January 10, 2011

Chairman Julius Genachowski
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Atwell Baker
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Chicago/Milwaukee TV License Renewals
Application for Review of DA 10-2336

Dear Mr. Chairman and Commissioners:

This letter accompanies a copy of an unusual application for review which has been filed today. Because it involves a case of considerable importance and precedential significance, but might appear to be a mere procedural dispute, I write to ask that you pay special attention to this case.

In the landmark *United Church of Christ* case, then-Judge Burger castigated the Commission for conducting a proceeding which manifested "[a] curious neutrality-in-favor-of-the-licensee...." *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 546 (D.C. Cir. 1969). Forty years later, the Commission staff seems not to have learned otherwise. It ignored applicable precedent, and relied on irrelevant and often obscure cases to reach its desired goal of never having to give any consideration to a detailed factual presentation painstakingly compiled by citizen petitioners. Failure to address this case on the merits will further diminish already weak public confidence in the Commission's regulatory process for broadcasting.

With great effort and expense, a group of citizens in Chicago and Milwaukee conducted extensive data collection of all substantially all news and public affairs programming in the weeks prior to election day in 2004 for each English language station in those TV markets. They obtained the services of highly qualified independent experts to analyze the data. Finding, *inter alia*, that '[l]ess than 1% of newscasts was devoted to...non-federal elections in the four weeks prior to the election...," they challenged the license renewals of these stations.

The staff rejected the petitions to deny in a decision which woefully misstated the proper legal standard and declined to consider the factual evidence presented. It then dismissed two non-frivolous petitions for reconsideration. The petitioners then filed an application for review to you, the full Commission, but the staff inexplicably ignored the

clear language of the Commission's rules delegating authority to the staff and purported to dismiss that application for review without referring it to the full Commission. This action was ***ultra vires***, and the new application for review calls upon you to vacate the staff action.

Please insure that this case receives your attention and is properly reviewed on the merits.

Respectfully submitted,

Andrew Jay Schwartzman
Counsel for Chicago Media Action and Milwaukee Public Interest Media Coalition

cc. Rick Kaplan
Marilyn Sonn
Joshua Cinelli
Rosemary Harold
Krista Witanowski
Steven Waldman

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of
Applications for Renewal of Station License of

WTMJ-TV, Milwaukee, WI	)	BRCT20050729CYF
WITI-TV, Milwaukee, WI	)	BRCT20050729DRL
WISN-TV, Milwaukee, WI	)	BRCT20050729CEF
WVTV-TV, Milwaukee, WI	)	BRCT20050729BDQ
WCGV-TV, Milwaukee, WI	)	BRCT20050729BBZ
WVCY-TV, Milwaukee, WI	)	BRCT20050729AGS
WMLW-TV, Milwaukee, WI	)	BRTT20050729ADM
WJJA-TV, Racine, WI	)	BRCT20050729ABE
WWRS-TV, Mayville, WI	)	BRCT20050729DNH
WPXE-TV, Kenosha, WI	)	BRCT20050729AIH
WDJT-TV, Milwaukee, WI	)	BRCT20050729ADL
WBBM-TV, Chicago, IL	)	BRCT20050801AFV
WMAQ-TV, Chicago, IL	)	BRCT20050801CEL
WLS-TV, Chicago, IL	)	BRCT20050801CUZ
WGN-TV, Chicago, IL	)	BRCT20050801BXY
WCIU-TV, Chicago, IL	)	BRCT20050801ADO
WFLD-TV, Chicago, IL	)	BRCT20050729DSN
WCPX-TV, Chicago, IL	)	BRTTA20050729AGG
WSNS-TV, Chicago, IL	)	BRCT20050801CFO
WPWR-TV, Gary, IN	)	BRCT20050401AQB

TO: The Commission

APPLICATION FOR REVIEW

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January 10, 2011

Chicago Media Action ("CMA") and the Milwaukee Public Interest Media Coalition (jointly referred to as "Petitioners") respectfully ask the Commission to vacate a December 10, 2010 staff decision ("*December 10 Decision*"). *Chicago Media Action and Milwaukee Public Interest Coalition* (DA 10-2336) (Vid. Div.) (released December 10, 2010), and to consider the case on its merits.

The *December 10 Decision*, issued by the Chief, Video Division, Media Bureau, purported to dismiss Petitioners' February 16, 2010 *Application for Review*[1] of staff decisions relating to their petitions to deny the license renewal of 8 broadcast television stations in the Chicago market and 11 broadcast stations in the Milwaukee market, respectively, *Chicago Media Action and Milwaukee Public Interest Coalition*, 22 FCCRcd 10877 (Vid. Div. 2007) ("*2007 Letter Decision*"), and thereafter dismissing two petitions for reconsideration of the *Letter Decision. Chicago Media Action and Milwaukee Public Interest Media Coalition*, 25 FCCRcd 167 (Vid. Div. 2010) ("*2010 Letter Decision*"); *Chicago Media Action and Milwaukee Public Interest Coalition*, 23 FCCRcd 10608 (Vid. Div. 2008) ("*2008 Letter Decision*"). The *December 10 Decision* is in conflict with Commission rules, case precedent and Commission policy. 47 CFR §1.115(b)(1)(I).

This case is extraordinary in that the Commission staff had absolutely no authority to withhold the *Application for Review* from the Commission or to act upon it. Only the full Commission has the power to act on an application for review from a staff action taken under delegated authority. The staff action must be vacated.

The underlying case is a matter of great importance relating to whether television stations in Chicago and Milwaukee provide adequate coverage to local elections. The staff's egregious mis-

[1]For the convenience of the Commission, a copy of the *Application for Review* is provided as Attachment A hereto.

handling of the *Application for Review* has the unfortunate appearance of seeming to trivialize extremely substantial efforts to vindicate the public's right to participate in the broadcast license renewal process. Its failure to comply with an explicit Commission rule requiring that the *Application for Review* be referred to the full Commission reinforces the claims of those who believe that the Commission harbors "[a] curious neutrality-in-favor-of the licensee...." *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 546 (D.C. Cir. 1969).

