

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL  
APPROVING IN PART, DISSENTING IN PART**

*Re: Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations (MM Docket No. 00-168) and Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398) (MM Docket No. 00-44)*

Today the Commission is taking steps to advance the laudable goals of transparency and modernization. And I agree with those goals. But before I go further, it is important for all of us to understand the historical context of how we got here.

For decades, the Commission has required broadcasters to maintain general files for public inspection that contain information regarding many aspects of broadcasters' operations that speak to whether a broadcaster is serving its local community of license. The Commission has also required broadcasters to maintain files containing information regarding political advertisements. The general public inspection file and the political file have separate histories and purposes, however.

In 1938, the Commission required broadcasters to afford equal opportunities and uniform pricing to candidates for the same office. In the ensuing years, the Commission emphasized that the main purpose of the political ad pricing rule was for the benefit of *candidates*. Nearly 30 years later, the Commission decided that the political file containing the pricing information for candidates should be added to the local public inspection file essentially because the political file did not have any other designated place for storage. Next, in 1972, Congress took the Commission's rules a step further and mandated that candidates were entitled to the cheapest rates for campaign ads. Subsequently, in 2002, through the McCain-Feingold campaign finance law, Congress codified essentially what the Commission had put in place decades earlier. Interestingly, Congress chose not to require the political file to be posted online, even though the paper world was rapidly moving to the Internet the year McCain-Feingold passed.

Prior to McCain-Feingold, however, *broadcasters* asked the FCC to allow them to move their public inspection files online. Broadcasters felt that modernizing the public file disclosure requirement by moving the information online would enhance transparency and save money. At the same time, broadcasters were very concerned about moving the political ad file online for several reasons, but especially because those files contain competitively sensitive information regarding the rates charged for television ads.

To make a long story short, in 2007, I and all four of my fellow Commissioners at that time *unanimously* voted to move almost all sections of broadcasters' general public inspection files online while explicitly exempting the political file from that transition. All of us recognized the unique history and practical realities of the political file requirement and how those contrasted with the history and intent of the general public inspection file rule. We also recognized the competitive sensitivities and burdens of placing pricing information online. In the end, on a bi-partisan basis and without dissent, the Commission re-emphasized that the public inspection file contains material that speaks to whether a broadcaster is serving its local

community of license while the political file exists to serve political candidates. Accordingly, we chose to treat them differently for good reason.

So here we are today with this draft order before us. I cannot join my colleagues in the majority in mandating that TV broadcasters post sensitive pricing information, contained in the political file, online. This is not common sense. There is no statutory requirement that the Commission place any of this information, either in whole or in part, on the Internet. Similarly, there is no prohibition against placing a subset of this information online while maintaining the commercially-sensitive information at the station for the use of candidates, campaigns, and other political ad buyers. After all, the political file is a tool for examining transparency in campaign spending rather than broadcaster behavior.

The record in this proceeding contains ample evidence that posting rate information online may cause market distortions, including price signaling, which could lead to rates mysteriously rising in some markets, or other unforeseen consequences in other cases. Put another way, imagine for a moment if antitrust authorities learned that broadcasters were sharing pricing information market-by-market. Undoubtedly, broadcasters would be sued for antitrust violations. The majority appears to discount the adverse effect that potential anticompetitive pricing activity could have on everyday consumers. By forcing broadcasters to do what would otherwise be illegal is simply surreal.

Either way, it is the notion of disclosing competitively sensitive rate information that has broadcasters of all sizes most concerned. With this in mind, I offered a compromise proposal whereby we would require most aspects of the political file to be posted online, but carve out the lowest unit rate information from the rule. In the meantime, we would explore new ideas for the treatment of the rate information in a further notice, which we would conclude quickly. Although my colleagues politely considered this idea, apparently I was insufficiently persuasive. The same holds true for the good faith compromise proposals put forth by broadcasters.

Ironically, in an attempt to move away from paper, the majority may run into the requirements of the Paperwork Reduction Act (PRA). Our 2007 order on this matter never went into effect due to PRA concerns. As the mandates in today's order require the duplication of some information already required by the Federal Election Commission, it may also mark time in PRA Purgatory.

