produce perverse results, such as increased homogeneity of content. Second, some of the Proposals, such as the Advisory Board and Origination Proposals,

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[4] *Localism NPRM* at ¶27. Licensees would be compelled to consult with these advisory boards – representing various diverse segments of the community – as to whether programming is sufficiently responsive to local community concerns. *Id.* at ¶¶26, 40.

[5] *Id.* at ¶¶40, 124. Compliance with the thresholds would result in "expedited processing" of stations' license renewal applications, while those broadcasters who fall short of the mark would receive scrutiny by the full Commission. Most license renewal applications are processed routinely – and relatively quickly – by the Media Bureau staff pursuant to delegated authority. The frank truth is that the full Commission lacks the time to deal with its *existing* workload in a timely fashion. Any requirement subjecting a host of applications to the attention of the full Commission is guaranteed to impose years of delay. If only 10 percent of stations fail to satisfy the new FCC dictates in a given renewal cycle, the full Commission would have to scrutinize the records of ***1,481*** radio stations and ***231*** television stations of various kinds. *See* http://www.fcc.gov/mb/audio/totals/bt071231.html. The full Commission simply could not act on such a volume of applications. Consequently, licensees will feel severe pressure to avoid such uncertainty as to their continued authority to operate.

[6] With respect to the FCC's concerns about the emergency notifications, the proposed benefit is redundant and less efficient than the current Emergency Alert System.

are inherently contradictory, and arguably hostile, to the broadcasting efforts of a Church premised on the authoritative teachings of its Magisterium. Third, heavy regulation aimed at localism in general, and in particular the Advisory Board and Origination Proposals, invoke problematic constitutional questions and might even be challenged under statutes protecting religious organizations.

I. Increased Barriers to Entry and Operating Costs Will Undermine True Localism and Diversity.

Significant confusion arises in any discussion of policy goals if the goals themselves are not first clearly defined. Viewed in the aggregate, the Proposals betray a presumption that locally-produced programming content is *ipso facto* more responsive to the diverse interests of the community. This presumption is especially apparent with respect to the Origination Proposal. The FCC does not, and cannot, sufficiently justify this presumption. Indeed, to perceive a causal relationship between, on the one hand, expansive influence by local special interests and locally-produced programming, and on the other hand, the respective goals of diversity and localism, is to accept blindly a superficial and illusory view of these otherwise worthy policy priorities.

First, locally produced programming does not necessarily equate to responsiveness to local communities. For example, a locally produced program featuring a single person speaking over the course of an hour is less, rather than more, community responsive than a regionally or nationally distributed program featuring a host in telephone dialogue with many different individuals in several communities.

The presumption that locally produced programming equates to community responsiveness also ignores the increased diversity of local programming made possible where national distributors of content that the market has not historically supported

essentially *give away* content to support its availability to smaller local audiences, perhaps even marginalized ones. This is particularly true with respect to Catholic radio programming. Such programming is ***freely*** made available to local ministries so that local audiences who crave its spiritually distinctive and intellectually rich content may have benefit from it, so long as the local licensees can find ways to sustain their operating costs. Catholic broadcasting poses a particularly difficult challenge to the presumptions underlying the Advisory Board and Origination Proposals inasmuch as fully one-fourth of the country's population is Catholic. Regardless of where Catholic programming is produced or what local interest group may be annoyed by its message, its responsiveness to any community is very difficult to question.

Programming that is truly responsive to the interests and needs of local audiences attracts and sustains audiences no matter where it is actually produced. Conversely, a failure to respond to local communities alienates prospective listeners and is therefore automatically self-destructive without any need for government intervention to dictate a venue for program production. This is especially true in an age of satellite-delivered and MP3 alternatives. Audiences have much greater choices now in audio and video programming than ever before. If what they hear is of no interest, regardless of where it has been produced, they will not listen. If audiences do not listen, advertisers and/or donors will not support the station in question, and it will either go silent or be sold. This cycle will continue until someone operates the station in a manner that is truly community responsive.

Similarly, true diversity in programming is the result of independent voices offering distinct products that the audience prefers enough to ensure that the provision of

these products will be sustained over time. If listeners in Summersville, West Virginia, choose to listen to a program produced in Irondale, Alabama, over one produced in Summersville, should they not have the freedom to do so? Further, if every station in Summersville were to air nothing but programs produced in Summersville, how would that contribute to *diversity*? And on what legitimate basis does the federal government presume to discourage audiences in Summersville from listening to programs produced in Irondale, Nashville, or New York City?

In other words, audience share – while admittedly imperfect -- is a more accurate reflection of responsiveness to the diverse interests of local communities than is the amount of programming produced at the local level, or approval by any supposedly representative sample of that community.