I. THE MEDIA BUREAU HAS NO AUTHORITY TO ACT ON APPLICATIONS FOR REVIEW OF ITS OWN DECISIONS.

The *December 10 Decision* decision was issued *ultra vires*. It must be vacated and the February 10, 2010 *Application for Review* must be considered on its merits. The Commission's staff has no authority to act on applications for review of its own decisions. Indeed, the Commission's delegation of authority to the Media Bureau directs the staff to refer such matters to the full Commission. It expressly provides that

> The Chief, Media Bureau, is delegated authority to perform all functions of the Bureau, described in [47 CFR §]0.61, ***provided that the following matters shall be referred to the Commission en banc for disposition***:
>
> * * * *
>
> (b) Application for review of actions taken pursuant to delegated authority.

47 CFR §0.283 (emphasis supplied). Moreover, Section 1.115 of the Commission's rules, which governs applications for review of action taken pursuant to delegated authority, expressly provides that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application for review of that action ***by the Commission***." 47 CFR §1.115(a) (emphasis added). The *December 10 Decision* cites no authority for staff jurisdiction over the *Application for Review*, and

there is no other provision in the Commission's rules, and no other directive or authorization of the Commission which can, or does, supercede the specific provisions cited here.

II. FOR WHAT IT IS WORTH, THE BUREAU'S DETERMINATION IS WRONG AS A MATTER OF FACT AND LAW.

To the extent that it matters, the Media Bureau's *December 10 Decision* is factually and legally incorrect.

A. Background.

In their petitions to deny renewal, Petitioners challenged the renewal of 8 Chicago and 11 Milwaukee television stations. Relying on a detailed study of substantially all the news and public affairs programming on all the TV stations in those markets conducted by highly qualified independent experts, they alleged that

> singly and together, each of these stations has failed to meet the needs of their community of license and that, therefore, renewal of [these] licenses would not serve the public interest. Specifically,...these stations failed to present adequate programming relating to state and local elections during the 2004 election campaign.

Chicago Media Action *Petition to Deny*, p. 2.

The staff rejected the two petitions to deny renewal. In the *2007 Letter Decision*, the staff cited two irrelevant and obscure decisions, one of them a staff letter, improperly placed the burden of proof on petitioners, found that petitioners had not demonstrated that the broadcasters' programming decisions were made in bad faith, and found that Section 326 of the Communications Act and the First Amendment limited the Commission's authority to review evidence such as that presented by Petitioners.

Because the staff employed the wrong legal standard, and this had not been the subject of

discussion in the pleadings, it was not possible for Petitioners to seek review of the *2007 Letter Decision* without first seeking reconsideration. 47 CFR §1.115(c).[2] In seeking reconsideration, Petitioners also submitted newly available factual information which reinforced the case against renewal of the licenses. This, too, could only have been submitted by means of a reconsideration petition. The staff denied reconsideration in the *2008 Letter Decision*.

During the pendency of reconsideration of the *2008 Letter Decision*, the Commission issued its so-called *Enhanced Disclosure Order* in Docket 00-168. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCCRcd 1274 (2008). Because the *2007 Letter Decision* predated the *Enhanced Disclosure Decision*, and because the *2008 Letter Decision* did not take the *Enhanced Disclosure Decision* into account, it was not possible to seek full Commission review without first seeking reconsideration. 47 CFR §1.115(c). Thus, petitioners again sought reconsideration, filing a *Second Petition for Reconsideration* on August 11, 2008.

The *Second Petition for Reconsideration* was dismissed in the *2010 Letter Decision*. Although the staff held that the *Second Petition for Reconsideration* was repetitious (the error of which is discussed below), the staff nonetheless chose to discuss its merits. *2010 Letter Decision*, 25 FCCRcd at 168-169. In this discussion, the staff considered, and rejected, Petitioners' arguments with respect to the *Enhanced Disclosure Order*.

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[2]Section 1.115(c) provides that

c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

NOTE: Subject to the requirements of 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration."

B. Petitioners Did Not Waive the Right to File Their *Application for Review*.

The *December 10 Decision* appears to contend that Petitioners somehow waived their right to seek full Commission review by taking the required step of petitioning for reconsideration of legal issues.

There is nothing in the rules, and no case law, which even suggests that the filing of a petition for reconsideration with the staff precludes the subsequent timely filing of an application for review which addresses the original underlying order. It is inherently illogical to require that a party required to raise an issue on reconsideration must forego the right to file an application for review of the underlying decision. It would require a party aggrieved by two or more separate errors of fact or law to forego raising one or more of the issues. If the party attempted to raise an issue fully considered in the initial order, reconsideration of that issue would be properly dismissed as repetitious. If the party instead filed an application for review, efforts to raise issues not fully considered in the initial decision would be dismissed based on non-compliance with Section 1.115(c).

C. The *Application for Review* Is Not Untimely.

The *December 10 Order* erroneously finds that the *Application for Review* is untimely except with respect to the *2010 Letter Decision*. Its logic is that since the challenge to the reasoning of the original *2007 Letter Decision* was not presented in an application for review within 30 days of issuance, those arguments may not be raised in an otherwise timely application for review of the most recent decision.

The problem with the staff's theory is that a decision upholding an order on reconsideration in whole or in part effectively constitutes a readoption of the prior decision and its reasoning. It is

common for parties to seek reconsideration of one element of an action taken on delegated authority and then seek full Commission review of the initial decision without rejection on timeliness grounds. *See, e.g., Tidewater Communications LLC*, 25 FCCRcd 1675 (affirming underlying order after modification on reconsideration); *Radio One Licensees, Inc.*, 18 FCCRcd 15964 (2003) (granting in part application for review of underlying forfeiture order).

D. The *Application for Review* Is Not Repetitious.

Contrary to the staff's holding, the *Application for Review* is not repetitious. It presents, for the first time, challenges to the staff's use of an erroneous "bad faith" legal standard, and its failure to consider quantitative and qualitative evidence, as well as its erroneous claims that Section 326 of the Communications Act and the First Amendment bar consideration of Petitioners' evidence. The only portions of the *Application for Review* which are even arguably repetitious are its references to the *Enhanced Disclosure Order*. However, as noted below, since the staff chose address the merits of the *Enhanced Disclosure Order* in its 2010 Letter Decision, that portion of the challenge may be properly raised on review.

E. Even If the *Second Petition for Reconsideration* Were Repetitious, the Staff's Consideration of its Arguments on the Merits Makes it Reviewable.

