

Testimony of Jane E. Mago
Executive Vice President & General Counsel
National Association of Broadcasters

Before the
Federal Communications Commission

Future of Media &
Information Needs of Communities:
Serving the Public Interest in the Digital Era Workshop
March 4, 2010

**Testimony of Jane E. Mago
Executive Vice President and General Counsel
National Association of Broadcasters**

For close to a century, broadcasters have served the American people. Broadcasting is a ubiquitous, free and trusted source of news, other information and entertainment. It is a reflector of the myriad communities across the nation in which radio and television stations are located. It plays a unique role in providing vital, often life-saving emergency journalism. And despite the vast changes that have occurred and will continue to occur in national and local media markets, local broadcasters will continue to play these important roles. Indeed, stations have embraced new opportunities and new technologies to better serve their viewers and listeners and to continue to innovate in broadcast journalism.

The Public Interest Standard

No matter what changes occur in the media landscape, one reality of broadcasting remains constant: Broadcasters have and will continue to take seriously their responsibility as broadcast licensees to serve the public interest.

The concept of public interest obligations has undergirded the nation's system of broadcasting since the Radio Act of 1927. The nature and details of the regulatory interpretation of those obligations, however, has metamorphosed over the years. For example, the fairness doctrine, personal attack rule, and political editorializing rule were once part of the regulatory evaluation, but are no longer due to First Amendment concerns. Today other considerations have taken their place, including children's programming requirements, making time available to qualified candidates at the lowest

unit charge, closed captioning, Emergency Alert System (EAS) requirements, and Equal Employment Opportunity (EEO) outreach and reporting requirements.

Whatever specific elements have been in the regulatory spotlight, the essential core of the public interest obligation has remained constant. This core requirement focuses on whether a station is providing programming responsive to the local community. In NAB's view that core obligation should remain. NAB, however, does not believe that it is either necessary or appropriate for the FCC to develop new quantitative standards for measuring a station's public interest performance, particularly if such a standard were to be content-based.

The current public interest standards, other than a few tweaks for digital television broadcasting (such as the requirement that each multicast stream contain at least three hours per week of children's programming) have been in place for more than two decades. They have served both the public and the broadcast industry well.

If there are to be any changes in the regulatory standards, those changes should take account of developments in technology and the media marketplace, but there should not be changes for the sake of change. Technological developments should not be an open door to imposing new, burdensome regulatory obligations.

Indeed, technological and marketplace changes counsel against any new regulatory requirements for individual broadcast outlets. The proliferation of broadcast outlets and the rise of multichannel video and audio programming distributors and the Internet have produced an exponential increase in programming and service choices available to viewers and listeners. In such an environment, it is neither necessary nor economically efficient for every broadcast station to be "all things to all people," so long

as wide varieties of programming are available to consumers on a market basis. Similarly, it is neither necessary nor appropriate for the Commission to try to develop one-size-fits-all standards for measuring public service. Rather, in considering whether the public's interest in a diversity of programming and service is being met, the Commission should focus on the totality of a station's service and the totality of programming offered across markets as a whole. See, e.g., *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998) (it is "understandable why the Commission would seek station to station differences," but a "goal of making a single station all things to all people makes no sense" and "clashes with the reality of the radio market").

In today's multichannel, multiplatform media environment, minimum or quantitative public interest standards are at best unnecessary. They are also at odds with the FCC's supervisory role, as envisioned by Congress, with respect to only the *totality* of a broadcast licensee's performance of public interest obligations. See *CBS v. DNC*, 412 U.S. at 121 ("Every licensee is already held accountable for the totality of its performance of public interest obligations."). As the Supreme Court has observed, "Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by *evaluation of its overall performance* under the public interest standard." *Id.* at 120 (emphasis added). Quantitative content-based requirements raise serious legal questions about the scope of the FCC's statutory authority and are constitutionally suspect. See, e.g., *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (FCC's general powers under Communications Act do not authorize the adoption of rules about program content);

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 650-51 (1994) (the Commission may not impose upon broadcasters “its private notions of what the public ought to hear”).

Fulfilling Broadcasters’ Public Interest Obligation

The fact that quantified regulatory public interest standards are suspect does not, however, imply that the public interest obligation has no real meaning or that broadcasters do not take them seriously. To the contrary, it is clear that radio and television stations fulfill their public interest obligation and serve their local listeners and viewers.

We see what local stations do for their communities every day. Just this past weekend, for example, stations in Hawaii helped local residents prepare for the tsunami predicted to strike the Islands as a result of the massive earthquake in Chile, which, fortunately, did not come to pass. Stations in the mid-Atlantic and Northeast have been assisting their viewers for months now during this record-breaking snow season.

