

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of
Applications for Renewal of Station License of

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

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SUMMARY

The Oppositions filed by the Broadcasters seek a renewal of their licenses without a hearing to determine whether they have served the public interest during their license period. The Oppositions first attack the standing of the Petitioners. However, the *Petition to Deny* clearly establishes standing since Chicago Media Action's organizational members include residents of Chicago who watch the stations.

The Oppositions also attack the merits of the *Petition to Deny* by claiming that Petitioners have not provided *prima facie* evidence of substantial and material questions of whether the Broadcasters have fulfilled their obligation to serve the public interest during the license period. However, the CMPA Study provides such *prima facie* evidence of minimal coverage of local elections. Any challenge to the methodology or the conclusions of the CMPA Study, which was conducted by neutral professionals, must be further explored in a hearing.

Finally, the Oppositions suggest that any review of their programming regarding local elections would be an infringement on their First Amendment rights and editorial discretion. However, a review of the Broadcasters' programming is necessary to enhance the First Amendment rights of the viewers. In fact, it is the First Amendment rights of the viewers that are paramount, and which the Broadcasters are obligated to serve. Accordingly, the Commission must designate the renewal applications for a hearing to determine whether, based on the *prima facie* evidence, the Broadcasters have indeed fulfilled their duty to serve the public interest.

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REPLY TO BROADCASTERS' OPPOSITION

Chicago Media Action (CMA) respectfully submits this Reply to the Oppositions to CMA's *Petition to Deny* filed by the broadcasters listed in the above caption (collectively referred to as Broadcasters). As is demonstrated below, the Broadcasters' Oppositions do not provide any basis for finding that they have fulfilled their public interest obligation or that a hearing is unwarranted to determine whether they have fulfilled their public interest obligation.

I. STANDING

WCPX, WLS-TV and a non-party, the Illinois Broadcasters Association, have interposed claims that CMA lacks standing to appear before the Commission. They complain that CMA has not provided a declaration from a local resident of Chicago or regular viewer of the stations.

The petition fully establishes CMA's standing. Standing of a group is established so long as the group provides an affidavit from "members entitled to standing in their own right, and those persons indicate that the group represents local residents." *In re Application of Vineland, NJ*, 5 FCCRcd 7499, 7501 n. 2 (1990) (citing *NAB Petition for Rulemaking*, 82 FCC2d 89, 98-99 (1980)). *See also License Renewal Applications for Philadelphia Stations*, 5 FCCR 3847 (1990). Mitchell Szczepanczyk's declaration fully establishes CMA's right to participate. He identifies himself as a board member of CMA and states that "CMA's individual members are residents of the Chicago area and are regular viewers of television stations in the Chicago Market." Since CMA's members are local residents and viewers, Mr. Szczepanczyk, as a CMA member, has standing in his own right, as a resident and viewer, and has declared CMA represents local residents. Thus, there can be no doubt or question that CMA has established standing to oppose the renewal applications of the Broadcasters. *See In re Application of WDOD of Chattanooga, Inc.* 12 FCCRcd 6399, 6400 ¶ 6 (1997) (standing was established since the executive director of the petitioning group established that he was a resident and regularly listened to the stations).

II. LEGAL ANALYSIS

Despite the Broadcasters' attempts, the Broadcasters' Oppositions do not demonstrate that CMA has failed to present substantial and material questions of fact or that the renewal applications should not be designated for a hearing. In fact, CMA has provided more than sufficient evidence, *i.e.*,

the findings of the CMPA Study, to show that there indeed are substantial and material questions of fact as to whether renewal of the licenses is in the public interest. The Broadcasters' arguments fall short of providing any real grounds for simply renewing the licenses without a hearing.

A. The CMPA Study Raises Substantial and Material Questions of Fact as to Whether a License Renewal Would Be Consistent with the Public Interest, Convenience, and Necessity.

The Commission cannot renew the license of a broadcaster if substantial and material issues of fact have been raised regarding the broadcaster's service. 47 USC §309(d). The CMPA Study provides specific facts regarding the amount of local election news coverage provided by the Broadcasters. The CMPA Study provides evidence of a woefully minimal amount of coverage related to local elections in the Chicago market as a whole. Thus, the evidence presented in the CMPA Study clearly raises a substantial and material issue of whether each of the Broadcasters has met its obligation to serve the public interest, namely by providing viewers information about local elections and ballot-related issues. In fact, none of the Broadcasters seriously challenge the conclusions of the CMPA Study, that there was minimal coverage of local elections. Rather, the Broadcasters attempt to poke holes and point out flaws of the CMPA Study.

