In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents, FREE PRESS, BENTON FOUNDATION, CAMPAIGN LEGALCENTER, COMMON CAUSE, NEW AMERICA FOUNDATION, and OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, Intervenors.	Case No. 12-1225

INTERVENORS' OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING JUDICIAL REVIEW

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July 20, 2012

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Intervenors Free Press, Benton Foundation, Campaign Legal Center, Common Cause, New America Foundation, and Office of Communication, Inc. of the United Church of Christ (collectively Public Interest Public Airwaves Coalition or "PIPAC"), by its attorneys, pursuant to F.R.A.P 18 and 27, and D.C. Circuit Rules 18 and 27, respectfully opposes the Emergency Motion for a Stay Pending Judicial Review ("Mot.") filed by Petitioner National Association of Broadcasters ("NAB") on July 10, 2012. NAB seeks a stay of the effective date of the FCC's Second Report and Order in MM Docket No. 00-168, *Standardized and Enhanced Disclosure Requirements for TV Broadcast Licensee Public Interest Obligations*, 27 FCC Rcd 4535 (2012) ("*Order*"). This *Order* requires that television broadcasters upload much of their public inspection files, which have traditionally been maintained at stations' main studios, online to a database hosted by the FCC, effective August 2, 2012.

The Court should deny NAB's request for a stay because NAB has failed to show that it meets any of the four criteria in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Background

A. The FCC's Statutory Authority

The Communications Act authorizes the FCC to license broadcast stations to serve the public interest. 47 USC §§ 307, 309. The Act also gives the FCC broad

authority to "make general rules and regulations requiring stations to keep such records of programs, transmission of energy, communications, or signals as it may deem desirable." 47 USC §303(j). An important part of serving the public interest is to provide information the public needs to participate in a democratic society. *See, e.g., CBS v. FCC*, 453 U.S. 367, 396 (1981).

To prevent licensees from abusing their power to favor certain candidates, Congress required that broadcasters afford candidates "equal opportunities." As adopted in 1934, §315 of the Communications Act required that any licensee that allowed a candidate to "use" his station to afford "equal opportunities" to other candidates for the same office. Section 315 also granted the FCC authority to "make rules and regulations to carry this provision into effect." 47 U.S.C. §315, 48 Stat. 1088 (June 19, 1934).

In 1938, the FCC adopted a rule requiring licensees to maintain a political file. That rule was "essentially identical" to the current rule. *Order* at ¶5 (citing 3 Fed. Reg. 1691 (1938)). The current rule, 47 C.F.R. §73.1943, requires that

> Every licensee shall keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.

Congress has periodically amended §315. In 1952, it added §315(b) to provide that charges to political candidates "shall not exceed charges made for comparable use of such station for other purposes." *Hernstadt v. FCC*, 677 F.2d 893, 895 (D.C. Cir. 1980). Subsequently, as part of the Federal Election Campaign Act of 1971, Congress amended §315(b) to limit charges to candidates during the period prior to elections to "the lowest unit charge of the station for the same class and amount of time for the same period."

In 2002, Congress again amended §315. Section 504 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155 (2002) (codified at 47 U.S.C. §315(e)), codified the FCC's political file rule. It also required that broadcasters maintain records regarding requests to purchase broadcast time for messages relating to any political matter of national importance. 47 U.S.C. §315(e)(1)(B).

In challenging BCRA, NAB argued that §504 imposed onerous administrative burdens and lacked any offsetting justification. *McConnell v. FEC*, 540 U.S. 93 (2003). The Court rejected NAB's claims, noting that "broadcaster recordkeeping requirements simply run with the territory." *Id.* at 236 (internal citation omitted). The Court found that "candidate request" requirements would help "'the *public* to evaluate whether broadcasters are processing [candidate] requests in an even handed fashion . . . . [and] make the *public* aware of how much money candidates may be prepared to spend on broadcast messages." *Id.* at 237 (citations omitted,

emphasis added). "[T]he FCC's regulatory authority is broad," the Court noted, and there is "broad . . . authority for agency information demands from regulated entities." *Id.*

The Court similarly upheld §504's additional reporting requirements. As to election message requests, it noted that "recordkeeping can help both the regulatory agencies and the *public* evaluate broadcasting fairness, and determine the amount of money . . . [spent] to help elect a particular candidate." *Id.* at 239 (emphasis added). As to "issue requests," the Court noted that the recordkeeping requirements would help the FCC determine whether broadcasters were meeting their public interest responsibilities. The Court found that "burdens are likely less heavy than many that other FCC regulations have imposed, for example, the burden of keeping and disclosing '[a]ll written comments and suggestions' received from the public, including every e-mail." *Id.* at 242.[1]

B. The Enhanced Disclosure Rule

In adopting the enhanced disclosure rule, the FCC used its authority to "modernize the procedures television broadcasters use to inform the public about how they are serving their communities, by having stations post their public files

[1] *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), struck down restrictions on political ad spending, but upheld BCRA's disclosure requirements. The Court observed that "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Id.* at 916.

online in a central, Commission-hosted database." *Order* at ¶1. The FCC explained that online postings would be "more accessible to the public and, over time, reduce broadcasters' costs of compliance." *Id.*

The origins of the enhanced disclosure rule can be traced to the advisory committee charged with making recommendations to the FCC concerning public interest obligations for broadcast television stations after they made the transition from analog to digital. The committee recommended that "digital broadcasters should be required to make enhanced disclosures of their public interest programming and activities" and that this information should be distributed widely. Advisory Comm. on Pub. Interest Obligations of Digital TV Broadcasters, *Charting the Digital Broadcasting Future* 45-46 (1998). It noted that "many local broadcasters now maintain Internet websites where they could post on a regular basis this kind of information." *Id.* at 46.

