

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	MB Docket No. 17-264
)	
)	
Revision of the Public Notice Requirements of Section 73.3580)	MB Docket No. 05-6
)	

**COMMENTS OF
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.,
BENTON FOUNDATION, COMMON CAUSE, FREE PRESS, NATIONAL HISPANIC
MEDIA COALITION, AND THE OPEN TECHNOLOGY INSTITUTE AT NEW
AMERICA**

The Office of Communication of the United Church of Christ, the Benton Foundation,¹ Common Cause, Free Press, the National Hispanic Media Coalition, and the Open Technology Institute at New America (“UCC *et al.*”), by their attorneys, the Institute for Public Representation, respectfully submit these comments in response to the Federal Communication Commission’s (“Commission’s”) Notice of Proposed Rulemaking, Revision of the Public Notice Requirements of Section 73.3580, MB Docket No. 17-264 and No. 05-6 (rel. November 29, 2017) (“2017 NPRM”).

UCC *et al.* strongly oppose repeal of the local public notice requirement. Meaningful public notice is essential for the public to exercise its rights under the Communications Act to challenge broadcast license applications and for the Commission to meet its obligations under the Communications Act to grant licenses only where it serves the public interest. UCC *et al.* do not oppose updating the public notice requirements so long as the public actually receives

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

meaningful public notice of upcoming license renewals or transfers. At a minimum, effective notice must have both on-air and online information. Moreover, where an applicant seeks a waiver of an FCC rule, that information must be included in the public notice.

I. Background

Section 73.3580 of the FCC rules is designed to ensure that listeners and viewers will have a meaningful opportunity to participate in the broadcast licensing process. It requires local public notice of the filing of applications for new licenses, renewals of licenses, assignments or transfers of licenses, major amendments of the above, and some other types of applications. The rule spells out specific requirements, such as pre-filing and post-filing announcements, on-air announcements, and language advising the public on how to obtain more information and of their right to file an objection.

In 2005, the Commission proposed to amend Section 73.3580 to strengthen the public notice provided in cases of proposed transfers or assignments. It explained that

Section 309 of the Act and Section 73.3580 of the Commission's rules are designed to promote public participation in the broadcast licensing process. This role is particularly critical in the sales context. The Commission has long recognized the connection between ownership and the type and quality of broadcast service provided to a community.²

The FCC noted that both listeners and members of Congress had expressed concern about the adequacy of the FCC's public notice procedures. For example, listeners had "contended that the public may not fully understand the information which buyers and sellers now provide in print and broadcast notices of pending assignment applications. Complex ownership structures and transactions can substantially increase the amount of information provided in these

² *Revision of the Public Notice Requirements of Section 73.3580*, 20 FCC Rcd 5420, ¶ 3 (2005).

announcements, and with it, the potential for confusion by the public.”³ The Commission also observed that “the public may not in all instances be familiar with the terminology traditionally used by the Commission and applicants to describe transactions, *viz.*, ‘assignments,’ ‘assignors,’ ‘assignees,’ ‘transfers of control,’ etc.”⁴ It was also concerned that public notices failed to advise the public of the opportunity to file petitions to deny or informal objections or of the deadlines for those filings. UCC and others filed comments at that time strongly supporting proposals to improve local public notice.

Unfortunately, the Commission took no further action in this docket. Now, it seeks additional comment in the 2017 NPRM. But instead of seeking to increase the transparency of its licensing process,⁵ the FCC’s sole focus seems to be on affording licensees greater flexibility.⁶ It seeks comment on whether to allow applicants to provide public notice solely online.⁷ In the alternative, the NPRM seeks comment on whether there is a need for any public notice requirements.⁸

II. The Commission should not repeal the requirement of local public notice

UCC *et al.* emphatically oppose repealing the public notice requirements. Public notice is essential for members of the public to participate in the broadcast licensing process. It was established many years ago that the public “possesses an unassailable right to participate in the disposition of valuable public licenses, free of charge, to ‘public trustees.’”⁹ Without notice that

³ *Id.*

⁴ *Id.*

⁵ *Id.* at ¶ 4.

⁶ 2017 NPRM, ¶¶ 8–9.

⁷ *Id.* at ¶ 9.

⁸ *Id.* at ¶ 10.

⁹ *Office of Communication of United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1441 (D.C. Cir. 1983).

a license application has been filed, members of the public would not know about such applications and would effectively be deprived of this statutory right.¹⁰

The Communications Act requires the FCC to grant a station license only “if public convenience, interest, or necessity will be served thereby.”¹¹ Moreover, Section 309(d) gives any party in interest, including members of the public that reside within the service area of station, to file a petition to deny a broadcast application. The Commission has long understood that the right of the public to participate is protected by statute and cannot be eliminated by depriving the public of the information that it needs to participate.