It therefore stands to reason that increasing the barriers to entry, including the operating costs of broadcasting, will most likely redound to the *net detriment* of would-be broadcasters seeking to provide programming responsive to less significant, and perhaps even marginalized, audiences in a local community. For example, the added cost to licensees that the Staffing and Origination Proposals represent is a prohibitively high price to pay for new entrants to the broadcasting world and for small broadcasters catering to audiences that are marginalized and underserved already. This is especially problematic when one considers that it has never been proven that the benefits to the public from such a requirement, such as they may be, would outweigh its costs.

The Commission has reserved a portion of the FM band for noncommercial operation to prevent the commercial market's high costs from serving as a barrier to entry as to this portion of the spectrum, and thereby denying portions of the local audience

from receiving programming responsive to their needs. Specifically, religious broadcasters such as CRA members manifestly fulfill the goals of that reservation by contributing valuable educational service to their local communities.[7] The founding fathers of this country certainly believed that religious education would prove essential to the survival of the Republic.[8]

In other words, the very existence of our federal government has its support in the morality and religion of the people. These virtues are not automatic or innate. They must be taught. While the government may not dictate to private individuals and religious organizations how they may think or what they may preach, our system of government benefits indirectly from the voluntary propagation of religion and from education about moral principles. Therefore, the agency would be well advised to allow noncommercial broadcasters, including religious apostolates, to fulfill this role without interference.

The barriers to entry that the market imposes and the basic operating expenses that any licensee must defray are daunting enough to non-profit broadcasters as a whole. Imposing new regulatory burdens poses a substantial threat to the financial viability of continued operation.

Right now, without adoption of the Staffing Proposal, average annual operating costs for CRA members run at approximately $100,000. If the Staffing Proposal was adopted and if CRA members sought to achieve only minimal compliance, operating

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[7] *See, e.g.*, *WQED Pittsburgh*, 15 F.C.C.R. 202, 215 (1999), citing *Columbia Bible College Broadcasting Co.*, 06 F.C.C.R. 516, 517 (ASD 1991).

8 *See, e.g.,* John Adams, Address to the Military, 11 Oct 1798. <http://www.snyders.ws/alan/quotes/adams_j.htm> "We have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other." *Id*.

costs would double, at least. If the additional staff were actually to attempt to produce more programming locally during their time at the station, the even higher personnel costs would be expected to quadruple.

Recall that nearly all CRA members are entirely dependent on charitable donations to maintain broadcast operations. Very few small market commercial radio operators could absorb these additional costs, and it is highly doubtful that a noncommercial operator could survive. Almost no small market operators could survive the added financial burden if the Staffing Proposal was applied to separate tower and studio sites, and a noncommercial operator in any market, regardless of size, would find it impossible to maintain financial viability.

Weighed against these added costs, consider the dubious benefits that might be derived from the Staffing Proposal. The vast majority of AM stations, for example, power down dramatically at night. Is it really so important to have the station staffed at a time when virtually no one hears it? With respect to the emergency notification, is it really the Commission's contention that contacting each station individually, and ensuring that each station is always staffed so that such contact is possible, is more easily achieved and more efficient a means of broadcasting emergency alerts quickly, than simply working to improve EAS automation and to ensure that it is reliable? Would not simply charging the Enforcement Bureau with a more pronounced effort to "audit" compliance with current requirements be more effective to ensure that stations' technical contacts are truly available – without risking the failure of hundreds or even thousands of licensees due to the onerous costs of the Staffing Proposal?

Numerous would-be Catholic broadcasters have planned to build new NCE FM stations based on an expectation of operating costs under the regulatory paradigm that was in effect when they submitted applications just several months ago. Raising costs so substantially can only to serve to endanger the continued financial viability of so-called "mom and pop" operations that contribute to true localism and diversity in a community. These small independent broadcasters are the least poised to absorb the additional costs of operating under the Proposals. If the new Rules make continued operation impossible, the silencing of many stations will rightfully provoke outrage among the public.

Although any link between the proposed changes in the Rules and the fostering of increased localism is highly speculative, the changes are certain to impose substantial costs on the small, independent broadcasters comprising the vast majority of CRA members. The financial viability of such stations is a prerequisite for the distinct programming voice that Catholic broadcasters provide in local communities throughout the country. Changes in the regulatory climate that endanger the financial viability of CRA member stations therefore pose a great danger to localism.