The FCC sought comment on these recommendations. Noting that its rules "currently allow licensees to maintain their public inspection file in computer databases, and encourage licensees that elect this option to post their public file on any websites they maintain," the FCC asked whether it should *require* broadcasters to make their public files available on the Internet and the costs of benefits of such a requirement. *Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd 21,633, 21,641 (1999). Based on this record, the FCC proposed to enhance the

public access to public files by requiring stations to post them on either the station's website or their state broadcasters association's website. *Standardized and Enhanced Disclosure Requirements for TV Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19,816, 19,816 (2000). The FCC adopted the proposed rule in late 2007. *Standardized and Enhanced Disclosure Requirements for TV Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd 1274 (2008). The rule as adopted exempted political files, finding that they required frequent updating and that candidates had the resources to visit station offices. *Id.* at 1282.

Some PIPAC members sought reconsideration of the exclusion of the political file, arguing that the FCC failed to consider that members of the public, researchers, and public interest organizations also need access to broadcasters' files. Pet. for Recon. of Campaign Legal Center, *et al.*, MM Dkt. 00-168 (Apr. 14, 2008). Several broadcasters also sought reconsideration. One complained that the FCC failed to consider hosting the public file on its website, which would be less costly than having stations host files on their own websites. Pet. for Recon. of State Broadcasters Ass'ns, MM Dkt. 00-168, at 8 (Apr. 14, 2008).

The 2007 rules were never sent to the Office of Management and Budget for clearance, and so they never took effect. In late 2009, the FCC Chairman appointed a Working Group to examine whether 1) citizens and communities were getting the news, information, and reporting they needed and 2) public policy was in sync with

the nature of modern media markets. The Working Group issued its Report in July 2011, recommending that the FCC make public files more accessible and that "*the information already required to be disclosed by broadcasters should be, over time, put online, and the paper file should become a thing of the past*." Steven Waldman et al., *The Information Needs of Communities* 348 (2011) (emphasis in original).

Following this recommendation, the FCC vacated its 2007 Order. *Standardized and Enhanced Disclosure Requirements for TV Broadcast Licensee Public Interest Obligations*, 26 FCC Rcd 15,788 (2011). At the same time, it "propose[d] to largely replace the decades-old requirement that commercial and noncommercial television stations maintain a paper public file at their main studios with a requirement to submit documents for inclusion in an online public file to be hosted by the Commission." *Id.* at 15,789.

The FCC received many comments supporting its proposal.[2] Even NAB recognized "that parts of the public file can likely be uploaded with relatively few difficulties." Comments of the NAB, MM Dkt. 00-168 (Dec. 22, 2011) at ii ("NAB Comments"). NAB also expressed concern that requiring television stations alone

[2] *See, e.g.*, Comments of Assoc. for Educ. in Journalism and Mass Communication, MM Dkt. 00-168 (Jan. 13, 2012); Comments of Dean Susan King, UNC School of Journalism and Mass Communications (Jan. 17, 2012); Comments of Penelope Abernathy, Chair of Journalism and Digital Media Economics at UNC, MM Dkt. 00-168 (Jan. 17, 2012); Comments of Brennan Center for Justice, MM Dkt. 00-168 (Dec. 22, 2011); Comments of LUC Media Group, MM Dkt. 00-168 (Dec. 21, 2011).

to make their rates available in a central location would "place broadcasters at a disadvantage vis-à-vis their competitors," and that stations "could see advertising revenues drop if competitors attempt to use the data in the file to undercut their rates." *Id.* at 21-22. NAB argued for the first time that the FCC's proposal was inconsistent with BCRA in an *ex parte* filing. Supplemental Comments, MM Dkt. 00-168 (Mar. 8, 2012).

On April 27, 2012, the FCC adopted the enhanced disclosure rule in a 50-page order with more than 340 footnotes. The FCC bent over backwards to minimize burdens on broadcasters. It agreed to host the online files on its own website and declined to impose any new recordkeeping requirements. *Order* at ¶¶ 2, 19-23. With respect to the political files, it required online postings only prospectively and deferred the effective date for all stations but those affiliated with the major networks in the 50 largest markets. *Id.* at ¶¶ 3, 19-37. It also committed to evaluating the filing process and making changes if appropriate. *Id.* at ¶49.

OMB approved the rule, allowing it to take effect on August 2, 2012. 77 Fed. Reg. 39,439 (July 3, 2012). On July 12, the FCC's Media Bureau denied NAB's petition for stay, concluding that NAB "satisfied none of the four factors in the stay calculus." *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Order, DA 12-1122 at ¶7, MM Dkt. 00-168 (July 12, 2012) ("*Stay Order*").

Argument

I. NAB Is Not Likely to Succeed on the Merits

NAB is unlikely to prevail on the merits of its arguments that the FCC's action was arbitrary and capricious or inconsistent with BCRA. The arbitrary and capricious standard of review is narrow and deferential to the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983); *Ass'n of Private Sector Colls. & Univs. v. Duncan,* 681 F.3d 427, 441 (D.C. Cir. 2012) (agency's obligation to respond to significant comments is not "particularly demanding"). Similarly, courts give great deference to agency interpretations of statutes where, as here, a statute is silent or ambiguous with respect to the specific issue. *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984); *Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665 (D.C. Cir. 2011) (review under *Chevron* Step II is "highly deferential").