Furthermore, additional study of the matter regarding the lowest unit rate would help the Commission conduct a proper cost/benefit analysis, which is lacking here. One would think that moving from paper to online would always be more cost effective. Surprisingly, however, evidence in the record suggests that the new rule might *not* be more efficient than the old rule and, in fact, could add up to tens of thousands of dollars a year in new costs for some broadcasters due to the requirement that fresh advertising information be uploaded "immediately." During one of the busiest seasons for broadcasters, station personnel would have to be diverted from other vital tasks to take up the full-time job of uploading information to a government website. Such scenarios almost always add costs. The majority seems to recognize this reality by adopting a phase-in provision which, of course, underscores the flaw in its original premise that the new rule should be less expensive to administer.

In any case, whether it is now or at the end of the phase-in period, all TV broadcasters may well have to swallow larger costs. This unfunded mandate will harm smaller broadcasters the most, and those owned by minorities and women will not be spared. While the Commission often opines on its desire for more diversity of ownership in the broadcast market, all too often it seems to make it harder for such small and disadvantaged businesses to succeed by heaping more regulations on their backs. Indeed, without a *bona fide* cost/benefit analysis, which also takes into account the effects of potential anticompetitive behavior, the majority cannot be sure if it is doing more harm to the public interest than good. Furthermore, the majority is violating the letter and the spirit of President Obama's 2011 executive order titled *Improving Regulation and Regulatory Review*.

I fully support transparency in political campaign spending. As many have noted, I have a mantra that says, "I don't tell Congress what to do, Congress tells me what to do." In this case, many Members of Congress have asked me what Congress should do. If the concern is to know where campaign money is going, the public interest might be better served if Congress were to focus its scrutiny on the *spenders* of campaign dollars rather than just one of many, many, many *recipients*. Today's rule applies only to TV broadcasters, yet campaign money flows to radio, cable TV, satellite radio and TV, newspapers, direct mail, outdoor ads and the Internet, not to mention companies that offer other ways to reach voters. What the government has created is a regime of disparate treatment. Congress should fix what the FCC won't or can't.

Nonetheless, today, I vote with my colleagues to approve of common sense modernization of our public inspection file disclosure requirements. But I cannot join them in the aspects of the Order requiring broadcasters to post sensitive pricing information, contained in the political file, online. Nor can I support aspects of the Order that may needlessly raise costs. I am disappointed that my colleagues would not agree to a prudent and modest compromise, so I have no choice but to approve in part and dissent in part.

I thank the Chairman and Commissioner Clyburn for their willingness to engage in an open dialogue throughout this process. And many thanks to the Bureau for its work on this matter, even if I disagree with much of the outcome.

## SUPPLEMENTAL POLICY AND LEGAL STATEMENT

Transparency and modernization are always laudable public policy goals. By placing the majority of the public inspection file online, we will increase accessibility to these documents, thus improving communications between broadcasters and their local communities. Moreover, I support providing broadcasters with a more cost-effective means to comply with the Commission's rules. Currently, our rules require the public inspection file to contain a series of documents, including authorizations, applications, ownership reports, and information regarding broadcasters' programming of local interest, hiring practices, service areas, and investigations and complaints.<sup>1</sup> Today, we act to reduce the current burden on broadcasters by requiring them to upload only those documents maintained in the public file that are solely in their possession. I approve of this aspect of today's decision.

I must dissent, however, to the requirement that the contents of the political file be placed online. The political file, maintained with the rest of the public file, contains information for candidates seeking to purchase political ads and sheds light on the spending patterns of campaigns, political committees, and third-party groups.<sup>2</sup> Unlike other parts of the public inspection file, the political file does not reveal broadcaster behavior, *i.e.*, whether a broadcaster is serving its local community of license,<sup>3</sup> which instead is a tool for examining campaign spending. Although the pursuit for transparency can be a positive endeavor, political advertising and speech bring many factual, legal and pragmatic complexities.<sup>4</sup> As discussed below, placing the political file online will harm American consumers because diverting resources to fulfill the online requirement will negatively affect newsgathering operations, local programming offerings, and may chill political speech.

By way of background, the "political file" was first created in 1938 when the Commission required that broadcasters afford equal opportunities and uniform pricing to candidates for the same office.<sup>5</sup> Subsequently, the Commission recognized that the main

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<sup>1</sup> See 47 C.F.R. §§ 73.3526, 73.3527.