Thus, if the Commission wishes to shoulder responsibility for more failed stations and fewer broadcasters -- if those who can still afford to operate are airing more locally produced programming -- then by all means it should proceed with the re-regulatory Proposals. However, if the Commission respects liberty, and wishes to foster true localism and diversity in programming, the agency should refrain from imposing higher costs on the licensees already working to achieve these goals.

II. Local Censorship Boards Equal Ascertainment on Steroids.

The perceived homogeneous impulse in programming content frustrates the Commission.[9] Yet as shown above, homogeneity will actually be exacerbated by the fatal blow of inflated costs for small independent broadcasters. By the same token, a requirement that licensees submit to the verdict of Advisory Boards will foster greater homogeneity of content, as the Advisory Boards devolve into censorship boards.

Significantly, the Advisory Board Proposal is no better than a revisitation of the FCC's old and unlamented policy of "ascertainment." The Commission has historically relied on broadcasters' unique position as stewards of radio spectrum to justify imposing on licensees an obligation to provide programming that is responsive to the needs and issues of the citizens who reside in the broadcaster's community of license.[10] The Commission's ascertainment procedures required broadcasters to take a series of minutely-prescribed affirmative steps to determine the problems, needs and interests of the community, and to devise programming to meet those problems, needs and interests. One might describe such a presumption underlying a regulatory approach as the erroneous view that community responsiveness can only be determined at the "macro" level, *i.e.*, with respect to the entire potential listening audience. The "macro-only" analysis was rejected in the *Deregulation of Radio Order*.[11] The Commission therein determined that there was no need to require a single radio broadcaster to provide programming to meet all of the needs and issues of all of the groups within its

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[9] *Localism NPRM* at ¶140.

[10] *See Broadcast Localism,* Notice of Inquiry, 19 FCC Rcd 12425 ¶ 1,2 (2004) (the "*NOI*").

[11] *See Deregulation of Radio*, Report and Order, BC 79-219; RM-3099; RM-3273, FCC 81-17, 84 FCC 2d 968, ¶66 (1981) (the "*Deregulation of Radio Order").*

community. Instead, the community responsiveness of a broadcaster might well be determined at the "micro" level, *i.e.*, with respect to the station's own audience and presumably only a portion of the local community[12] Thus, the FCC long ago determined that ascertainment was not producing its intended benefits, and there is simply no reason to believe a resuscitated form will prove beneficial now.

This is just as well inasmuch as the teachings of Catholicism are not subject to referenda. In America's "marketplace of ideas," the Catholic Church has staked its claim to authoritative teaching under the doctrine of Apostolic succession, and to the applicability of its teachings universally. For this reason, at the "micro" level of determining responsiveness to a station's target audience within the larger community, it is inherently biased against Catholicism to exalt *local production* over the *authority* of the Magisterium and *diversity of content* rather than the *universality* of Truth.

Furthermore, at the "macro" level of determining responsiveness to a local community, Catholic broadcasting can contribute best to true localism and diversity by

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[12] *Deregulation of Radio Order* at ¶66. The Commission found "[w]hat is important is that broadcasters present programming relevant to public issues both of the community at large or, in the appropriate circumstances, relevant primarily to the more specialized interests of its own listenership." *Id.* Likewise, in its *Deregulation of Television Order*, *Deregulation of Television*, Report and Order, MM 83-670, FCC 84-293, FCC 2d 1076 (1984) (the "*Deregulation of Television Order"),* the Commission found that "market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities." *Id.* at ¶2. To that end, revision of the ascertainment rules would "provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities." *Id.* at ¶3. The Commission found that there was no evidence that ascertainment made television broadcasters provide more programming addressing the needs and issues of their communities than they would without formal ascertainment requirements. *Id*. at ¶48. In fact, the Commission noted that the ascertainment procedures and programming guidelines did not guarantee that programming would serve the goal of localism. *Id*. Instead, ascertainment impeded licensees from using their discretion to address the needs of their communities and delayed service to the public. *Id*. at ¶52.

first proving responsive to its own audience. But in any event, efforts to compel Catholic broadcasters to seek consultation or ratification by a local advisory board representing diverse factions within a community, as well as mandates with respect to local originating programming, are utterly inappropriate.

If, as explained above, the sustaining of an audience is one of the better indicators of a broadcaster's community responsiveness, it bears noting that whatever steps a licensee must take in order to secure the approval of every self-appointed representative of a panoply of local special interest groups, such steps are highly unlikely to produce a passionate audience for the station. Moreover, since the same activist groups are likely to exert pressure in nearly every community of any size, the pressure on broadcasters will be toward greater homogeneity of content, not toward offering a distinct programming format craved by a distinct subset of the community.