A. NAB Is Unlikely to Prevail in Claims that the FCC Acted Arbitrarily and Capriciously

NAB contends that requiring online posting of stations' political files "raises serious antitrust concerns" that the FCC failed to consider. Mot. at 7, citing *Order* at 70 (Statement of Comm'r Robert McDowell Approving in Part, Dissenting in Part). What NAB actually argued before the FCC was not, as Commissioner McDowell suggested, that disclosure might violate antitrust laws, but that requiring broadcasters, but not cable operators, to disclose political advertising rates online,

would "place broadcasters at a disadvantage vis-à-vis their competitors." NAB Comments at 22. *See also* Mot. at 5, 12. This is a completely different argument. Nonetheless, neither has merit.

1. The FCC Gave Sufficient Consideration to NAB's Concerns that Broadcasters Would Suffer Competitive Harm

The FCC fully addressed NAB's concerns about market distortion and competitive harm. *Order* at ¶¶ 38-39. The FCC found that "placing this already-public information online will not cause significant market distortions." *Id.* at ¶39. It explained at ¶39 that broadcasters failed to support claims of commercial harm.

> [W]e are not requiring broadcasters to make any information publicly available that stations are not already required to make public. . . . Moreover, the public files of broadcasters' competitors have been available in paper form to television broadcasters and the public for years. . . . To the extent it is economically beneficial for competitors, potential advertisers, or buyers who seek to represent advertisers, to access this data, they already have the ability to review the material at the stations. Commenters have failed to show that an online posting requirement would alter in any meaningful way the economic incentive of these entities.

NAB acknowledges that cable and satellite operators are required to publicly disclose their political rates. Mot. at 11, n.20. Time Warner Cable, one of the largest cable operators, makes its political files available online.[3] Any broadcaster can go view the cable company's public file. While it might be preferable if the rules

[3] Time Warner Cable Media, Political File, http://www.cablemediasales.com/politicalfile/index.cfm (last visited July 18, 2012).

required cable and satellite operators to place their public files online, it is not arbitrary and capricious for the FCC to proceed one step at a time. "The FCC generally has broad discretion to . . . defer consideration of particular issues to future proceedings." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 588 (D.C. Cir. 2004). *See also Star Wireless, LLC v. F.C.C.*, 522 F.3d 469, 475 (D.C. Cir. 2008) ("[A]n agency need not address all problems at once. Instead, its rules may solve first those problems it prioritizes.") (internal citation omitted); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C.Cir.1984) ("[A]gencies need not address all problems in one fell swoop.") (internal citation omitted).[4]

NAB relies on *Business Roundtable v. Securities & Exchange Commission*, 647 F.3d 1144, 1152 (D.C. Cir. 2011), to argue that the FCC failed to give sufficient weight to broadcasters' claims of harm. Mot. at 12-13. In that case, the SEC had a unique statutory obligation to consider the effects of a new rule on efficiency, competition and capital formation and also failed to consider empirical studies and quantitative data. Here, NAB cites no statutory requirement to consider commercial harm to broadcasters and cites no data or studies to support its claim of commercial harm. Thus, the FCC acted reasonably in rejecting NAB's claims as generalized and vague. *See Duncan,* 681 F.3d at 447-48.

[4] The FCC had not provided adequate notice to adopt similar requirements for cable and satellite operators in Docket 00-168. It does have the legal authority to adopt such requirements in the future.

Even if NAB's members do experience commercial harm, "[a]n activity is not anti-competitive merely because it causes a competitor harm. Business activity, by nature, is designed to further a firm's fortune at the expense of its competitors." *Infonxx, Inc. v. N.Y. Tele.,* 1997 WL 621592, at ¶21 (FCC 1997); *see also Implementation of the Pay Tel. Reclassification & Comp. Provisions*, 11 FCC Rcd 20541, at ¶227 (1996) (rejecting arguments that a proposed rule making would harm competition because "[t]he only resulting injury is to competitors, not competition").

2. The FCC's Action Does Not Raise Antitrust Concerns

Commissioner McDowell's Separate Statement suggests requiring broadcast television stations to make public the prices they charge for political advertisements would force broadcasters to engage in illegal activity and subject them to possible antitrust suits. *Order* at 70-71. If this were true, one would have expected the antitrust agencies to have raised this concern already. But they have not.

The NAB fails to offer any explanation for why converting the very same information that broadcasters have been required to make public for decades to an electronic format would compel broadcasters to engage in illegal activity. Nor do the cases cited by NAB (Mot. at 7-11) support Commissioner McDowell's contention. The cases involve claims under Section 1 of the Sherman Act, which makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspir-

acy, in restraint of trade or commerce." 15 U.S.C. §1. To violate Section 1, there must be some sort of an *agreement* and that agreement must have an *anticompetitive effect* on the market. Neither factor is present here.