<sup>2</sup> See *Id.* §§ 73.1943, 73.3526(e)(6), 73.3527(e)(5); Bipartisan Campaign Reform Act of 2002 § 504, 47 U.S.C. § 315(e) (2002) (codifying the Commission's rules and requiring broadcaster disclosure of political issue ads, by expanding the criteria to purchases of broadcast time "relating to any political matter of national importance.")

<sup>3</sup> Compare New Section 0.418 and Amendment of Sections 0.417 (formerly in 0.406), 1.580 (formerly 1.359), and 1.594 (formerly in 1.362) of the Commission's Rules Relating to Inspection of Records, to Pre-Grant Procedures, and to Local Notice of Filing or of Designation for Hearing of Broadcast Applications, *Report and Order*, 4 R.R. 2d 1664, 1667-68 ¶¶ 11-12 (1965) ("*1965 Public Inspection File Order*") (citing Commission Policy on Programming, *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 R.R. 1901, 1912 (1960) (stating that a broadcaster's public interest obligation "consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area.")), with 3 Fed. Reg. 1691 (1938).

<sup>4</sup> It is worth noting that the Supreme Court reiterated in *Citizens United* that political speech is core protected speech under the First Amendment; therefore, as a threshold matter, the government's ability to regulate in this area is severely curtailed. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (prohibiting the government from limiting communications spending for political purposes by corporations and unions). As a consequence, administrative agencies and Congress alike should think carefully before imposing new laws and regulations that could be construed by the Court as *de facto*, or "backdoor," inhibitions on political speech.

<sup>5</sup> 3 Fed. Reg. 1691, 1692 (1938).

purpose of the rule was to benefit candidates.<sup>6</sup> In 1965, the Commission decided that the political file should be placed with the public inspection file at the relevant station, because “[n]o place of retention for such records is specified in [the political file rule] sections.”<sup>7</sup> Later, in 1972, Congress mandated that candidates receive the lowest unit charge for advertising to place candidates on par with a broadcast station’s most-favored advertisers.<sup>8</sup>

The discussion regarding whether to place the public inspection file online commenced in a 1999 notice,<sup>9</sup> followed by a 2000 notice of proposed rule making, which tentatively concluded that the public inspection file should be posted on a broadcaster’s or its state broadcasters association’s website.<sup>10</sup> Neither notice sought comment specifically on the political file.

In 2007, the Commission unanimously adopted an online requirement for the public inspection file; however, the agency explicitly exempted the political file finding that the burden of placing this material on the Internet outweighed the benefits.<sup>11</sup> Further, no Commissioner

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<sup>6</sup> Commission orders noted the importance of the political file information to candidates, but were silent on the interest of such information to the general public. *See, e.g.*, Amendment of Sections 3.120, 3.290, 3.590, and 3.657 of the Commission’s Rules – Equal Opportunities Under Sec. 315, Communications Act, *Order*, 40 F.C.C. 1082 (1959) (“[I]nterpretations and interpretive opinions require clarification and supplementation in order that candidates for public office and broadcast licensees may be more fully informed as to their rights and obligations under section 315 and the rules and in order to insure the orderly and expeditious disposition of requests submitted to such licensees and to the Commission for ‘equal opportunities’ under said section of the Act and under said rules.”); Codification of the Commission’s Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 698 ¶¶ 123-24 (stating that “[w]e believe that our current rule 73.1940(d) adequately addresses the political file requirements and that continuation of our existing policies will best serve the interests of both candidates and broadcasters” and that information regarding the disposition of requests “is necessary to determine whether a station is affording equal opportunities and whether the candidate is getting favorable or unfavorable treatment in the placement of spots. . . .”). Other Commission orders recognize that candidates and their representatives are the most likely to use political file, not the general public. *See, e.g.*, Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, MM Docket No. 97-138, *Memorandum Opinion and Order*, 14 FCC Rcd 11113, 11122 ¶ 22 (1999) (stating that, in exempting the political file from requirements to make portions of the public inspection file available by mail upon telephone request, “[s]ince candidates or their representatives, rather than the general public, are the persons most likely to be effected by this exemption, we do not believe that the exemption will adversely affect the public interest.”).

<sup>7</sup> *1965 Public Inspection File Order*, 4 R.R. 2d at 1672 ¶ 25.

<sup>8</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

<sup>9</sup> Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, *Notice of Inquiry*, 14 FCC Rcd 12633, 21641 ¶ 17 (1999).