Even if the staff were technically correct that the *Second Petition for Reconsideration* could be dismissed as repetitious, that does not matter in this case because the staff chose to address the merits of the petition. This effectively revivified the proceeding, and entitled Petitioners to seek review of the language. The *Application for Review* was the first opportunity to seek review of the staff's discussion of the *Enhanced Disclosure Order*. If this language were not reviewable, there would be no way for the Commission to correct errors of fact or law which the staff may have made.

CONCLUSION

WHEREFORE, the Commission should vacate the December 10 Decision, consider the February 16, 2010 *Application for Review* on the merits, reverse the *2010 Letter Decision*, the *2008 Letter Decision* and the *2007 Letter Decision*, give detailed instructions to the staff on how to administer the license renewal process, designate the renewal applications for hearing, and grant all such other relief as may be just and proper.

Respectfully submitted,

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January 10, 2011

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of
Applications for Renewal of Station License of

WTMJ-TV, Milwaukee, WI	)	BRCT20050729CYF
WITI-TV, Milwaukee, WI	)	BRCT20050729DRL
WISN-TV, Milwaukee, WI	)	BRCT20050729CEF
WVTV-TV, Milwaukee, WI	)	BRCT20050729BDQ
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WMLW-TV, Milwaukee, WI	)	BRTT20050729ADM
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WWRS-TV, Mayville, WI	)	BRCT20050729DNH
WPXE-TV, Kenosha, WI	)	BRCT20050729AIH
WDJT-TV, Milwaukee, WI	)	BRCT20050729ADL
WBBM-TV, Chicago, IL	)	BRCT20050801AFV
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WGN-TV, Chicago, IL	)	BRCT20050801BXY
WCIU-TV, Chicago, IL	)	BRCT20050801ADO
WFLD-TV, Chicago, IL	)	BRCT20050729DSN
WCPX-TV, Chicago, IL	)	BRTTA20050729AGG
WSNS-TV, Chicago, IL	)	BRCT20050801CFO
WPWR-TV, Gary, IN	)	BRCT20050401AQB

TO: The Commission

APPLICATION FOR REVIEW

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February 16, 2010

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SUMMARY

In the landmark *United Church of Christ* case, then-Judge Burger castigated the Commission for conducting a proceeding which manifested "[a] curious neutrality-in-favor-of-the-licensee...." *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 546 (D.C. Cir. 1969). Forty years later, the Commission staff seems not to have learned otherwise. It ignored applicable precedent, and relied on irrelevant and often obscure cases to reach its desired goal of never having to give any consideration to a detailed factual presentation painstakingly compiled by citizen petitioners.

Here, the Petitioners challenged the renewal of 8 Chicago and 11 Milwaukee television stations. Relying on a detailed study of substantially all the news and public affairs programming on all the TV stations in those markets conducted by highly qualified independent experts, they alleged that

> singly and together, each of these stations has failed to meet the needs of their community of license and that, therefore, renewal of [these] licenses would not serve the public interest. Specifically,...these stations failed to present adequate programming relating to state and local elections during the 2004 election campaign.

The staff rejected the two petitions to deny renewal. In its letter decision, the staff cited two irrelevant and obscure decisions, one of them a staff letter, and placed the burden of proof on petitioners, found that petitioners had not demonstrated that the broadcasters' programming decisions were made in bad faith, and found that Section 326 and the First Amendment limited the Commission's authority to review evidence such as that presented by Petitioners.

The petitions to deny in this case presented detailed and painstakingly compiled statistical data and scientifically designed qualitative analysis which vastly exceeded the threshold necessary to trigger further review. Indeed, the showing is precisely the kind which was contemplated by the Commission in fashioning its policies governing license renewals, as confirmed by the recent *Enhanced Disclosure Order*.

In this *Application for Review*, Petitioners contend that the staff made four errors of law.

First, the staff improperly ruled that the licensees' programming judgments would not be subject to review unless Petitioners established that the broadcasters acted in bad faith. Applicable precedent clearly shows that the Commission has established a reasonableness test, not one of bad faith.

Second, the staff improperly refused to consider Petitioners quantitative data, notwithstanding repeated agency statements that licensees can be subject to license renewal challenge if there is a showing that there was minimal programming addressing important issues. Moreover, the staff wrongly refused to reconsider this ruling after the Commission's newly-issued *Enhanced Disclosure Order* reaffirmed that quantitative showings are a proper means for challenging license renewals.

Third, the staff erroneously suggested that Section 326 and the First Amendment bar consideration of quantitative data about past programming. This ignores the fact that the Childrens Television Act employs quantitative data, and repeated Commission rulings upholding the Childrens Television Act as against constitutional challenge. It also contravenes the *Enhanced Disclosure Order*, which held that requiring the submission of such data does not violate the First Amendment.

Finally, the staff entirely ignored Petitioners' qualitative analysis of the licensees' programming. This was an error of law.

Accordingly, the staff decision must be reversed, and the Commission should either designate the applications for hearing or conduct further investigation pursuant to *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978 (*en banc*).

Chicago Media Action ("CMA") and the Milwaukee Public Interest Media Coalition ("MPIMC") (jointly referred to as "Petitioners") respectfully ask the Commission to reverse staff actions dismissing their petitions to deny the license renewal of 8 broadcast television stations in the Chicago market and 11 broadcast stations in the Milwaukee market, respectively, *Chicago Media Action and Milwaukee Public Interest Coalition*, 22 FCCRcd 10877 (Vid. Div. 2007) ("*Letter Decision*"), and thereafter dismissing two petitions for reconsideration of the *Letter Decision.* " *Chicago Media Action and Milwaukee Public Interest Media Coalition*, (DA 10-46) (Video Division) (released January 12, 2010); *Chicago Media Action and Milwaukee Public Interest Coalition*, 23 FCCRcd 10608 (Vid. Div. 2008).[1]

FACTUAL BACKGROUND

The *Petitions to Deny*

On November 1, 2005 CMA and MPIMC filed similar petitions to deny.[2] As CMA explained,

> The basis of this challenge is that, singly and together, each of these stations has failed to meet the needs of their community of license and that, therefore, renewal of [these] licenses would not serve the public interest. Specifically,...these stations failed to present adequate programming relating to state and local elections during the 2004 election campaign. Less than 1% of newscasts was devoted to these non-federal elections in the four weeks prior to the election.

