

Question Presented: Would requiring television licensees to prepare quarterly public disclosure forms as proposed by the Public Interest, Public Airwaves Coalition, post the forms on their websites, and file them with the FCC, present any problems under the First Amendment's guarantee of free speech?

Short Answer: No, such disclosure requirements are clearly constitutional.

Requiring television licensees to prepare, post, and file quarterly public disclosure forms, as proposed by the Coalition, does not raise any issues under the First Amendment. This proposal would neither prohibit broadcasters from airing any programming they chose, nor require broadcasters to air any particular viewpoint or type of programming. All that the proposal requires is that broadcasters report the quantities of different types of programming they choose to air. The FCC has clear legal authority to mandate that stations keep records of their programming. *See* 47 USC §303(j); *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (“There is no question but that the Commission has the statutory authority to require whatever recordkeeping requirements it deems appropriate.”)

To even implicate free speech issues, broadcasters would have to show that the mere requirement of disclosure somehow compels them to air certain types of programming. They might argue, for example, that requiring a station to disclose how much local news it aired, sends the message that the station should air local news. Yet, this is simply not true. No penalty is imposed if a station decides not to air any local news.

But even, assuming for purposes of argument, that broadcasters interpret disclosure requirements as suggesting that they should air certain types of public interest programming, this would not make the disclosure requirements unconstitutional. Indeed, just as the FCC adopted a processing guideline for children's educational programming, it may constitutionally adopt processing guidelines that can be used to assess whether licensees are meeting their public interest obligations through other types of programming. If a processing guideline is constitutional, then a weaker disclosure requirement is certainly constitutional.

Broadcasters are already required to disclose many different types of information about their programming. *See, e.g.*, 47 CFR §73.3526(e)(11)(i)(must prepare and place in public file a quarterly list of the station's most significant treatment of community issues)¹; §73.3526(e)(11)(ii)(must retain records in public file sufficient to permit substantiation of compliance with commercial limits on children's programs); §73.3526(e)(11)(iii)(must place quarterly report of educational and informational children in public inspection file and file them electronically with the FCC); §73.3526(e)(14)(must put copies in public file of any agreements involving time brokerage); §73.1943(must maintain political file that includes information about spots purchased by political candidates as well as free time provided for use of candidates); §73.1212(must disclose when station broadcasts any matter in exchange for consideration and keep certain records relevant to sponsorship identification); and

¹ Under the Coalition proposal, the disclosure form would take the place of the issues program list.

§73.3613(identifying which contracts, including network affiliation agreements, must be filed with FCC).²

No court has ever found such disclosure regulations unconstitutional. Indeed, the Supreme Court recently upheld new and expanded political reporting requirements against a facial constitutional challenge in *McConnell v. FEC*, 124 S. Ct. 619 (2004). The opinion of the court, written by Justice Breyer, upheld three provisions of the Bipartisan Campaign Reform Act of 2002 that require broadcasters to keep publicly available records of politically related broadcasting requests.

First, the Court found that the requirement that broadcasters keep records of requests made by political candidates was virtually identical to existing FCC rules. Citing numerous FCC recordkeeping and reporting requirements, the Court observed that broadcaster recordkeeping requirements “run with the territory.” *Id.* at 713. It found that the records would help the FCC, the FEC and the public to evaluate whether broadcast stations were treating candidates fairly. *Id.* at 714.

Second, the Court upheld the requirement that broadcasters keep records of requests made by any member of the public to broadcast a message about a candidate, even though this requirement was somewhat broader than the first. It noted that such “disclosure can help the FCC carry out other statutory functions, for example, determining whether a broadcasting station is fulfilling its licensing obligation to broadcast material important to the community and the public.” *Id.* at 715, citing 47 U.S.C. §315(a).

² Other FCC regulations require various other types of disclosures. *See, e.g.*, §73.3526(e)(9)(written comments and suggestions from the public); §73.3615 (ownership reports); §73.2080(c)(6) (EEO reports).

Finally, it upheld a requirement that broadcast stations keep records of requests from any member of the public to broadcast messages about “a national legislative issue of public importance” or “any political matter of national importance.” *Id.* at 716, quoting 47 U.S.C.A. §§315(e)(1)(B), (e)(1)(B)(iii) (Supp. 2003). The Court rejected the claim that this language was too broad. *Id.* Moreover, while acknowledging this provision could impose substantial burdens on broadcasters, it declined to conclude “that the burdens are so great, or the justifications so minimal, as to warrant” finding them unconstitutional. *Id.* at 717.

When analyzed under this approach, it is clear that each of the disclosure requirements as proposed by the Public Interest, Public Airwaves Coalition, would be found constitutional. Disclosure serves several important government interests: First, it assists the FCC in making the determination required by the Communications Act of whether the licensees are serving the public interest. Specifically, the Commission may grant renewal of a license only where it finds that “during the preceding term of its license, the station has served the public interest, convenience, and necessity.” 47 USC § 309(k)(1).

