

## FCC Proposes New Form Requiring TV Broadcasters to Document their Public Interest Programming

By David Oxenford

November 15, 2011

When the FCC last month started [a new proceeding to mandate an online public file for television stations](#), the Commission promised to soon initiate another proceeding to look into the need for a **new form to document the public interest programming that TV stations provide**. The FCC today fulfilled that promise, and issued a [Notice of Inquiry \("NOI"\)](#) to start the process of adopting a new form for TV stations to complete to report on various categories of "public interest programming," however that might be defined. In 2007, the FCC had [adopted Form 355](#) to accomplish that task. But, after an outcry from stations about the paperwork burden that the form would impose, the FCC never submitted it to the Office of Management and Budget for approval under the Paperwork Reduction Act, and thus the form never became effective. The adoption of the Form 355 was [vacated last month](#) in the online public file proceeding. But the Commission now proposes its return - in some fashion. So what does the Commission now propose to require from TV stations to document their public interest programming?

First, the FCC asks a series of questions about how such a form should be structured, and how the information should be collected to be meaningful for those that want to analyze it, but not overly burdensome for the TV stations. The Commission seems to conclude that the form is necessary - not even asking questions on that basic issue of whether to adopt a standardized form. The NOI states:

We continue to believe that the use of a standardized disclosure form will facilitate access to information on how licensees are serving the public interest and will allow the public to play a more active role in helping a station meet its obligation to provide programming that addresses the community's needs and interests

The Commission then goes on to discuss the Quarterly Programs Issues lists ("QPIs") that are currently required to be placed in a station's public file every three months - describing the issues that station management sees as important in the community and the programs that the station has broadcast to address those issues (see our most recent advisory on this obligation, [here](#)). The Commission states that these quarterly reports should be replaced, as broadcasters have been uneven in their recordkeeping of such lists. Of course, that may be because the FCC has never proscribed any specific form for these reports, nor specifically said what is acceptable and what is unacceptable in connection with such reports. Seemingly, replacing one form with another (albeit a more complete, detailed new form) may well accomplish nothing if the new report does not have clear and unambiguous instructions - something never adopted for the Quarterly Reports.

But will a replacement for the current QPIs produce any more of a uniform report? And will any uniformity that results be produced at a substantially higher cost to the broadcaster? To understand the answers to these questions, it is important to first look at the specific proposals for the categories of information that

the FCC suggests that it might want to collect. The FCC proposes that a station collect and include on this form information about programming in the following categories:

- Local news
- Local Civic/Government Affairs ("interviews with or statements by elected or appointed officials and relevant policy experts on issues of importance to the community, government meetings, legislative sessions, conferences featuring elected officials, and substantive discussions of civic issues of interest to local communities or groups")
- Local Electoral Affairs
- Closed Captioning and Video Description (i.e. how much [video description](#) is being done by a station, and what exceptions to closed captioning are being claimed for programming broadcast on the station)
- Emergency accessibility complaints (complaints filed against a station for not making emergency programming accessible to those with disabilities)

The proposal is to collect this information on the basis of a "composite week" for perhaps two weeks each quarter, as certain public interest groups requesting this information contend that at least two weeks worth of information each quarter is needed to have a statistically valid sample. These groups also suggest that the days that are included in the composite weeks not be announced until after the day has already passed - meaning that stations would either have to monitor and record this type of programming daily, or record all of its programming so that it could go back after-the-fact to compute the amount of time devoted to these types of programs. So the adoption of this requirement may in practice require that all broadcast programming be recorded by stations - effectively imposing for an entirely different reason a rule **mandating that stations record their programming** that [was proposed in 2004](#) during the height of the indecency battles and never adopted.

For each program fitting into the categories specified, the FCC asks whether it can require that broadcasters report on a per segment (as opposed to a per program) basis, i.e. reporting only on those segments of a program that address one of the topics specified above. The public interest groups suggested that the following information be kept for each program (or each segment) and reported on the form:

- Program/segment title or topic
- Date and time aired
- Whether it was aired on a primary channel or a multicast channel
- Was it first-run programming or had it been aired previously on another channel
- Approximate length

- Was there a sponsor for the program that needs to be disclosed pursuant to the sponsorship identification rules (seemingly asking if it was some sort of Video News Release or other paid segment)
- Was the program aired as part of a **shared services, local marketing or news sharing agreement** with another station or newspaper in the market

The Commission also proposes that each program fit in only one category. In other words, an electoral program should not also be counted as a local news segment, and so on. How these distinctions could be made is unclear. One would think that most local news would either deal with local electoral or civic and governmental affairs in some way or another. How to decide where to include programs that fit in more than one category is unclear.

But the biggest question about this form, as it was for the Form 355 (see our analysis [here](#)) is "why"? Why collect this information at all? The FCC takes great pains to say that it is not establishing any quantitative requirements for a particular amount of programming in any of these categories. Instead, this is merely an attempt to make this information available to the local residents and others who may desire to study it. But what would these groups do with this information? The FCC suggests that they could engage with the stations to be able to help the stations better shape their programming to community needs. Without such information, we have already seen many cases where citizen's groups have complained to the FCC, particularly at license renewal time, that a station was not programming so as to address issues of importance to some group of local citizens in some way or another. In those cases, the FCC denied the petitions, saying that broadcasters were free to choose how to serve the public interest, and that there were no specific requirements for particular amounts of programming in these various categories. If that remains the case, as the FCC suggests in the NOI, why mandate that the many man hours necessary to collect this information be spent, when there is no regulatory purpose for that information? The FCC asks for a cost benefit analysis, and one would think that there is no regulatory purpose for the information that is collected will be part of any such analysis.

The FCC seems almost as if it is doing the work of collecting information for various groups, so that these groups can challenge the service provided by broadcasters. In fact, the FCC suggests that, in addition to the categories of information requested, stations be allowed to volunteer additional information about ways in which they are serving the public. Again, if this form is not to be used for some sort of enforcement purpose, what purpose would the volunteered information serve? It is almost as if the FCC, and these citizens groups, are operating from a presumption that broadcasters are not serving the public unless they can fill this form up with good stuff - when most viewers of television programming can judge the service of TV stations in the way that they always have - by changing the channel (or, these days, changing the viewing screen to cable or online services) if information that they want is not available on a particular channel.

What is perhaps most confounding is that this detailed information collection is being required of what is perhaps the most transparent industry in the country, in terms of the ability of citizens to judge its output and to collect the information that the government is proposing to mandate that broadcasters provide. This is not a manufacturing plant, where the output of a factory can only be computed by someone in the factory itself, counting the number of products as they come off the assembly line. Nor is it like some potentially harmful substance that may be emitted from a smokestack or in waste water, where access to the output might be restricted, and information can only be gleaned with specialized scientific equipment. In the case of television, all of the information that the FCC asks the broadcaster to collect (and much

more) could be collected by any citizen at any time that they want - if they are willing to sit in front of the TV set (or a DVR) and watch the output of the TV station. It is there for all the world to see and to document, if anyone so desires. Why does the FCC need to put this burden on the broadcaster? That is a question that will no doubt be argued in the comments on this NOI.

The Comment deadline has not yet been set, but will be 30 days after the publication of this order in the Federal Register. The Commission notes that, at this time, it is not proposing to extend these rules to radio, but that "**we believe that we should eventually require radio licensees to replace their issues/programs lists with a standardized form as well.**" So this proceeding is crucial for all broadcasters to follow closely and to provide the FCC with the information that it needs to make a rational decision as to the degree to which broadcasters will need to document how they serve the public interest.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.