NAB admits that "[b]ecause the television stations will be compelled to publish the price information, there will be no 'agreement' in restraint of trade for purposes of Section 1 of the Sherman Act." Mot. at 8, n.16. The cases cited by NAB are inapposite because they all involve *agreements* among companies to disclose prices or related information when disclosure was not required by law.[5]

NAB also fails to show how online disclosure will have any anticompetitive effect on the market. The Court has held that "the dissemination of price information is not itself a *per se* violation of the Sherman Act." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975). Indeed, in *U.S. v. U.S. Gypsum Co*., the

[5] *United States v. Container Corp.*, 393 U.S. 333 (1969), involved an agreement among dominant sellers of corrugated containers to provide recent price information to each other upon request, which the Court found had the effect of stabilizing prices in a falling market. *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), involved an agreement among major producers of gypsum board to raise, fix and stabilize prices. *Todd v. Exxon Corp*., 275 F.3d 191 (2d Cir. 2001), involved an allegation that 14 major oil companies acted in concert to survey past and current salary information and used that information to set salaries at depressed levels. Similarly, none of the FTC or DOJ guidance documents cited by NAB have any application here. The FTC & DOJ *Antitrust Guidelines for Collaborations Among Competitors* do not apply here because the broadcast stations are presumably not collaborating. Likewise, the DOJ & FTC guidance documents for the healthcare industry do not apply to the telecommunications industry. Finally, the FTC's *Staff Report on Competition Policy in the World of B2B Electronic Marketplaces* concerns business-to-business transactions, not information that the government requires broadcasters to disclose to the public.

Court noted that the "exchange of price data and other information among competitors . . . can in certain circumstances increase economic efficiency and render markets more, rather than less competitive." 438 U.S. at 441 n.16.

Because the FCC's disclosure rule does not result in an agreement to restrain trade, and if anything will promote competition in the sale of political broadcast time, NAB's contention that the FCC is creating impermissible "exceptions to the antitrust laws" (Mot. at 13), is simply wrong.

3. FCC Acted Reasonably in Declining to Adopt Broadcasters' Alternative Proposals

NAB contends that the FCC's "decision is particularly vulnerable because the agency rejected an alternative approach that would largely avoid the anticompetitive concerns." Mot. at 13-14. Because the FCC decision raises no anticompetitive concerns, this circular argument does not change the likelihood of NAB prevailing on the merits. In any event, the FCC gave full consideration to alternative proposals. The FCC explained: "While we appreciate the efforts of these parties to develop alternatives, we believe that these options will deprive the public of the benefits of immediate online access to all the information in the political file." *Order* at n.177. It also concluded that the alternative would impose additional reporting requirements and would be of limited value to candidates. Thus, the FCC clearly met its obligation to respond to significant comments.

B. NAB Is Unlikely to Prevail in Claims that BCRA Precludes the FCC from Publishing the Political File Online

NAB contends that requiring online posting of political files is inconsistent with BCRA because §§ 501 and 502 of BCRA require that certain election-related records be made available on the Federal Election Commission ("FEC") website, while in contrast, §504 "adopted a hard-copy inspection requirement for broadcasters, but did *not* require online publication." Mot. at 15 (emphasis in original).

This argument is simply wrong. Section 504 says nothing about hard copies and it is silent as to the method by which broadcast stations are to make this information available to the public. *See* Pub. L. No. 107-155 §504 (2002) (codified at 47 U.S.C. §315(e)). When a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. Deference to agency interpretation is especially warranted where, as here, Congress has given the agency explicit authority to implement the statute through rulemaking. *United States v. Mead Corp.,* 533 U.S. 218, 229 (2001).

Here, the FCC properly considered and rejected NAB's interpretation of BCRA. *Order* at ¶¶ 51-54. It found that in passing BCRA, Congress essentially codified the FCC's existing political file regulations at a time when the FCC had tentatively concluded that stations should place their political files online. Congress placed no restriction, however, on how the FCC could direct stations to make

the political file available for public inspection. *Id.* at ¶52. Given Congress's silence and "given the ubiquity and general expectation of electronic access to records today," the FCC reasonably interpreted BCRA to allow the FCC to require the political files be made available for public inspection online.[6]

II. Broadcasters Have Failed to Show Irreparable Harm

NAB devotes only two paragraphs to claiming irreparable harm. The first argues that NAB's members will be injured because non-broadcast competitors will gain an "unfair advantage" by being able to learn "exactly what prices local

[6] NAB's attempt at 17-18 to graft First Amendment arguments on to its statutory claim does not increase its likelihood of prevailing on the merits. Although NAB's arguments are far from clear, it seems to be contending that 1) even though the Supreme Court facially upheld the constitutionality of BCRA §504's reporting requirements in *McConnell*, the FCC's requirement that the reports be submitted online instead of being maintained at each individual station is so burdensome as to render the reporting requirements unconstitutional; and 2) compelled disclosure infringes upon First Amendment interests in privacy of association and speech. NAB is barred from making these arguments by 47 U.S.C. § 504, because it failed to raise them before the FCC. In any event, these claims are without merit. First, because the FCC reasonably concluded that online posting imposed little burden on broadcasters and would reduce burdens over time, it surely is not so burdensome as to raise an as-applied constitutional issue. Second, while compelled disclosure can sometimes infringe upon First Amendment interests, courts "do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious." *Nat'l Mining Ass'n v. Kempthorne,* 512 F.3d 702, 711 (D.C. Cir. 2008). NAB's argument is not serious. Nor has it presented any evidence as to how changing the format of reporting affects its members' First Amendment interests at all, much less subjecting them to harassment and intimidation comparable to "the individuals who joined the Alabama NAACP in the 1950s." *Nat'l Ass'n of Mfrs v. Taylor*, 582 F.3d 1, 21 (D.C. Cir. 2009). Finally, NAB's charge that the FCC arbitrarily failed to even consider claims that disclosure could chill speech is not true. *See Order* at ¶80 (responding to arguments of National Religious Broadcasters).

broadcast stations are charging for specific spots" and by the costs of compliance. The second asserts that "[t]hese losses constitute irreparable harm." Mot. at 19.