CMA *Petition to Deny*, p. 2.[3].

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[1]The staff's decision dismissing Petitioners' most recent petition for reconsideration was released on January 12, 2010. Accordingly, the original filing deadline for applications for review was February 11, 2010. However, the Federal government was closed that day and pursuant to Commission rules, the deadline for filing was February 12, 2010. On February 12, 2010, Petitioners filed a *Request for Extension of Time* based on the disruption caused by the two recent snow storms and counsel's inability to access relevant materials and copying facilities.

[2]Although CMA also stated that its petition should be considered as an informal objection to the renewal of WPWR-TV, Gary, IN, the *Letter Decision* does not treat that licensee differently.

[3]MPIMC used similar language. "[L]ess than 1% of newscast time was devoted to state level elections, about 2% to ballot issues and about 1% to other local elections." MPIMC *Petition to Deny*,

In addition to the requisite affidavits attesting to the standing of the petitions and to personal knowledge of the facts, the petitioners attached a rigorous study analyzing essentially all regularly scheduled news programming and public affairs programming on Chicago, Milwaukee and Portland, OR television stations in the four weeks prior to the November, 2004 election. The Center for Media and Public Affairs ("CMPA"), a nonpartisan research and educational organization which was founded in 1985 to conduct scientific studies of the news and entertainment media, was commissioned to conduct the analysis. Trained volunteers taped the programming, which CMPA examined using coding methodology that employs numerous statistical and other controls to assure completeness and accuracy.

The CMPA study

> examined each taped newscast for any stories dealing with elections anywhere in the U.S. For each relevant story, [it] noted the story length, the contest that was being discussed, and the primary frame used to address the campaign (e.g., horse race, issue discussion, strategy, etc.). [It] also timed the sound bites of any candidates who spoke. The data obtained through this process are presented in the following three sections of the report.
>
> To complete...analysis of local programming [it] also examined non-news public affairs programming that were found outside of regularly scheduled newscasts. These public affairs programs ranged from candidate debates to town hall meetings and from panel discussions with local pundits to extended candidate interviews.

CMA *Petition to Deny*, Exhibit B, p. 7.

The study was both quantitative and qualitative. It placed particular emphasis on how much news coverage was devoted to local (*i.e.,* non-federal) election campaigns, and reviewed what the focus of that coverage was. For example, in Chicago,[4] the study found, that

> the data show that only 7.8% of total newscast time was devoted to elections in the four weeks prior to a major election, and that the U.S. Presidential and U.S. Senate races accounted for 79% of that coverage. All other Illinois contests together counted for approximately 8% of the election news coverage. This is well under 1% of the total

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p. 2.

[4]Findings for Milwaukee were similar.

time devoted to news on the stations on the five monitored stations.

CMA *Petition to Deny*, p. 4.

As detailed in the study, "the Presidential and [Illinois] Senate races accounted for nearly four-fifths (79%) of all election coverage at the Chicago stations." CMA *Petition to Deny*, Exhibit B, p7. The study went on to say that "After these two races, the next focal point was the election process itself....Across the entire Chicago market these stories made up 12% of the coverage, ..." *Id.* It then stated that

> All other Illinois races combined accounted for eight percent of all election coverage. This included races for the House of Representatives as well as the state legislature and other state and local offices. The contest for the 8th Congressional District race between Republican incumbent Phil Crane and Democratic challenger Melissa Bean accounted for fully half of this coverage (four percent of election coverage overall). The most prominent state level race on TV was that of Jeff Tomczak, who was running as the incumbent for State Attorney in Will County. The race received virtually no attention until Mr. Tomczak's father was arrested i n the hired truck scandal sweeping through Chicago at the time. Once that story broke, Mr. Tomczak's campaign faced questions about suspicious campaign contributions, Chicago city workers volunteering on his campaign, and other issues.

Id., pp. 7-8.

Further qualitative analysis of the news coverage demonstrated the lack of issue coverage. CMPA found that

> the dominant frame was strategic. Almost one third (32%) of all election strories approached the news from the vangatge point of its strategic implications.****
>
> Strategic frames were followed in number by horse race frames, which accounted for almost a quarter of all election stories (23%).****
>
> Information on how and where to register to vote or how to vote accounted for eight percent of campaign coverage.....There was little coverage of personal character (only three percent overall), and almost no ad watch stories, which analyzed or evaluated the candidates' advertising claims. Finally, coverage of alleged voting improprieties or potential problems was classified under "Other" in our analysis. This residual category was also used for scandals involving campaigns or candidates, vandalism to election signs, etc.

The CMPA study also

> identified all instances in which a candidate for office spoke on camera. [It] then timed each of these soundbites and aggregated them to determine how much total air time the candidates were given****
>
> Overall, candidates accounted for 15% of the air time devoted to the election.

Id.

The two petitions to deny set forth the legal standard by which the Commission assesses renewal challenges, and argued that "the paucity of coverage of local elections...cannot be reconciled with the localism which [Section 307(b) of] the Communications Act demands." CMA *Petition to Deny*, p. 6; MPIMC, *Petition to Deny*, p. 8. The petitions concluded by stating that there was "a fundamental marketplace failure in the coverage of what is arguably the most important kind of programming in a modern democracy - coverage of elections." CMA *Petition to Deny*, p. 8; MPIMC, *Petition to Deny*, p. 10.[5]

The Staff *Letter Decision*

It took a year and a half for the staff to act on the petitions to deny. By letter decision released on June 13, 2007, the Chief, Video Division, Media Bureau, denied the two petitions to deny in a cursory, even dismissive, two and one-half page letter. *Chicago Media Action and Milwaukee Public Interest Coalition*, 22 FCCRcd 10877 (Vid. Div. 2007)("*Letter Decision*"). Invoking Section 326 and

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[5]See *Political Primer 1984*, 100 FCC2d 1476, 1478 (1984):

> The FCC itself has stressed the importance of political broadcasting many times. In one statement, it said:
>
> > In short, the presentation of political broadcasting, while only one of the many elements of service to the public ... is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic.