However, this is not the appropriate forum to challenge the methodology or the conclusions of the CMPA Study. CMA is not required, at this juncture, to "fully establish ...what it is the very purpose of the hearing to inquire into...." *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). The Commission is barred from applying a merits standard to the CMPA Study. *Id.* The Commission "must look into the possible existence of a fire only when it is shown a good deal of smoke" not "when it is shown the existence of a fire." *Id.* The Broadcasters here would have CMA show the existence of a fire.

For example, some Broadcasters contend the CMPA Study is flawed because only some of the Broadcasters' programs were analyzed in the CMPA Study. *See* Oppositions of WCPX-TV, WSNS-TV, and Illinois Broadcasters Association. However, in addition to the news programming of the top five stations, the CMPA Study attempted to analyze public affairs programming on all the stations. *See* CMPA Study at 13. Moreover, since CMA's petition alleges a market-wide failure to cover local elections, it is necessary to view the conduct of all the stations, and not simply those that broadcast news programming.

Under applicable policy, all broadcasters in a market are collectively responsible for meeting the needs of their community. In *Deregulation of Television*, 98 FCC2d 1075 (1984), the Commission stressed that during the renewal process, an individual station's decisions regarding programming is not the only factor in determining whether that individual licensee has provided issue-responsive programming relevant to the community. *Id.* ¶ 37. Rather, programming provided by all the broadcasters may be considered to determine whether the public interest of the community has been met. *Id.* at ¶ 38. As a result, it is entirely logical and necessary to consider the programming efforts of all the stations to determine whether they have fulfilled their duty to provide programming relevant to the local community.

Another alleged flaw raised was that the entire license term was not analyzed. *See* Oppositions of WGN-TV, WCPX-TV, WFLD-TV, WPWR-TV, WCIU-TV, WFBT-TV, WLS-TV, WMAQ-TV, and Illinois Broadcasters Association. However, for the purpose of considering whether to designate a hearing, the Commission has frequently relied on monitoring studies of brief periods. *See, e.g., Catoctin Broadcasting Co.*, FCC 85-155 (May 2, 1985); *United Broadcasting Company*, 59 FCC2d 1412, 1413 (Rev. Bd. 1976); *New South Radio, Inc.*, 59 FCC2d 337, 344 (1975); *New Mexico*

Broadcasting Co., Inc., 54 FCC2d 126 (1975). Indeed, prior to 1984, the Commission routinely reviewed a broadcaster's performance based on a "composite week" to determine if the licensee's programming, during the entire renewal period, had met the public interest during the license period. *See In the Matter of Broadcast Localism*, 19 FCCRcd 12425, 12430 n. 36 (2004) (explaining that the composite week was the "basic measure of the extent to which" the broadcaster fulfilled its programming obligations during the license period). Here, the CMPA Study goes beyond a week's worth of programming and instead provides a month's worth of programming as a measure of the Broadcasters' performance.

Some Broadcasters also contend the CMPA Study is not accurate since other sources of information for local news were not analyzed, specifically non-broadcast media available in the market. *See* Oppositions of WGN-TV, WCPX-TV, and Illinois Broadcasters Association. Essentially, the Broadcasters are attempting to dismiss their responsibility to serve the public interest by suggesting that other, non-broadcast media in the marketplace fulfill the Broadcasters' responsibility. However, Commission policy does *not* consider what non-broadcast media provide to be relevant because those media are not subject to a public interest mandate. Moreover, and in any event, those media do not meaningfully contribute to debate on local issues, including elections. *See In the Matter of 2002 Biennial Regulatory Review*, 18 FCCRcd 13620, 13673 ¶ 145, 13693 ¶ 191 (2004). The Commission has noted that "cable networks are almost exclusively offering national or broadly defined regional programming." *Id.* at 13693 ¶ 191. "In contrast, local broadcast televisions offer a mix of national programming and local programming" relevant to a certain geographic area. *Id.* at 13673 ¶ 145. Further, reliance on the Internet as a source for local news is also misguided since the "Internet is also limited in its availability and as a source of public news." *Prometheus Radio Project v. FCC*, 373 F.3d

372, 415 (3rd Cir. 2004).

Thus, the availability of non-broadcast media such as cable and the internet are not meaningful services for local news. Further, unlike broadcasters, these alternatives are not required to focus on local issues as broadcasters are bound to promote localism. As a result, the Broadcasters still have an obligation to provide relevant programming independent of services provided by non-broadcast media.

WCIU-TV and WFBT-TV take issue with the sponsor of the CMPA Study. They claim that Meredith McGehee is not an appropriate sponsor of the CMPA Study. However, Ms. McGehee was personally involved with the CMPA Study. As she stated in her affidavit, the Alliance for Better Campaigns, (now part of the Campaign Legal Center) commissioned the CMPA Study. If there is any dispute as to her knowledge or qualifications, those issues can more fully explored, and in fact is more appropriately explored, at a hearing.

