

December 14, 2007

The Honorable Kevin J. Martin, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: Broadcasting Localism and Proposed Content Regulations
MB Docket No. 04-233

Dear Chairman Martin,

We are deeply concerned about provisions in the Commission's Broadcasting Localism proceeding (MB Docket No. 04-233) which, if enacted, would have an adverse impact on the First Amendment and likely be found unconstitutional. Enacting such provisions would be directly antithetical to the Commission's statutory mandate to protect the First Amendment.

For example, establishing amounts or percentages of particular types of programming that broadcasters need to carry to ensure the renewal of their licenses would coerce stations into selecting and airing content in these government-preferred categories. It would also effectively substitute a federal bureaucracy's judgment for the judgment of thousands of individual broadcasters as to the programming that best serves widely varying communities throughout the country. See *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress "has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities," and any "Commission requirement mandating particular program categories would raise very serious First Amendment questions").

Furthermore, governmental intrusion into how radio stations formulate their musical choices and playlists is contrary to previous decisions where the FCC eschewed involvement in music and format-related questions. See *FCC v. WNCN Listeners' Guild*, 450 U.S. 582 (1981). Such intrusion would clearly interfere with the selection of programming by thousands of radio licensees in communities across the country.

The Commission's responsibility to uphold the First Amendment is clearly and unmistakably set forth in the Communications Act, as it has been since the Act became law in 1934. Section 326 states that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech."

Moreover, government intrusion in programming content and selection is fundamentally at odds with the First Amendment, whether such intrusion is direct or indirect. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (“FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations”).

It is disheartening to think that in this age of unprecedented media abundance, the Commission is contemplating an unnecessary regulatory regimen that not only hearkens back to the last century, but will most likely be found unconstitutional by the courts. We suggest that the Commission’s time and energy could be better spent finding ways to encourage media competition, because a competitive media landscape marked by abundance and diversity will serve the public interest far better than an outmoded regulatory scheme.

Sincerely,

Patrick D. Maines
President

Richard T. Kaplar
Vice President