(*quoting Licensee Responsibility as to Political Broadcasts,* 15 FCC 2d 94 (1968))

citing to three early decisions,[6] each of which related to requests for Commission sanctions against specific individual programs, and did not involve license renewals, the *Letter Decision* made the unassailable (but decisionally irrelevant) point that "the Commission has very little authority to interfere with a licensee's selection and presentation of news and editorial programming." *Letter Decision*, p. 2.[7] It then set forth the standard it would apply to the pending renewals, saying that "[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter [of] the licensee's good faith discretion," and that "the Commission will not review the licensee's news judgments."

Although the current TV license renewal procedures were adopted in 1984, the *Letter Decision* cited as support a 1980 decision in which the petitioners alleged, without quantitative analysis, that the licensee had engaged in discriminatory judgments in excluding news stories about African-Americans. *Letter Decision,* 22 FCCRcd 10879 n.4. It also cited to an unpublished staff letter decision rejecting a petition to deny relied on anecdocal evidence to allege that TV newscasts in Denver "suffer[ed] from 'Toxic TV News syndrome...,'" that news coverage "was dominated by violent topics" and that "'people of color are often stereotyped as perpetrators of crime...." *Dr. Paul Klite*, 12 Com. Reg. (P&F), 79, 81-82 (MMB 1998), *recon. denied sub nom., McGraw-Hill Broadcasting Co.*, 16

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[6]The latest of these decisions was issued in 1976, was vacated as moot, and involved a fairness doctrine complaint. *National Broadcasting Co. v. FCC,* 515 F.2d 1101, 1112-1113, 1119-1120 (D.C. Cir. 1974), *vacated as moot, id.* at 1180, *cert.denied*, 424 U.S. 910 (1976). The *Letter Decision* also cited *CBS v. DNC*, 412 U.S. 94 (1973), which related to whether broadcasters must sell time to a particular advertiser, and *Hunger in America,* 20 FCC2d 143, 150-151, which involved a Section 403 investigation into allegations of deliberate distortion of news programming in violation of Commission policy.

[7]In seeking to call a licensee to account for failing to serve the public interest in its past programming, Petitioners are not asking the Commission to interfere with current or future programming. See discussion at pp. 18-19, *infra*.

FCC2d 22739 (2001).[8]

Based on this sparse discussion, the staff concluded that

> The petitions have not provided evidence that the named licensees exercised their editorial discretion in bad faith. Quantity is not necessarily an accurate measure of the overall responsiveness of a licensee's programming.[10] The study provided only concerns one type of programming, local election coverage just prior to the 2004 election. It does not demonstrate that television programming in Chicago or Milwaukee has generally been unresponsive.
>
> [10] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1090 (1984).

Letter Decision, 22 FCCRcd at 10879.

Far from examining Petitioners' data, the *Letter Decision* suggested that Section 326 and the First Amendment barred consideration of quantitative programming data. *Id.*, 22 FCCRcd at 10878-79 ("Section 326 of the Act and the First Amendment to the Constitution prohibit any Commission actions that would improperly interfere with the programming decisions of licensees.")

Significantly, the *Letter Decision* did take note of the pendency of a proceeding to adopt standardized reporting forms, but suggested that its relevance was to the need for citizen-broadcaster dialog, and ***not*** to the license renewal process:

> The Commission, however, currently has pending a rulemaking seeking to standardize and enhance television broadcasters' public interest disclosure requirements. In initiating this rulemaking, the Commission has sought, in part, to promote discussions between the licensee and its community about how best to meet the local public interest obligations of the community a broadcaster serves. In the meantime, we urge all viewers and listeners, including such organizations as CMA and MPIMC, to raise their programming concerns directly with their local broadcasters.

Id. (footnote omitted).

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[8] For the convenience of those without access to Pike and Fisher, a text file of the decision can be viewed at http://tinyurl.com/y8rssr2.

First Petition for Reconsideration

Petitioners sought reconsideration on July 13, 2007. They argued that the staff improperly - placed the evidentiary burden on petitioners, that the staff employed the wrong legal standard and that the quantity of programming carried is not irrelevant to consideration of broadcasters' license renewals. Petitioners also supplied information which could not have previously been provided in the form of an analysis of conducted by the University of Wisconsin-Madison NewsLab. The study analyzed election news carried in nine markets, including Chicago and Milwaukee in the four weeks preceding the November, 2006 election, explaining that "The NewsLab Study underscores and corroborates the Petitioners' initial findings regarding the lack of local [election] news programming available to the communities of license." *Petition for Reconsideration,* p. 3.

The staff took no action on the *Petition for Reconsideration* for a full year. Finally, by letter decision dated July 11, 2008, the staff dismissed the petition. It reasserted that the "petitioners had failed to provide evidence that the broadcasters had exercised their discretion in 'bad faith.'" *Chicago Media Action and Milwaukee Public Interest Coalition*, 23 FCCRcd 10608 (Vid. Div. 2008). It did not examine Petitioners' studies, but reiterated even if the data were correct, Petitioners "did not demonstrate that 'television programming in Chicago and Milwaueee has generally been unresponsive.'" *Id.*, 23 FCCRcd at 10609 (citing *Letter Decision*, 22 FCCRcd at 10879).

Second *Petition for Reconsideration*

During the pendency of reconsideration, the Commission adopted its so-called "Enhanced Disclosure" decision, *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCCRcd 1274 (2008)("*Enhanced Disclosure Order*"). In the *Enhanced Disclosure Order*, the Commission found that the pre-existing public file requirements

for broadcasters gave the public insufficient information upon which it could rely to participate effectively in the license renewal process. Accordingly, it specifically required broadcasters to begin posting data about the quantity of certain categories of programming, including "Local Electoral Affairs Programming,"[9] in a standardized format.

Based on this significant new development, on August 11, 2008, Petitioners filed a *Second Petition for Reconsideration*. They argued that

> The staff's action cannot be reconciled with the recently-issued [Enhanced Disclosure] *Report and Order*. There, the Commission promulgated a reporting requirement which included details of programming very similar to the kind of information upon which Petitioners relied in preparing their evidentiary submission,...

Second Petition for Reconsideration, pp. 3-4.