The CMPA Study is clear evidence of “smoke,” raising substantial and material questions of fact. More importantly, though, the evidence CMA is required to provide is evidence of “*prima facie* sufficiency.” *Citizens for Jazz*, 775 F.2d at 397. Thus, not only are the results of the CMPA Study presumed to be true, but the evidence cannot be judged based on whether it can make a “fully persuasive case, but rather what a reasonable factfinder *might view* as a persuasive case.” *Id.* (emphasis in original). Here, the CMPA Study easily meets that standard.

The CMPA Study was conducted by an independent source, who is an acknowledged and distinguished expert in media analysis, including election studies. Further, despite the Broadcasters’ attacks, the CMPA Study was conducted following an established methodology. Thus, since substantial and material issues of fact have been raised, the Commission at the least must conduct further inquiry

as to whether or not the Broadcasters provided its viewers with a sufficient amount of local news programming relating to local elections. See *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630, 634 (D.C. Cir. 1977) (Commission must conduct further inquiry once a “factual uncertainty” has been raised).

B. The *Petition to Deny* Is Not an Attempt to Impede on the Rights of the Broadcasters.

Rather than acknowledging their duty to serve the needs of their community, the Broadcasters also try to reframe the issue as to whether CMA has presented *prima facie* evidence of the Broadcasters failure to serve the public interest, thereby raising a substantial and material issue of fact. The Broadcasters postulate that CMA’s *Petition to Deny* is an attempt to return to a quantitative programming standard and is seeking relief that can only be granted through legislation. Similarly, the Broadcasters also try to skirt the central issue by claiming that CMA’s *Petition to Deny* attempts to restrict the First Amendment rights and editorial discretion afforded to broadcasters as to what events to cover. This is simply not the case and is especially underscored by the fact that the Broadcasters do not seriously dispute the central finding of the CMPA Study, that there was minimal local coverage regarding local elections.

Although there is no longer a quantitative standard, a licensee still has an obligation to address local and community issues. *Deregulation of Radio*, 84 FCC2d 968, 982 (1981); *recon. granted in part and denied in part*, 87 FCC2d 797, *aff’d in part and remanded in part sub nom.*, *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). And although the licensee is afforded discretion as to how and whether to address certain issues, the licensee is not entitled to a renewal of its license if it has abused that discretion. *Deregulation of Television*, 98 FCC2d at ¶ 39. It is that very discretion that CMA’s *Petition to Deny* addresses. CMA’s challenge is to the Broadcast-

ers' discretion in the amount of programming related to local elections.

Furthermore, the Broadcasters do not dispute the fact that there was minimal coverage of local elections. Rather, the Broadcasters argue that it was within their discretion to provide little to no coverage of these elections. However, as more fully discussed in CMA's *Petition to Deny*, central to the role of broadcasting is the aspect of localism and the right of citizens to receive information about candidates for public office. *Petition to Deny* at 5-6. None of the Broadcasters can dispute this. Yet, they claim they have ultimate discretion in determining what, if any, information is conveyed to the public, even information that both the Commission and the Courts have found to be integral to a broadcaster's responsibility. *Petition to Deny* at 5-6. Instead, the Broadcasters attempt to hide their abuse of discretion behind the protections of the First Amendment's freedom of speech.

However, it is the citizens the Broadcasters are supposed to serve that have "paramount" First Amendment rights. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). In fact, the Broadcasters seem to forget that the airwaves belong to the citizens, who have permitted the Broadcasters to make use of the spectrum. The *quid pro quo* for broadcasters' right to exclusive use of publicly owned spectrum is their commitment under the Communications Act to serve the public interest, because it is

the right of viewers and listeners, not the right of broadcasters, which is paramount..., the right of the public to receive suitable access to social political, esthetic, moral and other ideas and experiences which is crucial here.

Id.

As more fully discussed in the *Petition to Deny*, a basic value afforded to citizens under the First Amendment is the access to speech concerning governmental elections. *Petition to Deny* at 7. Thus, an increase of the Broadcaster's news programming related to local elections would not result in the restriction of the Broadcasters' First Amendment rights. Rather it would enhance the First Amendment

rights of the viewers, allowing the viewers to make informed decisions in local politics.¹ It is hypocritical for the Broadcasters to claim an infringement on their rights to freedom of speech, yet ignore the relevance of those same rights to the citizens that the licences are intended to serve.