NAB's allegation of harm is entirely speculative. It offers no evidence that online publication of information which has been on the public record for decades will somehow create a *new* harm. If this data did present a significant benefit for competitors, they surely would have already taken advantage of this access. NAB however has not pointed to any evidence in the record or in its Declarations that competitors have *ever* used public file information to gain competitive advantage.

NAB also asserts, with no elaboration, that "broadcasters will be unable to recoup the significant costs of complying with the Order." Mot. at 19 (citing Ex. 3-6). NAB does not mention, much less rebut, the FCC's finding that "while broadcasters will incur a modest, one-time transitional cost . . . broadcasters will benefit from the lower costs of sending documents electronically to the Commission, as opposed to creating and maintaining a paper file at the station." *Order* at ¶11.

Nor does NAB address the FCC's conclusion that the broadcasters "vastly overstate the burdens of moving their public files online." *Order* at ¶24.[7] Instead, it

[7] In denying NAB's stay request, the FCC found that cost estimates provided in the declarations (which are the same as those submitted to the Court), improperly assumed that the costs of placing data online would be "*in addition to* the time it currently takes station personnel to file the documents in the station's paper file" when in fact the new online requirement "will replace rather than add to the existing file requirements." *Stay Order* at ¶11. (emphasis in original). The FCC also noted that the NAB declarations assume that all documents will be manually printed and

continues to make exaggerated claims. For example, the Declaration of Janine Drafs, Ex. 3, p. 7, states that a dedicated computer, scanner and fax would cost about $4,000. Assuming *arguendo* that a dedicated computer would be needed, the cost of this equipment would be much less. PIPAC *Ex Parte* Submission, MM Dkt. 00-168, at 2-3 (Feb. 16, 2012).

Moreover, NAB has not even come close to demonstrating why the alleged harm would be irreparable. "[T]he general rule" is that economic loss is not irreparable injury. *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009). There are two exceptions, neither of which applies here. First, the alleged economic loss does not "threaten[] the very existence of the movant's business." *Wisc. Gas Co.*, 758 F.2d 669, 674 (D.C. Cir. 1985). Second, the alleged economic loss is not "certain, great and actual—not theoretical—and imminent, creating a clear and present need for extraordinary equitable relief to prevent harm.'" *See Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005); *Mylan Pharm., Inc.v. Shalala*, 81 F. Supp. 2d 30, 42 (D.D.C. 2000).

III. Staying the Rule Would Harm the PIPAC's Members

PIPAC members are actively involved in efforts to inform the public about the role of media and money in politics. Staying the effective date of the FCC's *Order* would harm PIPAC members who require access to broadcast station politi-

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scanned even though the declarations "indicate that 80 to 90 percent of the stations' requests for political time requests are handled electronically." *Id.*

cal file information to conduct research on how campaigns and third party groups influencing the outcomes of federal, state, and local elections and ballot initiatives.

For example, as described in Ex. 1, Clement Decl. at ¶3. PIPAC members Free Press and New America Foundation have partnered with the Sunlight Foundation to form "Political Ad Sleuth." Political Ad Sleuth tracks political ad spending on television in media markets that encompass key battlegrounds in upcoming federal and local elections. The success of this project depends on the implementation of the FCC's *Order*. A stay would make systematic collection and analysis of local broadcast political advertising information impractical—*if not impossible*—and would stymie PIPAC members' educational and policy objectives to provide citizens and journalists with information about the interplay of local media and political advertising during this election cycle.

IV. Staying the Effective Date Would Be Contrary to the Public Interest

Not only would a stay harm PIPAC members, but it would harm the public interest. The FCC found that "access to the public files has been inconveniently (and unnecessarily) limited by current procedures." *Order* at ¶13. It also found that "public advocacy groups, journalists, and researchers act in part as surrogates for the viewing public" and that improving access to public files will assist the FCC and Congress in fashioning public policy. *Id.* at ¶18.

With the 2012 election fast approaching, it is especially important that the

rules not be stayed. The online political file will "further the First Amendment's goal of an informed electorate." *Id.* at 16. For example, ProPublica, an independent nonprofit news organization, plans to use online files to report where and how campaigns and outside groups are spending ad dollars. Ex. 2, Elliott Decl. at ¶5. The Michigan Campaign Finance Network plans to use the online files of Detroit broadcasters to gather information about political advertising and disseminate information of regional interest to journalists and the public. Ex. 4, Robinson Decl., at ¶ 5, 8. The Norman Lear Center at the University of Southern California plans to use data in online files to compare the volume of candidates' advertising buys with the volume of news coverage provided by stations. Ex. 3, Hale Decl. at ¶5. Allowing the rules to take effect before the election will also allow the public, the industry, and the FCC to better assess the relative costs and benefits based on experience rather than speculation.

Conclusion

Because NAB has failed to show that it meets any of the criteria for a stay, Intervenors urge the Court to deny NAB's motion.

Respectfully submitted,

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Exhibit 1:

Declaration of Candace Clement

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 12-1225 DECLARATION IN SUPPORT OF OPPOSITION TO MOTION TO STAY

DECLARATION OF CANDACE CLEMENT

I, Candace Clement, declare as follows pursuant to Federal Rules of Appellate Procedure 18(a)(2)(B)(ii) and 27(a)(2)(B), and 28 U.S.C. § 1746:

1. I am employed by Free Press as an Advocacy and Organizing Manager. I have personal knowledge of, and am competent to testify to, the matters set forth herein.