To the extent that the Advisory Board Proposal is essentially ascertainment revisited, coupling this Proposal with the Origination Proposal may well result in ascertainment on steroids. Together, the Advisory Board and Origination Proposals will tend to expose broadcasters of "niche" programming to opposition from special interests and to problems at license renewal time. These two Proposals may well lead to the most insidious effects of all. It is easy to forecast the development of an extortion process arising whereby self-appointed representatives of various local constituencies threaten to protest at renewal time if a broadcaster has not handed over air time to the "representative" in question. Never mind that the local interest groups enabled by the agency in this process did not have to bother to purchase or lease a station, or to have the

FCC pass judgment on their qualifications to serve as a *de facto,* no cost licensee,[13] or to worry about whether their programming will draw any real audience.

The Advisory Board and Origination Proposals constitute a back-door effort to regulate content by creating a "safe harbor" policy whereby licensees will be pressured to eschew nationally distributed programming, or at least certain kinds of such programming. Such an approach has already been employed essentially to push television licensees to air a minimum number of hours of programming aimed at children. But the resources of the typical full power television licensee are orders of magnitude greater than those of small local radio broadcasters. These particular new burdens would pose extraordinary challenges for new Catholic broadcasters. In the absence of the contemplated new requirements, most new Catholic broadcasters would no doubt seek to minimize operating expenses initially, and to expand local production capabilities only over time.[14]

They would not be inclined to replicate locally the fine programming that is already available from distributors such as EWTN, Ave Maria, Catholic Answers, and Relevant Radio. Under the Advisory Board and Origination Proposals, however, Catholic broadcasters could feel pressure to make the effectiveness of their ministries, and their allegiance to the Magisterium, subservient to the approval of some local advisory body and the perceived need to comply with an arbitrary number of hours of locally originating content. Or worse, the burdens of compliance with these new requirements could simply defeat the new entrant's ability to survive. Accordingly, the FCC should refrain from adopting its Advisory Board and Origination Proposals. At the

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[13] The *Localism NPRM* offers very little to suggest that the Commission has adequately considered how Advisory Boards could undermine or even contradict the FCC's Rules with respect to unauthorized control of a broadcast license.

[14] This has happened already. For example CRA member stations WLOF, Attica, New York; WNOP, Newport, Kentucky; KVSS, Omaha, Nebraska; WRYT, Edwardsville, Illinois; WSPM, Cloverdale, Indiana; KLPF, Midland, Texas; WDEO, Ypsilanti, Michigan; and KBLE, Seattle, Washington produce programming locally.

very least, noncommercial educational broadcasters, and religious broadcasters operating throughout the band, should be exempted from the requirement.

III. Constitutionality and Statutory Concerns.

For the reasons explained above, the Proposals would disproportionately hurt religious broadcasters, and in particular Catholic radio broadcasters. In any event, subjecting any broadcaster's continued operating authority to the approval of various special interest groups will have a chilling effect on religious and political expression rights.[15]

It is not our purpose to compose here an appellate brief, but we are alarmed by the Commission's apparent blind eye in its *Localism NPRM* to potential constitutional and statutory challenges posed by the Origination and Advisory Board Proposals in particular. The promulgation of these Proposals would almost certainly invite First Amendment constitutional challenges,[16] and they are perhaps even more problematic pursuant to the *Religious Freedom Restoration Act* ("*RFRA*").[17]

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[15] *See, e.g., Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 964 at n.12 (1984), *citing Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). "By placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech." *Id.*

[16] As a simple thought experiment, consider that if the FCC can compel the creation of Advisory Boards with an influential role in license renewals, what prevents the delegation to such Boards of the authority to decide whether various commercial broadcasters are adequately reflecting local community standards of decency? Certainly, the competence of Advisory Boards wishing to inform Catholic broadcasters how they should be running their radio apostolates would be no less suspect than the competence of Advisory Boards wishing to inform commercial broadcasters when the vulgarity, materialism, and sexual innuendo has gone too far and exceeded local community standards. Yet, we suspect that many of the public interest groups advocating for re-regulation in the name of "localism" would adamantly oppose subjecting commercial broadcasters to the verdicts of local Advisory Boards as to whether community standards have been violated.

[17] 42 U.S.C. §2000bb. Any "substantial burden" on religious exercise must be justified under strict scrutiny. See 42 U.S.C. §2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

First, the traditional justification for agency restrictions on the First Amendment rights of broadcasters, *i.e.*, the scarcity of spectrum as articulated in *Red Lion*,[18] has been increasingly undermined by technological advances with respect to digital broadcasting and the recent phenomenal growth of competitive media platforms. The FCC itself has cited these trends as grounds for its own deregulatory efforts with respect to the agency's ownership concentration Rules.[19] Thus, the FCC's own laborious efforts to loosen restrictions on media ownership have made applying different standards to the First Amendment freedoms of broadcasters more difficult to support.