For example, when the FCC deregulated radio in 1981 by eliminating quantitative guidelines for news and public affairs programming, commercial limits, ascertainment, and program logs, it emphasized that it was not eliminating “the Petition to Deny process, and periodic license renewal for commercial radio stations. Each of these requirements and procedures are mandated by statute and, . . . such statutory requirements cannot be modified by the Commission. They simply are not subject to deregulation by the Commission.”¹²

¹⁰ In 1966, in *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966), the court recognized that members of the public have standing as “interested ‘parties’” to file a petition to deny a license renewal. The court found that “[a] broadcaster seeks and 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 public’s interest in broadcast programming “is direct and their responsibilities important. They are the owners of the channels of television—indeed, of all broadcasting.” *Id.* at 1003 (citing FCC, Television Network Program Procurement, H.R.Rep. No. 281, 88th Cong., 1st Sess. 20 (1963)). “The theory that the Commission can always effectively represent the listener interests . . . is no longer a valid assumption which stands up under the realities of actual experience In order to safeguard the public interest in broadcasting, therefore, we hold that some ‘audience participation’ must be allowed in license renewal proceedings.” *Id.* at 1003–04.

¹¹ 47 U.S.C. §§ 307(a), 309(a), 310(d).

¹² *Deregulation of Radio*, 84 FCC 2d 968, 974 (1981) (footnotes omitted).

The Commission further explained that it would rely on petitions to deny filed by the public to ensure that licensees met their public interested obligations.

Part of the public interest obligation of any licensee is to address issues of importance to the community as a whole or, in larger markets with many stations, to the station's listenership. If a station is not addressing issues, citizens will be able to file complaints or petitions to deny. We continue to encourage citizens to meet with their local broadcasters to discuss their concerns, but if they do not receive satisfaction, they should take the complaint or petition to deny routes. These long standing channels will allow the Commission to continue to monitor the performance of licensees, the indeed will better indicate the responsiveness of licensees than do fixed guidelines.¹³

UCC and others appealed the radio deregulation order. Although the Court upheld most of the FCC's changes, it reversed and remanded the Commission's repeal of the requirement to keep program logs. The Court found that because the "proposed renewal scheme would place near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations," the FCC's simultaneous elimination of program logs would unreasonably "deprive interested parties and [the FCC] of the vital information needed to establish a prima facie case."¹⁴

On remand, the Commission adopted a more robust requirement for issues/programs lists. In deregulating television in a similar manner to radio in 1984, the Commission also discussed the importance of petitions to deny. It explained that

when a programming issue is raised in a petition to deny . . . [the issues/programs] lists will serve as a significant source of information for any initial investigation by a member of the public or by the Commission. . . . In a contested license renewal the burden of proving that programming relevant to public issues has been provided is on the licensee. A broadcaster must demonstrate, if

¹³ *Id.* at 1011.

¹⁴ *Office of Communication of United Church of Christ v. F.C.C.*, 707 F.2d at 1441-42.

called on to do so, in a hearing or otherwise, that it has met its responsibility in this regard.”¹⁵

The Commission has often remarked on how public participation helps it to meet its statutory obligations. For example, in 2012, it found that “placing the public file online will improve the public’s access to information and facilitate dialogue between broadcast stations and the communities they serve.” It would also foster increased public participation in the licensing process, the FCC said, because “when broadcasters fall short of their obligations or violate Commission rules, the public’s ability to alert the Commission by filing complaints or petitions to deny the renewal of a station’s broadcast license is essential, and the public file provides information necessary to file such complaints or petitions.”¹⁶

The public’s ability to alert the Commission when licensees fall short of their public interest obligations also depends on having actual notice that a license application that could affect them has been filed. And public participation in licensing requires that members of the public know what they can do to find out more and how they can object. Thus, any attempt by the Commission to repeal public notice requirements would violate the Communications Act.

III. The Commission should take steps to make local public notice more meaningful and effective.

UCC *et al.* encourage the Commission to improve the notice requirement in Section 73.3580 to ensure that the public receives effective and meaningful notice when broadcast license applications are filed. Effective notice requires delivering announcements in ways that are likely to reach the public. Meaningful notice requires informing the public of the nature of the transaction so that people can make informed decisions about whether to participate in the

¹⁵ *Deregulation of Television*, 98 FCC 2d 1075, 1110 (1984).

¹⁶ *Standardized and Enhanced Disclosure Requirements*, 27 FCC Rcd 4535, 4541 (2012).

proceedings. Thus, it is particularly important that the public be notified when an applicant is seeking a waiver of an FCC rule.

A. Notice should be provided over the airwaves and online

Online notice alone is insufficient to allow full public participation in licensing matters. Not everyone has access to the Internet. According to one study, approximately 23% of people in urban areas and 28% of those in rural areas lack broadband Internet access.¹⁷ Another study found that 13% of U.S. adults do not use the Internet at all, including 22% of those in rural areas.¹⁸ And many members of the public who do have access to the Internet still receive news via broadcast. According to 2016 statistics by Pew Research Center, TV remains the dominant medium of choice for receiving news in the United States.¹⁹ As of 2016, “57% of U.S. adults often get TV-based news,” compared with 38% who get news online.²⁰

Eliminating on-air announcements would disproportionately impact communities of color, who are more likely to rely on smartphones as their only means of internet access. Hispanics and African Americans are 155% and 67%, respectively, more likely to depend entirely on a smartphone to access the internet than white individuals.²¹ Smartphones are poor substitutes for broadband access because smartphone users face data caps, are more likely to lose

¹⁷ Rani Molla, *More Than 60 Million Urban Americans Don't Have Access To Or Can't Afford Broadband Internet*, Recode (June 20, 2017), <https://www.recode.net/2017/6/20/15839626/disparity-between-urban-rural-internet-access-major-economies> (quoting *The Urban Unconnected*, Wireless Broadband Alliance (June 2017), <https://www.wballiance.com/resource/the-urban-unconnected/>).