When not hiding behind constitutional arguments, the Broadcasters make excuses for such limited news programming regarding local elections. For example, the Broadcasters contend that the local elections were not contested or there was no interest in them. However, the *Chicago Sun-Times* and *Chicago Tribune*, which serve the Chicago metropolitan area, thought it of interest to its residents, to cover the local races. Some of those articles carried during the monitoring period include the following:

- October 18, 2004: explanations for the endorsements of one candidate over the others by the Sun-Times in contested area races for the Illinois House of Representatives for the following districts: 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 24th, 28th, 35th, 36th, 38th, and 40th.
- October 14, 2004: explanations for the endorsements of one candidate over the others by the Chicago Tribune in contested area races for the Illinois House of Representatives for the following districts: 24th, 28th, 35th, 36th, 38th, 40th, 43rd, 46th, 47th, 48th, 50th, 51st, 52nd, and 53rd.
- October 13, 2004: explanations for the endorsements of one candidate over the others by the Chicago Tribune in contested area races for the Illinois House of Representatives for the following districts: 5th, 8th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, and 22nd.
- October 13, 2004: explanations for the endorsements of one candidate over the others by the Chicago Tribune in contested area races for the Illinois House of Representatives for the following districts: 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th, and 11th.

Clearly, there were local races that were contested and raised significant issues affecting citizens, and for the Broadcasters to insist otherwise is unfounded.

¹CMA has submitted a Statement, provided as Attachment A, emphasizing the need and importance of local election coverage for the community.

The Broadcasters also attempt to undermine the merits of the *Petition to Deny* by stating that the license renewal should be awarded based on the Broadcasters' overall programming service, rather than their efforts on a single issue. However, a necessary and critical component of that overall effort is local election news programming, which in turn, is a critical component of serving the public interest. The findings of the CMPA Study show that the Broadcasters, collectively, failed in their duty to serve the public interest by providing a minimal amount of local election news programming. The Broadcasters would like to evade the issue by pointing to their overall programming and claiming that the minimal amount of local election news programming is sufficient to meet their public interest duty. However, simply providing some programming does not lead to the conclusion that the Broadcasters have met their duty and therefore deserve an automatic renewal of their broadcast license. *See In the Matter of Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 104 FCC2d 357, *4 (1986) (“[A]n allegation that a licensee has failed to address an issue of particular relevance to a significant segment of the community, may be raised even where some issue-responsive programming has been provided.”).

III. CONCLUSION

The *Petition to Deny* is appropriately before the Commission since Petitioners, as residents of Chicago, have the appropriate standing to challenge the renewal applications of the Broadcasters. More importantly, there exists *prima facie* evidence, *i.e.* the CMPA Study, raising substantial and material questions of fact as to whether the Broadcasters have fulfilled their duty to serve the public interest during the license period. Thus, the Commission must designate the Broadcasters' renewal applications for a hearing to resolve these substantial and material questions of fact.

Respectfully submitted,

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January 18, 2006

**Attachment A:
CMA Statement**



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CMA Statement for Inclusion in Reply

January 16, 2006

Informed elections are an essential aspect of any democracy. CMA is particularly concerned about media and democracy. The Media Access Project, acting in our members' name and with CMA's approval and concurrence, has raised more than enough doubt concerning the adequacy of the Chicago TV stations' 2004 coverage of local elections. By any reasonable standard, Chicagoans deserve public hearings on the matter. (And, judging by the separate, yet related and concurrent Third Coast Press FCC Petition to Deny and the responses to it, further public discussion on other relevant matters is called for as well.)

CMA is particularly struck by the Broadcasters' repeated claim that a large number of elections for local and state offices and various referenda are just a simple, "single issue" that could perhaps be entirely overlooked at their discretion, as long as other "issues" are covered.

CMA needs to know: How have we arrived at this sad point? And: How do we get out of here?

An examination of the CMPA study can best be carried out through the public hearing we seek, as can a proper examination of the many other issues that have arisen, such as:

- * What, if anything, is "absurd" about our concerns?
- * What, if anything, in our statements about the residence of our members "stretches credibility"?
- * Has state and local election coverage been "suppressed"? "intentionally"? "corruptly"?
- * Is free speech for people or for things?
- * Should the "market" or "marketplace" take precedence over democracy?

* What makes TV broadcast corporations and their lawyers spend so much time and money avoiding the truth?

* Are Chicago's TV broadcasters "using the public's airwaves to express their tacit support for elective mass destruction, civil and human rights abuses, torture and mass murder" and have they "systematically engaged in policies which brought specific harm to the Chicago African American community, the broader Arab and Muslim communities, and other communities of color, by what can only be explained by their deliberate and repeated omission and marginalization"?

* How can local broadcasters best provide the civic information democratic communities require?

And so on.

Chicago Media Action declares here that the Reply by our counsel to which this is attached represents accurately our organization's serious concerns about the demonstrated and joint failure of the Chicago area's TV Broadcasters to adequately cover local elections. We are victims of the Broadcasters' "abuse of discretion"; the public is "paramount".



Scott Sanders, for
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Certificate of Service

I, Benjamin Lennett, hereby certify that on this 18th day of January 2006, a copy of the foregoing *Reply to Broadcasters' Opposition* was served via first-class mail to those upon the following:

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