In addition, any standards or "objective thresholds" that the Commission might adopt within its Origination or Advisory Board Proposals could be challenged as either too vague or too specific. That is, if the Commission gives insufficient guidance to broadcasters as to the community responsiveness thresholds that will satisfy the requirements for renewal of a license, the Proposals rightly would be viewed by a court as posing too great a danger of imposing self-censorship.[20] Conversely, standards that are too specific might well pose a problem under non-delegation doctrine.[21] At the very

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[18] *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

[19] See, *e.g., Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13,620 (2003). See also *Prometheus Radio Project v FCC*, 03-3388 (3rd Cir. 2004), upholding many of the FCC's conclusions with respect to the viewpoint diversity and localism.

[20] *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757. The court reasoned that only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship, *Id*. at 757-58, and by providing courts with a way to determine whether discretion has been abused. *Id*. at 758-59.

[21] Congress may delegate authority to an agency or even to a private group (provided that an intelligible principle remains by which the private group has not been delegated the legislative function itself), but an agency delegation to a private actor only survives scrutiny by the courts

least, courts are likely to insist that the new Rules include extensive provisions for administrative[22] and adjudicatory[23] review before empowering private actors such as Advisory Boards to exercise government's coercive power over other private actors, *i.e.*, broadcasters.

Significantly, under public forum law, a group may not be excluded from a government sponsored forum based on the viewpoint or even the content of its messages.[24] Religious organizations (even those that decide to initiate a broadcasting ministry) -- retain freedom over their internal affairs.[25] The desire to receive spectrum rights is no open door to heavy-handed government regulation in a manner that would interfere with a religious broadcaster's control over content -- no matter where it is produced, or which local interest group might disagree with the theological basis for that content.

By itself, the Origination Proposal disproportionately burdens religious broadcasters operating from hierarchical orthodox faith perspectives, including Catholic radio apostolates. CRA members frequently rely on inexpensive programming provided by reliable sources of Catholic media content, and requiring such broadcasters to "reinvent the wheel" at the local level is not only an extremely unnecessary and imposing a burdensome cost. It also presumes an inherently non-Catholic view that local production,

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where the agency itself has not given up the role that Congress delegated to it. See, *e.g., Prometheus Radio Project v FCC*, 03-3388, at 102-103 (3rd Cir. 2004).

[22] See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

[23] See *Touby v. United States*, 500 U.S. 160, 111 S.Ct. at 1757-58 (1991).

[24] See *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

[25] *Petruska v. Gannon*, No. 05-1222 (3rd Cir. 2006).

or perhaps local consciences, know better the spiritual needs of local populations than do the successors to Saint Peter and the other Apostles.

Respectfully, the Catholic Church has more than two thousand years of experience of ascertaining the spiritual hungers of its members and prospective adherents. It would be outrageously presumptuous for the FCC to pass judgment on whether Catholic broadcasters are proving sufficiently responsive to their local communities. Catholic broadcasters are providing programming content that is steeped in fidelity to the Magisterium. No matter where that programming is produced or which local interest group is angered by the underlying theological tenets, government intrusion into this sphere is highly difficult, if not impossible, to justify in a manner consistent with the First Amendment and with *RFRA*.

In view of the dubious benefit to be gained by these Proposals and the nearly certain high costs associated with them, the Commission may not want to engage in the difficult, perhaps impossible, work of attempting to reconcile its Advisory Board and Origination Proposals with the requirements of the Constitution and of *RFRA*. Since nearly all CRA members are nonprofit licensees engaged in noncommercial broadcasting, the easiest way to determine whether CRA member stations are responsive to local communities is whether they are able to sustain donor support.

First Amendment and statutory considerations suggest that the agency's Advisory Board and Origination Proposals would require extremely careful crafting, and in fact may not be able to survive court scrutiny in any event. Accordingly, the FCC should decline to adopt these particularly problematic Proposals, and should instead rely on local audiences to support the stations most responsive to their respective communities.

CONCLUSION

In view of the foregoing, the Commission's proposed new regulations would for the most part prove counter-productive by imposing additional costs and facilitating the perverse effect of fostering greater homogeneity in programming. Moreover, the proposed new regulatory burdens would disproportionately and negatively affect religious broadcasters, and in particular Catholic radio broadcasters. Accordingly, the FCC should decline to adopt the four re-regulatory Proposals addressed herein.

Respectfully submitted,

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