¹⁸ Monica Anderson and Andrew Perrin, *13% of Americans Don't Use The Internet. Who Are They?*, Pew Research Center (Sept. 7, 2016), <http://www.pewresearch.org/fact-tank/2016/09/07/some-americans-dont-use-the-internet-who-are-they/>.

¹⁹ Mitchell *et al.*, *The Modern News Consumer: News Attitudes and Practices in the Digital Era*, Pew Research Center (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news/>.

²⁰ *Id.*

²¹ *Internet/Broadband Fact Sheet*, Pew Research Center (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

service due to financial constraints, and may “encounter difficulties like accessing and reading content.”²²

Moreover, without on-air announcements that station has filed an application, even members of the public with good internet access would have no way to know when they should visit a station’s website or the FCC’s website. License transfers or assignments can occur at any time. With the many recent changes to the broadcast ownership rules, effective public notice of assignments or transfers is particularly important. And because license renewal applications are filed only every eight years, it is not reasonable to expect members of the public to know when a station serving their area will be seeking renewal.

UCC *et al.* know of no “comparable way for broadcasters to inform consumers of various license applications, if not done through on-air announcements.”²³ Nor is it reasonable, as suggested in the 2017 NPRM,²⁴ to put the burden on the public to sign up for the FCC’s RSS feeds or daily e-mails to get notice when applications are filed. This would require constant monitoring of large amounts of information, most of which would not be relevant.²⁵ Thus, it is essential that online notice be accompanied by on-air notices.

Moreover, the announcements must be broadcast well in advance of any filing deadlines to give the public an opportunity to review and comment on the application. On-air

²² Monica Anderson & John B. Horrigan, *Smartphones Help Those Without Broadband Get Online, but Don’t Necessarily Bridge the Digital Divide*, Pew Research Center (Oct. 3, 2016), <http://www.pewresearch.org/fact-tank/2016/10/03/smartphones-help-those-without-broadband-get-online-but-dont-necessarily-bridge-the-digital-divide/>.

²³ 2017 NPRM at ¶ 9.

²⁴ *Id.* at ¶ 10.

²⁵ The Dec. 22, 2017, Public Notice of Broadcast Applications, for example, is 36 pages long and lists over 170 applications. The Dec. 19, 2017, notice is 41 pages long. Moreover, these notices are difficult to interpret and do not include the information the public would need to know.

announcements should also be broadcast sufficiently frequently and at times of the day that listeners or viewers are likely to hear or see them.

B. Notices should provide sufficient information to the public

An announcement is only effective to the extent that its audience can understand what it says. Notice to the public therefore should use clear and concise language that avoids technical jargon. Words and phrases such as “trustee,” “assignment,” and “transfer of control” are unlikely to be understood by the general public. The Commission should therefore modify the sample announcement text in Section 73.3580 so that complex or technical phrases are replaced by their equivalent in everyday language.

It is particularly important that the public be informed when an applicant is asking for a waiver of FCC rules. A transaction that requires a waiver of an FCC rule is presumptively not in the public interest. In such cases, public participation is especially helpful. Yet UCC *et al.* are aware of many situations where, for example, no effective public notice was given of the fact that an application sought a waiver of an ownership limit.²⁶

Public notice should also include meaningful instructions on how the public can find a copy of the application and how to file objections. Section 73.3580 currently requires notices to state that a copy of the application is or will be “available for public inspection at www.fcc.gov.”²⁷ Because the FCC’s web site is large and complex, it is not reasonable to expect a member of the general public to find licensing information given only a reference to the FCC’s home page. Instead, broadcast notices should direct listeners to a page on the station’s website

²⁶ See, e.g., Letter from Angela J. Campbell & Andrew Jay Schwartzman, Institute for Public Representation, to Thomas Wheeler, Chairman, FCC (Feb. 3, 2015) (discussing a Media Bureau waiver order, related to the transfer of five FM radio stations in Virginia, for which “there was no public notice that a waiver had even been requested”).

²⁷ See 47 C.F.R. § 73.3580(d)(4)(i)–(ii).

with more detailed information about the application, including a direct link to the station's online public file. The FCC should include a prominent link on its home page for consumers seeking information about broadcast license applications. It should also inform the public about when objections are and how they should be filed with the Commission.

IV. Conclusion

Public participation in licensing matters is just as important as ever. Public notice of broadcast license applications is an indispensable component of the public's right to participate in licensing matters. UCC *et al.* therefore urge the Commission not only to retain the notice requirement but to improve it by adopting rules designed to ensure meaningful and effective public notice.

Respectfully submitted,

/s/

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December 29, 2017

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