2. Free Press is a non-profit, non-partisan organization that utilizes education, organizing, and advocacy to increase informed public participation in media policy debates. Free Press represents the interests of over half a million activists and supporters nationwide in advocacy regarding media and communications policy issues at the local, state, and national levels. Free Press

believes that an informed citizenry is central to a healthy democracy and that the media play a critical role in shaping public opinion and behavior. Free Press works to ensure that broadcast licensees are accountable to their local communities of license, and that they are acting transparently and complying with applicable law regarding when, to whom, and on what terms they sell access to the broadcast airwaves for the purposes of political advertising and advocacy.

3. In 2011, Free Press began visiting and collecting information from local television station public files to gain a better understanding of how broadcasters are serving their local communities and how they are selling political advertising time to campaigns and third party organizations seeking to influence public opinion and voter behavior. In 2012, Free Press launched the "Political Ad Sleuth" project in partnership with the New America Foundation and the Sunlight Foundation. The Political Ad Sleuth project works with volunteers and journalists across the country to collect data from station political files for research purposes. Free Press is also working with allies to implement a searchable database of political advertising information for use by researchers, journalists, watchdog organizations, community members and voters.

4. The success of the Political Ad Sleuth Project is heavily contingent on the FCC online public file rule (currently scheduled to take effect on August 2, 2012) to be implemented this election season. Free Press and its partners are

depending on the Internet-accessibility of the political files of the major network affiliates (NBC, ABC, FOX and CBS) in the nation's largest media markets. The online availability of these files will enable the Political Ad Sleuth project to conduct valuable research on political advertising without incurring the significant time, travel, and monetary costs of collecting paper files from those stations. This will enable Free Press and its partners to focus limited resources on the analysis of contents of these files, and to supplement online files by collecting and analyzing files from some smaller television stations that are not required to post their political files online until 2014, but which are nonetheless located in critical 2012 electoral battlegrounds.

5. If the FCC's online public file rule does not go into effect as currently scheduled, Free Press and its allies will not be able to complete these research goals because they will have to devote the vast majority of their resources to collecting paper versions of individual station political files, which would significantly inhibit their ability to analyze the actual contents of the files this election season.

6. To-date, Free Press staff and volunteers have visited over 50 broadcast television stations to review and collect public file information. I have coordinated and supervised volunteer visits to station public files. I also have visited the public files of multiple television stations and have observed firsthand the significant

financial and resource hurdles involved in collecting these files from individual television stations in their current paper form. For example:

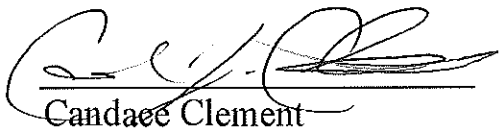
- Accessing these files requires traveling to the station in person. Some stations are located in places that are not accessible by public transportation. This requires staff and volunteers to be able to provide their own transportation or pay cab fare. Moreover, because station political files are updated frequently during the election season, collection of the most current political advertising information would require multiple visits to each station.
- Free Press staff and volunteers incur significant, inconsistent, and unpredictable charges for photocopying public file documents. Some stations provide copies for free, while others charge anywhere from 5 cents to $2.00 per page. Given that most political files comprise hundreds of pages of documents, these costs add up quickly. Additionally, the wide range and frequently exorbitant costs of photocopying make budgeting for file collection very difficult for a non-profit organization like Free Press.
- As with photocopying costs, the forms of payment accepted for such copying varies by station. Some stations that charge for photocopies strictly limit the forms of payment they will accept. For example, one station I

visited charged 25 cents per page for copies of public file documents, but would not accept cash or credit card payment, only check or money order.

7. As a consequence of these obstacles, it is impossible for Free Press and its partners to personally visit and collect political file information from all the major broadcast affiliates in large media markets if the FCC online public file rule were not to go into effect as scheduled. Moreover, the requirements of the station-by-station file collection process detracts drastically from staff time that otherwise could and should be spent analyzing the data and promoting availability of the data to journalists and the general public. Thus, if political file information is not posted online starting August 2, 2012, as scheduled, Free Press and its partners in the Political Ad Sleuth project would be unable to achieve their research goals and they and the public would be harmed.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 19th day of July, 2012, in Florence, Massachusetts.



Candace Clement

Exhibit 2:

Declaration of Justin Elliott

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 12-1225 DECLARATION IN SUPPORT OF OPPOSITION TO MOTION TO STAY

DECLARATION OF JUSTIN ELLIOTT

I, Justin Elliott, declare as follows pursuant to Federal Rules of Appellate Procedure 18(a)(2)(B)(ii) and 27(a)(2)(B), and 28 U.S.C. § 1746:

1. I am employed by ProPublica as a reporter. I have personal knowledge of, and am competent to testify to, the matters set forth herein.

2. ProPublica is an independent, nonprofit newsroom based in New York, New York. ProPublica's mission is to produce investigative journalism in the public interest.

3. Broadcasters' public files contain information about political advertising that has the potential to be an important resource in covering elections and the role

of money in politics. But the existing system of paper files renders practically inaccessible information that is, by law, public.

4. At ProPublica we have previously, at significant expense, hired researchers outside of New York to go to local stations to make copies of political files. This strategy presents several problems. It incurs a significant cost in money and in time to hire researchers and arrange for physical retrieval of files. It cost $400, for example, to hire freelance researchers to pull files from just a few stations in Nevada. Because of the costs, this method limits the scope of potential reporting projects.