Second, the proposed disclosure form allows the public to assess whether broadcast stations are serving the public interest, and where appropriate, exercise their right to file petitions to deny license renewals. As the D.C. Circuit held

the petition to deny plays a critical role in the current regulatory scheme. Moreover, we believe that an adequate public file is essential to proper functioning of the procedures governing the petition to deny. Specifically, the agency’s public file requirements must be sufficient to enable a petitioner to make a prima facie case under 47 U.S.C. § 309(d)(1).

Office of Communication of United Church of Christ v. FCC, 779 F.2d at 710.

Third, the proposed disclosure form provides information that is useful to the Commission and the public in assessing the effectiveness of current policies. For example, the information provided in response to Question 2(a), which asks the total number of hours broadcast on the primary channel and each non-primary channel, as well as the total number hours of high definition programming, is clearly relevant to assessing the progress of the digital transition. Similarly, Question 4(a), which asks about closed captioning, allows the FCC to assess whether television stations are complying with its rules regarding closed captioning, while Question 4(b), which asks for the total number of programs with video description is necessary to assess whether the market is providing sufficient amounts of such programming or whether legislation might be needed to ensure that the needs of people with impaired vision are being met.

The specific categories of programming included on the proposed disclosure form were been selected because they provide the kind of information that the public and the Commission need to assess a licensee's service to local communities. The first four categories (local civic programming, local electoral affair programming, public service announcements, and independent programming) have been specifically defined in the proposed guidelines. These definitions are not unconstitutionally vague.

In *McConnell v. FCC*, the Supreme Court upheld a provision requiring disclosure of "electioneering communication," defined as any broadcast, cable or satellite communications that refers to a clearly identified candidate for federal office and is made within 60 days before a general or 30 days before a primary election and is targeted to the relevant electorate. 124 S.Ct. at 686-87. The Court rejected the argument that this term was unconstitutionally vague, finding the components to be "both easily understood and

objectively determinable.” *Id.* at 689. Similarly, the Court rejected arguments that the phrases “political matter of national importance” and “a national legislative issue of public importance” were unconstitutionally vague. 124 S. Ct. at 716. It found “that language is no more general than that Congress has used to impose other obligations upon broadcasters.” *Id.* (citing numerous examples from the Communications Act and FCC rules). Similarly, the definitions proposed by the Coalition are easily understood and objectively determinable; they are no more general than other phrases routinely used in FCC regulations.

The program categories of national news, local news, local programming, and religious programming, while not defined in the Coalition proposal, are generally well-known and understood. In determining whether a program falls within these categories, the Commission should, as it does in other contexts, rely on the good faith judgment of the broadcaster. For example, in the *Children’s TV Order*, the Commission stated that in “determining whether programming has a significant purpose of educating and informing children, we will ordinarily rely on the good faith judgment of broadcasters, who will be subject to increased community scrutiny.” 11 FCC Rcd 10660, 10701 (1996). The Commission routinely relies on the good faith judgment of licensees in determining whether programming is *bona fide* news that is exempt from equal opportunities under Section 315 of the Communications Act.³

³ See, e.g., *Request by CBS News, Inc. for Declaratory Ruling Concerning Section 315 Political Broadcast*, 58 FCC 2d 601 (1976)(finding that “60 Minutes” presented *bona fide* news interviews); *Request by Multimedia Entertainment, Inc., for Declaratory Ruling*, 56 R.R.2d 143 (1984)(finding “Donahue” fits within exemption in reliance on Multimedia’s good faith assertion that guests and topics selected for newsworthiness); *Request by Multimedia Entertainment, Inc. for Declaratory Ruling*, 56 R.R.2d 956 (1984) (Chief, Fairness/Political Programming Branch)(finding “Larry King Show” is a *bona*

Only the category “programming for underserved communities” is fairly open ended. While the Coalition would not object to defining this category with greater precision, it made sense to give broadcasters flexibility in determining what programming falls under this category since different areas may have different “underserved communities” and these underserved communities may have different types of program needs.

In sum, there are no constitutional problems in adopting the disclosure form proposed by the Coalition.

fide news interview program); *Request by CBS, Inc. For Declaratory Ruling*, 2 FCC Rcd 4377 (1987)(Chief, Fairness/Political Programming Branch)(finding that news interview segments of “The Morning Program exempt); *Request for Declaratory Ruling, by Paramount Pictures Corporation*, 3 FCC Rcd 245 (1988)(MMB)(find that in light of the absence of bad faith or unreasonableness, appearances by legally qualified candidates during “Entertainment Tonight” and “Entertainment This Week” should be accorded the *bona fide* newscast exemption); *Request of Joyner Management Services, Inc. for Declaratory Ruling*, 11 FCC Rcd 22,360 (1996) (finding that the ‘Tom Joyner Radio Program’ is a *bona fide* news interview program).