The staff took about 17 months to act on the *Second Petition for Reconsideration*. *Chicago Media Action and Milwaukee Public Interest Media Coalition*, (DA 10-46) (Video Division) (Released January 12, 2010). In its January 12, 2010 decision, the staff dismissed the petition as repetitious because the *Enhanced Disclosure* Order was issued prior to the issuance of its July 11, 2008 decision.[10] It nonetheless chose to address Petitioners' arguments, stating that "the staff's conclusions were not contingent on the eventual resolution of the [Enhanced Disclosure] rulemaking." It said that in the

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[9]"Local Electoral Affairs Programming," is defined as follows:

> Local electoral affairs programming consists of candidate-centered discourse focusing on the local, state and United States Congressional races for offices to be elected by a constituency within the licensee's broadcast area. Local electoral affairs programming includes broadcasts of candidate debates, interviews, or statements, as well as substantive discussions of ballot measures that will be put before the voters in a forthcoming election.

Enhanced Disclosure Order, 23 FCCRcd at 1301.

[10]This is an odd conclusion in light of the fact that the Commission does not accept supplements to petitions for reconsideration. 47 CFR §1.106(f). Thus, Petitioners were unable to present additional facts until they had the opportunity to file a new petition for reconsideration.

Enhanced Disclosure Order, "[t]he Commission stated that the purpose of the new disclosure requirement was...to make 'information about broadcasters' efforts more understandable and more easily accessible by members of the public...," *Id.,* p. 3 (*citing Enhanced Disclosure Order*, 23 FCCRcd at 1287), but did not state how such information might be used, and concluded that the new decision "did not alter established precedent...." *Id.*

QUESTIONS PRESENTED

1. Did the staff err in using a "bad faith" standard for evaluating the *Petition to Deny*?

3. Did the staff err in failing to consider quantitative evidence about past programming?

4/ Did the staff err in failing to address Petitioners' qualitative evidence?

ARGUMENT

In the landmark *United Church of Christ* case, then-Judge Burger castigated the Commission for conducting a proceeding which manifested "[a] curious neutrality-in-favor-of-the-licensee...." *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 546 (D.C. Cir. 1969). Forty years later, the Commission staff seems not to have learned otherwise. It ignored applicable precedent, and relied on irrelevant and often obscure cases to reach its desired goal of never having to give any consideration to the detailed factual presentation offered by Petitioners.

The petitions to deny in this case presented detailed and painstakingly compiled statistical data and scientifically designed qualitative analysis which vastly exceeded the threshold necessary to trigger further review. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985) (reversing where "[t]he statute in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into the possible existence of a fire only when it is shown the existence of a fire.") Indeed, the showing is precisely the

kind which was contemplated by the Commission in fashioning its policies governing license renewals, as confirmed by the recent *Enhanced Disclosure Order*.

The *Letter Decision* and the two subsequent decisions on reconsideration must be reversed. Since the Commission cannot conclude on the basis of the current record that any of the stations have operated in the public interest, it should either conduct further review under the *Bilingual* standard, *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978 (*en banc*) or designate a hearing pursuant to Section 309(e).

The staff made four fundamental errors of law.

First, it erroneously employed a "bad faith" standard rather than the "reasonableness" standard contemplated by Commission rules and policies for broadcast renewals.

Second, it erroneously refused to give any weight whatsoever to Petitioners' detailed quantitative showing that singly and collectively, the licensees failed to provide meaningful coverage of local electoral issues. Moreover, on reconsideration, it arbitrarily and capriciously failed to reconcile its action with the *Enhanced Disclosure* decision insofar as that ruling reconfirmed the Commission's policy with respect to the use of quantitative data in petitions to deny license renewal and the importance of coverage of local elections.

Third, it erroneously held that Section 326 and the First Amendment restrict the Commission from considering quantitative evidence pertaining to broadcasters' programming and thus it erroneously held that Section 326 and the First Amendment restrict the Commission from considering quantitative evidence pertaining to broadcasters' programming and thus refused to give any weight whatsoever to Petitioners' detailed quantitative showing that singly and collectively, the licensees failed to provide meaningful coverage of local electoral issues.

Fourth, it improperly failed to consider or discuss Petitioners' qualitative showings.

I. The Staff Erroneously Employed a "Bad Faith" Standard.

The first error of law made in the *Letter Decision* was its ruling that Petitioners had to demonstrate that the licensees acted in "bad faith" in making their programming decisions. Under clear Commission policy, the proper standard for such an assessment was whether the broadcasters' decisions were "reasonable."

A simple review of the Commission's policy statements demonstrates that the Commission repeatedly and unequivocally stated that the Commission employs a "reasonableness" test of renewal applicants' programming decisions.

In 1981, the Commission adopted a sweeping set of changes to its administration of the radio broadcast renewal application process in a proceeding popularly referred to as "Radio Deregulation." *Deregulation of Radio*, 84 FCC2d 968 (1981), *aff'd in part, remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC,* 707 F.2d 1413 (D.C. Cir. 1983)("*UCC v. FCC*"). After the decision was substantially affirmed by the D.C. Circuit, the Commission relied on the *Deregulation of Radio* model for a similar "*TV Deregulation*" decision. *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC2d 1075 (1984), *aff'd in part, remanded in part sub nom. Action for Childrens Television v. FCC,* 821 F.2d 741 (D.C. Cir. 1987)("*TV Deregulation*").

Prior to these decisions, the Commission employed quantitative guidelines for news, public affairs and other non-entertainment programming under which applicants exceeding the guidelines were generally received automatic renewal, but those falling short were subjected to additional review. In its *Deregulation of Radio* decision, the Commission expressed the belief that the guidelines could be

eliminated and "that marketplace forces will assure the continued provision of news programs in amounts to be determined by the discretion of the individual broadcaster...." *Deregulation of Radio*, 84 FCC2d at 978. Of particular relevance here, the Commission said that

> broadcasters will have the flexibility to choose which issues they believe warrant coverage based on the existence of other radio services appealing to other segments of the community. ***The focus of our inquiry, in the case of a challenge will be upon whether the licensees's judgment in this regard was reasonable.***

Id., 84 FCC2d at 979. *See also, id.*, 84 FCC2d at 991 ("The focus of our inquiry in the case of a challenge to license renewal will be ***whether the challenged licensee acted reasonably in choosing which issues to address.***") (emphasis supplied).

Because of its focus on marketplace forces, the Commission allowed broadcasters to take into account the programming carried by other stations in the market while making their own programming decisions.