5. Starting August 2, 2012, ProPublica plans to take advantage of the new, Internet-accessible disclosures to greatly simplify the collection of political file information from the top-four affiliates in and around highly populated regions in the country. ProPublica will use the online political files to produce timely stories about where and how campaigns and outside groups are spending ad dollars. We will use the database to find initial story ideas as well as to check leads and flesh out investigations.

6. Although it is impossible to know in advance what specific stories of journalistic interest we will find in stations' political files, here are two examples that illustrate the newsworthiness of political file content:

- Bloomberg has reported that in 2010, five organizations spent $4 million on attack ads in the run-up to the election, none of it reported to the Federal Elections Commission. J. Crewdson et al., *Secret Donors Multiply in U.S. Election Spending*, Bloomberg (May 19, 2011), http://www.bloomberg.com/news/2011-05-19/secret-donors-multiply-in-u-s-with-finances-dwarfing-watergate.html. Bloomberg was able to track that spending with the help of TV stations' political files.
- Many political entities report their advertising purchases to the FEC as single, high-dollar value line items. For example, a campaign might report $1 million paid to an ad buying firm. In contrast, TV stations' political files offer an ad-by-ad breakdown of ad spending. That data should make it possible for a granular analysis of political strategy by campaigns and outside groups—what demographics they are targeting, which parts of the country, etc. That granular data could also help assess whether campaigns and outside groups are abiding by rules barring coordination.

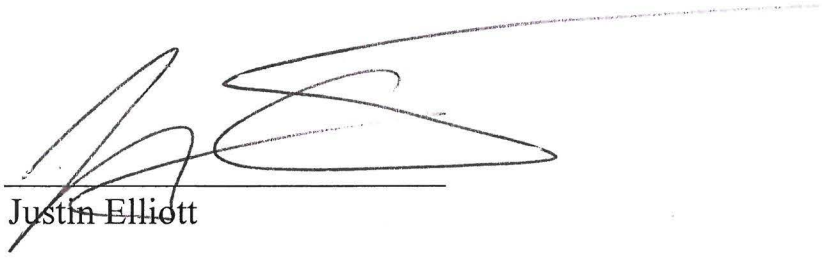
7. If political file information is not posted online starting August 2, as scheduled, ProPublica's newsgathering efforts and the public generally will be harmed. ProPublica will continue to collect data from broadcasters' hard copy files housed at stations for use in its stories. If data must be collected from hard copy

files, however, information gathering will be slower and more expensive for each occurrence.

8. ProPublica has created a crowd-sourcing project called "Free the Files" to enlist members of the public to collect political files at their local stations. *See* Daniel Victor, *If TV Stations Won't Post Their Data on Political Ads, We Will*, ProPublica (Mar. 20, 2012), http://www.propublica.org/article/if-tv-stations-wont-post-their-data-on-political-ads-we-will. In the event that political file information is not posted online starting August 2, Free the Files offers ProPublica and others a less expensive way to collect broadcasters' political files than hiring researchers; however, it cannot replicate a constantly updated comprehensive online database.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 18th day of July, 2012, in New York, New York.



Justin Elliott

Exhibit 3:

Declaration of Matthew Hale

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 12-1225 DECLARATION IN SUPPORT OF OPPOSITION TO MOTION TO STAY

DECLARATION OF MATTHEW HALE

I, Matthew Hale, declare as follows pursuant to Federal Rules of Appellate Procedure 18(a)(2)(B)(ii) and 27(a)(2)(B), and 28 U.S.C. § 1746:

1. I am a Research Fellow at the Norman Lear Center at the University of Southern California Annenberg School for Communication and Journalism. I am also an Associate Professor and MPA Program Chair for the Department of Political Science and Public Affairs at Seton Hall University. I have personal knowledge of, and am competent to testify to, the matters set forth herein.

2. The Norman Lear Center is a nonpartisan research and public policy center that studies the social, political, economic and cultural impact of media and entertainment on society. Since 1998, Lear Center researchers have examined how

local TV news covers political campaigns and elections. The results of this research have been widely published in academic journals, reported on in the mainstream media and included in numerous FCC and congressional reports and testimonies. A list of these publications can be found at http://www.learcenter.org/html/projects/?cm=news.

3. Broadcasters' public files contain information that is highly relevant to Lear Center research. For example, we believe that comparing the information local TV stations put in their political files with our analysis of what local TV station air would be an extremely important academic and public policy research project.

4. It is a significant burden on researchers, including those at the Lear Center, to find and document political files from individual TV stations. We have studied up to 122 local TV stations and up to 74 different media markets at one time. Because the current system requires us to physically go to many stations in this many markets we have been unable to include a systematic evaluation of the stations' political files in our research.

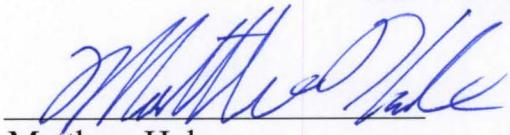
5. Starting August 2, 2012, Lear Center researchers plan to take advantage of the new, Internet-accessible disclosures to check our own analysis of actual TV content against stations' political files to make sure that we did not inadvertently miss any relevant political content. We will also use these disclosures to compare

the volume of candidates' advertising buys with the volume of news coverage provided by the stations to see if any correlation exists. This information will allow us to analyze the "issue advertising" in addition to our documentation of "issue focused news stories," providing a more complete picture of the public's exposure to issue-based political content. The information will also enable us to examine the extent to which independent expenditure advertising become a part of the campaign news narratives.