Local stations provide a variety of locally-produced and/or oriented programming that serves the needs and interests of their audiences, including news, sports, weather, religious, and other community-oriented programming. Indeed, it must be noted that broadcast stations today make available more news than ever before via a variety of platforms, including on-air and online. They interview local officials and leaders and host political debates. Local stations are a public voice for community and charitable organizations, allowing these organizations to speak directly to local citizens, raise their public profiles, cement connections within local communities and raise necessary funds. Stations also air innumerable public service announcements about both national and

local issues. Collectively, the value of the public service broadcasters provide on an annual basis has exceeded \$10 *billion* in a single year.

Above all, broadcasters provide important and often life-saving emergency information to their local communities, including information about disasters, weather emergencies and other crises. Broadcasters' life-saving work also is demonstrated by their pioneering of the AMBER Plan (America's Missing: Broadcast Emergency Response), which since its inception in 1996 has been credited with the recovery of nearly 500 abducted children. This commitment to emergency journalism is unique and distinguishes broadcasters in the media ecosystem. From coverage of hurricanes to bridge collapses to wildfires, broadcasters are not only the first-informers of the local media ecosystem but also are the source that remains available to citizens during major power outages when other media platforms are unavailable.

Numerous studies and surveys have shown that consumers rely on and highly value local television news. For example, a 2009 Pew report examining the favorability ratings of traditional news sources found that – even in an era of increasing criticism of media organizations – nearly three quarters of Americans (73%) had a favorable opinion of local TV news (a rating higher than daily newspapers and network TV news). Interestingly, local TV news is also seen as less partisan than other leading news sources, with high numbers of both Democrats and Republicans rating local TV news favorably. This survey also found that 82% of Americans say that if local TV news programming went off the air (and shut down their web sites), it would be an important loss. Pew Research Center for the People & the Press, *Public Evaluations of the News Media: 1985-2009* (Sept. 12, 2009).

A March 2010 Pew research study focusing on how the internet has changed news consumption nonetheless found that local TV remains the most popular platform for news. While most Americans now use a combination of media platforms to obtain news, on a typical day 78% of Americans say they still get news from a local TV station. Pew Research Center, *Understanding the Participatory News Consumer* (March 1, 2010).

Studies have also shown that minority-focused broadcast stations may have special benefits to the community. For example, the availability of local Spanish-language TV news has been linked to significant increases in Hispanic voter turnout. See F. Obholzer-Gee and J. Waldfogel, *Media Markets and Localism: Does Local News En Espanol Boost Hispanic Voter Turnout?*, Nat'l Bur. Econ. Res., Working Paper 12317 (June 2006).

From just the brief discussion above, it is obvious that broadcasters today – like they have in the past and will continue to do in the future – serve their local communities and the public interest.

Many have expressed concern that, due to marketplace and competitive changes, it is becoming more difficult for stations to fulfill their public interest obligation. However, dynamic markets are always changing, and it is probably neither significantly easier nor significantly more difficult for stations to fulfill their overall their public interest obligation than it has been in the past. In some ways, technological developments have made it easier for stations to be attuned to and respond to concerns of their viewers and listeners. For example, stations' websites often allow for immediate feedback from viewers and listeners. At the same time, the exponential increase in competition for

consumers' attention and for advertising revenues—from the Internet to 500+ cable network channels to satellite radio—has made it more difficult for broadcasters to devote resources to specific public interest requirements that are not imposed on their competitors. Obviously, in such a competitive marketplace, asymmetric regulation must be a real concern.

Broadcasters and the Current Regulatory System

Questions have been raised as to broadcasters' evaluation of the current regulatory system. This is a very broad question and implicates a variety of types of Commission regulation, from ownership restrictions to content regulation to public interest standards.

On balance, the broadcast industry believes that the FCC's structural ownership rules are too restrictive and fail to take account that competition for consumers' attention and for ad revenues has increased dramatically. In other words, the FCC's regulatory thumb is too heavy for the competitive marketplace to work fairly and efficiently. Does anyone really believe that allowing a newspaper to go out of business, but not allowing its newsroom assets to be combined with a broadcast newsroom makes common sense?

It costs real money—substantial amounts of money—to produce local news. See *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13685 (2003) (rising news costs and other factors may cause broadcasters, especially those under financial pressure, to turn to less costly programming options). Given the current economics of the broadcast television business—including the worst downturn in advertising in six decades and the economics of networks ending network

compensation or even requiring reverse compensation—allowing flexibility for reasonable station combinations is not only appropriate, but essential.

With respect to broadcasters' public interest obligations, the current regulatory system—putting aside the FCC's "enhanced disclosure" requirements for television stations, which remain on challenge in the courts—has worked well. However, the recordkeeping, paperwork and reporting requirements imposed in the FCC's enhanced disclosure proceeding (but which have not come into effect) would be exceedingly burdensome, and those burdens would not be offset by any appreciable benefit, either to the FCC or to the public.