> Licensees directing their nonentertainment programming to a narrow audience may defend their decision by demonstrating the presence of other stations in the community that ***reasonably*** were relied upon to address the issues confronting the other segments of the community. If the licensee can demonstrate that such other stations were present and ***that it acted reasonably*** in relying upon them to address issues pertinent to other segments of the community, the station will be permitted to be more narrowly focused. ***When called upon to assess the reasonableness of the licensee's decision, the Commission will have to undertake an ad hoc review which considers the circumstances in which the decision was made.***

Id., 84 FCC2d at 992 (emphases supplied).

As noted above, the subsequent *TV Deregulation* proceeding was explicitly modeled on the framework established in *Deregulation of Radio*.[11] In words closely resembling those used in

[11] *See, e.g., TV Deregulation*, 98 FCC2d at 0191 ("As we noted in the radio deregulation proceeding, the Commission's involvement in the area of non-entertainment programming has always been driven by a concern that issues of importance to the community will be discovered and addressed in programming so that the informed public opinion, necessary in a functioning democracy, will

Deregulation of Radio, the Commission set forth the standards for petitions to deny as follows:

> The focus of our inquiry in the petition to deny context can be expected to be ***whether the challenged licensee acted reasonably in choosing the issues it addressed in its programming.*** Assessing the reasonableness of a licensee's decision will necessitate an *ad hoc* review to examine the circumstances in which the programming decision was made. ***The examination will focus on the licensee's evaluation of the programming of other television stations and its own responsive programming in light of the needs of its community. In any event, in the face of a petition to deny which makes a prima facie case that a licensee has been unreasonable, the burden will be upon the licensee to demonstrate that the exercise of discretion was appropriate in the circumstances.***

TV Deregulation, 98 FCC2d at 1094-1095 (footnote omitted)(emphases supplied).

On review in the Court of Appeals, the D.C. Circuit summarized the Commission's revised policy as follows:

> In short, we view the Commission policy in this area as basically unchanged: The Commission gives discretion to the licensee in determining the amount of non-entertainment programming and ***reviews the reasonableness of the exercise of that discretion at renewal time.***

UCC v. FCC, 707 F.2d at 1433-1434 (emphasis supplied).

It is incontrovertible that the proper standard here was to examine whether the licensee's judgments were "reasonable," not whether they were made in "good faith." On the current record, the Commission cannot find that the broadcasters' judgments were reasonable, and further Commission action is required.

II. The Staff Erred in Disregarding Petitioners' Quantitative Evidence.

The staff refused even to consider Petitioners' detailed quantitative showing with respect to the news and public affairs coverage of the 2004 and 2006 elections in the Chicago and Milwaukee markets. This blanket refusal violates clear Commission policy and judicial analysis of it. Petitioners

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be possible.")

do not argue that every quantitative showing merits review, but they do contend that where there is a showing like the one here, of such minimal programming relating to an area of such importance to the community, the Commission must at the least consider whether these individual and collective shortcomings raise public interest questions.

The notion that the quantity of programming carried by licensees is irrelevant to renewal was extensively considered - and rejected - by the Commission and the Court of Appeals. In *Deregulation of Radio*, the Commission said that, while "the specific amount of programming being offered by an individual station, standing alone, would not be appropriate for petitions to deny...," it also said that

> the type of non-entertainment programming that would be relevant for a petition to deny would consist of ***a showing that an individual station is doing very little, or nothing***, to address though its programming issues facing the community.

Deregulation of Radio, 84 FCC2d at 990-991 (emphasis supplied).

The parties challenging the *Deregulation of Radio* decision argued that this language meant that the Commission was disclaiming interest in quantitative showings. However, in *UCC v. FCC*, the Court of Appeals disagreed with that reading of the decision below. The Court specifically rejected the claim that the Commission had improperly ruled that "'the amount of time devoted to public service programming is never relevant to the public interest determination at renewal.'" Rather, the Court said, "[W]e believe...the Commission intended only to 'downplay'" the significance of absolute numbers of minutes or percentages of broadcast time." *UCC v. FCC*, 707 F.2d at 1433.

It added that

> the Commission – and certainly this Court – could easily find that "such a disparity in allocation of programming time indicates a broadcaster's failure to serve his community needs." [*Allianza Federal de Mercedes v. FCC*, 539 F.2d 732,] 738 [(D.C. Cir. 1976).] In such a situation, then, despite the fact that the quantity of programming is largely left to the licensee's discretion, the program service may be so minimal in contrast to the needs of the community that it create[s] a disparity so significant as to amount to

a difference in kind rather than in degree." *Id.*

UCC v. FCC, 707 F.2d at 1434 n.70.

The use of quantitative data was confirmed and endorsed in the recent *Enhanced Disclosure Order decision.* The staff clearly erred in mischaracterizing that decision as doing no more than encouraging dialog and enhancing the public's understanding of how broadcasters operate.

Contrary to what the staff held, in adopting the standardized reporting form, the Commission made clear that it contemplated that knowledge about the amount of programming carried in each category would facilitate public participation in the license renewal process.

> We agree with commenters that the current issues/programs lists have not provided an effective means for the public to assess licensees' performance. The requirement to present a comprehensive list of programming in each category, rather than merely samples of programming in each category, will provide the public with a better basis on which to evaluate whether a broadcaster has substantially fulfilled its public interest obligation to provide programming responsive to the needs and interests of its community. ***The more comprehensive disclosure will also allow the public to participate more effectively in license renewal proceedings.*** We also note that commenters have discussed a lack of uniformity and consistency in the way that broadcasters maintain their lists, and commented that these practices make any overall assessment extremely difficult. As such, we believe that the benefits of a standardized form that requires broadcasters to list all relevant programming outweighs the burdens placed upon broadcasters.

Id., 23 FCCRcd at 1292 (emphasis supplied) (footnotes omitted). *See also, id.*, .23 FCCRcd at 1281 (quantitative information about programming is material "that members of the public would reasonably need...to participate in pre-hearing procedures with respect to the licensing process.")