6. If political file information is not posted online starting August 2, 2012, as scheduled, the Lear Center and the public will be harmed. The cost of paying people to travel to each individual station, make hard copies and then digitize those copies for analysis is prohibitively high to include political file data in any large study. Thus while we will continue to analyze local television news content, inability to access political files online will limit the types of questions we can ask and information we can provide.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 18th day of July, 2012, in South Orange, New Jersey.



Matthew Hale

Exhibit 4:

Declaration of Richard L. Robinson

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	Case No. 12-1225 DECLARATION IN SUPPORT OF OPPOSITION TO MOTION TO STAY

DECLARATION OF RICHARD L. ROBINSON

I, Richard L. Robinson, declare as follows pursuant to Federal Rules of Appellate Procedure 18(a)(2)(B)(ii) and 27(a)(2)(B), and 28 U.S.C. § 1746:

1. I am employed by the Michigan Campaign Finance Network ("MCFN") as executive director. I have personal knowledge of, and am competent to testify to, the matters set forth herein.

2. MCFN is a nonpartisan, nonprofit coalition of organizations and individuals concerned about the influence of money in politics and the need for campaign finance reform in Michigan. MCFN conducts research on campaign contributions and their relationship to election outcomes and issues of public

policy, supports access to campaign finance information and develops educational initiatives for the public on the subject of campaign finance reform.

3. An important part of MCFN's mission is to inform the public about the amount of spending in state political campaigns, and explain current limitations on disclosure of that spending.

4. Broadcasters' public files contain data that are critical to MCFN's mission. Over half of all spending in several heavily contested state political campaigns has not been disclosed through the State campaign finance disclosure system. The data MCFN collects from broadcasters' public files allows it to quantify the amount of that otherwise undisclosed spending, so that the public can know how much it does not know about the sources of money in politics.

5. MCFN has been collecting data on political "issue" advertising directly from the public files of Michigan television broadcasters since 2002. MCFN has been releasing those data in real time since 2006, and those data are also a key part of a biannual MCFN publication called *Citizen's Guide to Michigan Campaign Finance*, for which I am the principal investigator. A summary of political advertising data that were collected by MCFN from Michigan television broadcasters' public files was published in 2011 under the title *$70 Million Hidden in Plain View*. A recent release from MCFN titled *Nonprofits Blast Obama with $6 Million "Issue" Campaign* is the most recent example of how crucial political data

from the public files are used. There is no other source than the broadcasters' public files for these data.

6. Data on political advertising collected by MCFN are used by print, broadcast and online political reporters throughout Michigan.

7. The costs incurred by MCFN for data collection from broadcasters' hard copy public files has run into thousands of dollars each election cycle for mileage costs and staff time.

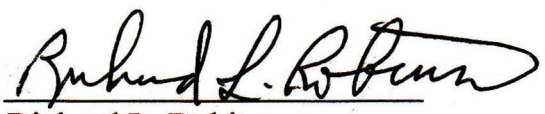
8. Starting August 2, MCFN plans to take advantage of the new, Internet-accessible disclosures to greatly simplify the collection of political file data from the top-four affiliates in the Detroit market, which is currently ranked 11th in Nielsen's Local Television Market Universe Estimates. If these data are made available on a centrally located website, news gathering regarding political advertising will become substantially faster, less expensive, and more comprehensive. Regional stories that MCFN is unable to cover will become accessible to a wider array of journalists with limited resources, thereby improving the public's understanding of the movement of money in political campaigns.

9. If political file information is not posted online starting August 2, 2012, as scheduled, MCFN, political reporters, and the public will be harmed. MCFN will continue to collect data from Detroit area broadcasters' hard copy files housed at stations for use in its public education programs. If data must be collected from

hard copy files, however, information gathering will be significantly slower and hundreds of dollars more expensive for each occurrence, and there will continue to be a bottleneck restricting reporters' access to data and information the public needs to know.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 18th day of July, 2012, in Lansing, Michigan.



Richard L. Robinson

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to Circuit Rules 18(a)(4) and 27(a)(4), the undersigned, on behalf of Intervenors Free Press, Benton Foundation, Common Cause, Campaign Legal Center, New America Foundation, and Office of Communication, Inc. of the United Church of Christ the undersigned, hereby states that as of the date of the filing of this Opposition to NAB's Emergency Motion for a Stay Pending Judicial Review, July 20, 2012, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

Petitioner: National Association of Broadcasters

Repsondents: Federal Communications Commission and
United States of America

Intervenors in Support of Respondents:
Free Press
Benton Foundation
Campaign Legal Center
Common Cause
New America Foundation and
Office of Communication, Inc. of the United Church of Christ

Respectfully Submitted,

/s/ Angela J. Campbell
Angela J. Campbell
Counsel for Intervenors

July 20, 2012

Certificate of Service

I, Angela J. Campbell, hereby certify that on July 20, 2012, prior to 4 p.m., I electronically filed the foregoing Opposition to Emergency Motion for Stay Pending Judicial Review, Supporting Declarations, and Certificate as to Parties and Amici Curiae with the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants who are registered CM/ECF users will be served by the CM/ECT system. In addition, I hand-delivered an original and four paper copies to the Clerk's office as required by the Court's order of July 11, 2012. With their consent, I also emailed copies to NAB's counsel, Robert Long , rlong@cov.com and FCC Counsel, Grey Pash, Grey.Pash@fcc.gov

/s/ Angela J. Campbell
Angela J. Campbell
Counsel for Intervenors