Broadcasters' submissions in the enhanced disclosure proceeding demonstrated that the recordkeeping burdens that would be imposed by replacing the current issues/programs list requirements with detailed quarterly reporting would be orders of magnitude greater than the FCC's estimate. The enhanced disclosure reporting obligations would be incapable of automation, would require the exercise of significant licensee judgment in reviewing and categorizing programming on an ongoing basis, and would be so time- and labor-intensive that many broadcasters would be required to devote a part-time if not a full-time staff position solely to the collection and reporting task.

Comments from broadcasters indicated that stations "testing" the proposed enhanced reporting requirements spent about 34 hours in a single week collecting, analyzing, and recording the information the enhanced disclosure rules would require. The data from this "trial run" of the enhanced disclosure form (FCC Form 355) showed that the total annual burden of responding to the form was greater than the burden

associated with the former TV programming log requirement which, before the FCC eliminated it in 1984, the General Accounting Office had called the single largest paperwork burden imposed on business by the government. See NAB Comments on Proposed Information Collection Requirements, MM Dkt Nos. 00-168 and 00-44, OMB Control No. 3060-0214 (filed May 12, 2008).

The burdens associated with the enhanced disclosure rules would directly and significantly impact broadcasters' ability to provide the very kind of community-responsive programming the FCC encourages. It is an elementary financial reality that finite resources devoted to detailed recordkeeping and reporting tasks are unavailable for use in creating programming responsive to community issues. And, ironically, the burdens associated with detailed reporting would fall most disproportionately on stations that already provide a significant volume of programming that addresses community issues.

Certain proposals made in the FCC's localism proceeding (such as restrictions on stations' ability to engage in remote operations and on main studio location) would be similarly counterproductive. Such regulatory requirements would saddle many broadcasters with significant new costs – costs that could potentially be devastating in today's current economic climate. Small broadcasters and station groups and those in more rural areas, in particular, would be adversely impacted in their ability to serve local audiences. See Comments of NAB, MB Dkt No. 04-233 (filed April 28, 2008); Reply Comments of NAB, MB Dkt No. 04-233 (filed June 11, 2008).

We must recognize that quantification of the burden of regulatory requirements in terms of dollars or hours can be difficult. In any event, fulfillment of the core public

interest obligation is more than a regulatory ideal; for broadcasters across the country it is a matter of business survival.

As stations trim staff in response to decreasing ad revenue and increased competition from other media sources, we see stations using innovation to respond to the needs of their communities, by, for instance, repurposing hyperlocal content on websites and using cooperative newsgathering operations. Websites that were once passive promotional opportunities for television and radio stations are now interactive, multimedia platforms that include video, user-generated content and special features created solely for the web. Both television and radio broadcasters are now using digital technologies to multicast, offering additional diverse programming (including local news, weather and sports, foreign language, and niche music programming) to local audiences. In these ways, broadcasters are able to continue to serve their audiences effectively and fulfill their public interest obligation. See NAB Comments, FTC New Media Workshop (filed Nov. 6, 2009) (discussing in more detail how broadcasters are using new digital technologies to innovate in broadcast journalism).

The ability of broadcasters to be nimble and to innovate, however, is not a reason for the imposition of new regulatory standards. Indeed, imposition of *new* regulatory requirements may prove to be more burdensome than the ones that currently serve the public well.

Broadcasters' Public Interest Role in the Digital World

Given convergence and the transition to digital technology, the FCC should recognize that heavy-handed regulation is unnecessary. In today's relentlessly competitive media marketplace, broadcasters must serve their local communities to

survive. Without locally-oriented programming and service to differentiate their offerings from a myriad of competitors, broadcasters will lose viewers and listeners and thus the advertisers that are vital to their business.

What the FCC needs to re-recognize is the value that local broadcasting provides to America as a *free* service, available to all virtually everywhere and without subscription.

Unlike other digital convergent services:

- * Broadcasting is a highly efficient point-to-multipoint service.
- * Broadcasting is virtually universal—now.
- * Broadcasting is what economists call a “public good”—i.e., the consumption of broadcast television or radio by one individual does not reduce its availability to be consumed by others and its consumption by one or many viewers or listeners does not exclude other viewers or listeners from using the good.
- * Broadcasting does not require additional infrastructure.
- * Broadcasting does not result in “network congestion.”
- * Broadcasting does not require network neutrality rules to prevent discrimination in access.
- * Broadcasting is free and does not require a subscription.

Broadcasting does provide a highly localized service consisting of news, emergency, public affairs, political, children’s, and other entertainment and informational programming that is costly to produce and valued by local audiences.

In sum, the core broadcast licensee/public interest obligation that has undergirded communications policy for eight decades does not need to be altered just because of technological change. However, Commission policy must ensure that its specific regulatory requirements applicable to broadcasters do not tilt the competitive playing field against locally-licensed and oriented radio and television stations.