Commissioner Copps reiterated his expectation that the programming data on the standardized form would be used in the renewal process:

> Even more important than the impact on program analysis, today's decision will also empower concerned and politically active citizens to become involved in the fight for a better and more democratic media environment. Every American citizen will be able to look up, on the Internet, the programs aired by his or her local station in the

> discharge of its public interest obligations. Every citizen will be able to form an independent opinion about whether that station is doing enough to justify the continued use of the public airwaves. ***And if citizens come to believe that a station is not holding up its end of the bargain, they can petition the FCC not to renew that station's license.***

Id., 23 FCCRcd at 1317 (Statement of Commissioner Copps)(emphasis supplied).

Thus, it is clear that the staff erred in refusing to consider Petitioners' quantitative analysis or to revisit that holding subsequent to the issuance of the *Enhanced Disclosure Order*.

III. The Staff Erroneously Ruled That Section 326 and the First Amendment Bar Consideration of Petitioners' Evidence.

In ruling that Section 326 and the First Amendment somehow preclude consideration of the CMPA study, the staff contravened established Commission policy.

In *UCC v. FCC*, the Court discussed in detail the Commission's authority to review broadcasters' past programming performance. In rejecting petitions for review, the it stressed that the Commission's action did not, as the petitioners alleged, remove the Commission from review of the content of broadcasters' programming. To the contrary, its affirmance of the *Deregulation of Radio* decision was based on the premise that the Commission had not abandoned its review of program content:

> This concept of the broadcast licensee as "public trustee" has had its most important and delicate implications in the area of program content regulation. While nothing in the Act expressly grants the Commission authority to regulate programming, the Commission is instructed to grant and renew broadcast licenses on the basis of the "public interest, convenience, and necessity." This power to license in the public interest was held necessarily to entail the power to license on the basis of program service. In his landmark interpretation of the Act's public interest standard, Justice Frankfurter explicated the Commission's authority over programming as follows"
>
> > "[W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.
> >
> > * * *
> >
> > Since the Commission has the power to make license determinations on the basis

> of programming, then it perforce has the power– and in fact the responsibility – to define the licensee's public interest obligations with respect to programming.[44]
>
> [44] See Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C.Cir.1968). *See also* S. Breyer & R. Stewart, [ADMINISTRATIVE LAW AND REGULATORY POLICY] 374 [(1979)]("Surely a Commission asked to award licenses in the public interest must have 'good programming' as some kind of objective; to ignore programming entirely would make a mockery of its mission.").

UCC v. FCC, 707 F.2d at 1428 (*quoting Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 215-217 (1943))(footnote 43 omitted)

The conclusion that Section 326 somehow bars review of quantitative programming data is also clearly at odds with the fact that the Childrens Television Act, 47 USC §303a, authorizes the Commission to engage in a far more intrusive review of programming by category. Indeed, the Commission has employed processing guidelines for the Childrens Television Act under which it reviews the quantitative performance of every television station at license renewal.

Nor was the staff correct in suggesting that the First Amendment limits the Commission's authority to review quantitative analyses of past programming. The Commission has repeatedly rejected such arguments with respect to the Childrens Television Act. In implementing the Act, the Comiussion unequivocally upheld the constitutionality of the regime:

> The course we adopt today -- defining what qualifies as programming "specifically designed" to serve the educational needs of children and giving broadcasters clear but nonmandatory guidance on how to guarantee compliance -- is a constitutional means of giving effect to the CTA's programming requirement. "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969). Congress's authority to order "suitable time and attention to matters of great public concern" includes the authority to require broadcasters to air programming specifically designed to further the educational needs of children. The airwaves belong to the public, not to any individual broadcaster. As the Supreme Court observed in *CBS, Inc. v. FCC*, [453 U.S. 367, 391 (1981)], "a licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain;

> when he accepts that franchise it is burdened by enforceable public obligations.'" The fact that Congress elected to retain public ownership of the broadcast spectrum and to lease it for free to private licensees for limited periods carries significant First Amendment consequences.
>
> * * *
>
> Our new regulations, like the CTA itself, impose reasonable, viewpoint-neutral conditions on a broadcaster's free use of the public airwaves. They do not censor or foreclose speech of any kind. They do not tell licensees what topics they must address. They provide only that broadcasters report the educational objective of the program and the expected educational effects. Moreover, they expressly provide that broadcasters need not describe the viewpoint of the program or the opinions expressed on the program.

Policies and Rules Concerning Children's Television Programming, 11 FCCRcd 10660, 10730 (1996)(footnotes omitted). *See also Childrens Television Obligations of Digital Television Broadcasters*, 21 FCCRcd. 11065, 11072-73 (2006).

More recently, the Commission rejected similar arguments with respect to the increased reporting requirements adopted in the *Enhanced Disclosure Order*. It said that

> Several [broadcasters] contend that the proposals made by the Commission in the instant *Notice* would be unconstitutional because the proposed form would constitute programming "quotas" in violation of the First Amendment. This fear is misplaced. Our decision here does not adopt quantitative programming requirements or guidelines. This *Order* does not require broadcasters to air any particular category of programming or mix of programming types. Accordingly, we reject the claim that our decision mandates programming quotas or guidelines, or otherwise improperly intervenes in licensee discretion.

Id., 23 FCCRcd at 1287.

The staff's citation to Section 326 and the First Amendment in supporting its refusal to consider the petitions to deny on the merits was clearly erroneous and must be reversed.

IV. The Staff Gave No Consideration to Petitioners' Qualitative Evidence.

As noted above, Petitioners presented both quantitative and qualitative evidence. The *Letter Decision* does not address Petitioners' analysis showing that the vast preponderance of local election

coverage was devoted to strategic and "horse race" coverage. Thus, the CMPA study showed that very little of the Chicago and Milwaukee local election coverage was devoted to actual discussion of issues and presentations of the candidates themselves.

The staff's failure to give any weight to the qualitative showing was clearly erroneous.

CONCLUSION

The staff has mishandled this important proceeding from the outset. Petitioners ask that the Commission reverse the staff's action, that it give detailed instructions to the staff as to how to administer the license renewal process, and that it grant all such other relief as may be just and proper.

Respectfully submitted,

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February 16, 2010

Certificate of Service

I, Andrew Jay Schwartzman, certify that on this 16th day of February 2010, a copy of the foregoing *Application for Review* was served by first-class mail, postage prepaid, upon the following:

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Certificate of Service

I, Andrew Jay Schwartzman, certify that on this 10th day of January 2011, a copy of the foregoing *Application for Review* was served by first-class mail, postage prepaid, upon the following:

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