<sup>10</sup> Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-168, *Notice of Proposed Rule Making*, 15 FCC Rcd 19816, 19816, 19829 ¶¶ 2, 31 (2000).

<sup>11</sup> Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket Nos. 00-168, 00-44, *Report and Order*, 23 FCC Rcd 1274, 1283 ¶ 20 (2008) (“2007 Order”). The 2007 order never went into effect because of challenges before the Commission, the courts and the Office of Management and Budget where the information collection was questioned under the Paperwork Reduction Act.

issued statements expressing any dismay about this exclusion.<sup>12</sup> In its discussion of the political file, the Commission recognized that:

Daily and even more frequent requests for access by political candidates and their campaign personnel, combined with a need for the station to update the file frequently, may make requiring the station to place this material on the Internet inappropriate. *Resources available to political candidates likely provide them with greater access to the station and distinguish them from members of the general public who will benefit from ready access to Internet posting of other parts of the public file.* Political candidates and campaigns make heavy use of the file and require quick access to material, and if the volume of material is too great, the station may not be able to update the Internet file quickly enough. Our rules currently require that records be placed in the political file as soon as possible, which the rule defines as meaning “immediately absent unusual circumstances.” This may mean multiple updates each day during peak periods of the election season.<sup>13</sup>

Today, the majority is reversing a unanimous decision exempting the political file from online display with no empirical evidence that its 2007 findings are no longer accurate.

The majority states that a new approach is warranted because the Commission’s understanding of how stations manage their political transactions have changed since 2007 and that additional technological advances have occurred.<sup>14</sup> Many in the broadcast industry, however, argue that very little has changed in the political ad purchase process since that time.<sup>15</sup>

One commenter conducted a survey of broadcasters, which demonstrated that “85% of the survey respondents reported no changes to their political advertising methodology and practices since 2007.”<sup>16</sup> Many broadcasters sell political time by non-automated processes, such

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<sup>12</sup> See *id.* at 1316-23. I dissented in part to the order because of the adoption of the enhanced disclosure and the 60-day implementation deadline to place the required postings online. See *id.* at 1322-23.

<sup>13</sup> See *2007 Order*, 23 FCC Rcd at 1282 ¶ 20 (emphasis added).

<sup>14</sup> Order at 17 ¶ 34. The 2010 further notice provides more insight into thinking of the majority: “Since exempting the political file in 2007, we have learned that the vast majority of television stations handle political advertising transactions electronically, through e-mails and a variety of software applications. As a result, requiring them to make this information publicly available online appears to impose far less of a burden than previously thought.” Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-168, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 15788, 15800 ¶ 23.

<sup>15</sup> See, e.g., Named State Broadcasters Association, Joint Comments, at 6 (Dec. 22, 2011) (“Named State Broadcasters Comments”); Joint Broadcasters, Reply Comments, at 5 (Jan. 17, 2012) (“Joint Broadcasters Reply”); The North Carolina Association of Broadcasters, The Ohio Association of Broadcasters and The Virginia Associations of Broadcasters, Joint Comments, at ii, 9 (Dec. 22, 2011) (“North Carolina, Ohio, and Virginia Association of Broadcasters Comments”).

<sup>16</sup> North Carolina, Ohio, and Virginia Association of Broadcasters Comments at 9.

as telephone conversations, handwritten forms, emails, and faxes.<sup>17</sup> In fact, the record states that “[o]ne of the most successful and profitable stations providing a survey response, a station with significant local news, public affairs and program production, reported using handwritten documents for approximately 90% of its political file.”<sup>18</sup> The record also reflects that, even if a broadcaster issues electronic invoices, the political file includes additional information that is in paper format.<sup>19</sup> Even assuming that the processes have changed, however, this is irrelevant because the Commission based its 2007 decision on the burdens resulting from the volume of material and the frequency of updates.<sup>20</sup>

By placing this information online, the majority requires broadcasters to widely disseminate proprietary and competitively-sensitive rate information. Though some say this action will shed light on the political spending process, the unintended consequence could be to encourage price signaling and other anticompetitive behavior. Imagine the government’s response if sales executives from competing television stations gathering in a conference room were to share such information.<sup>21</sup> Regarding price signaling, the record indicates that “[r]eadily available political file information would give television stations a convenient and completely legal way to act with ‘conscious parallelism’ to put a floor under rates during election seasons.”<sup>22</sup> Another party tells us that “a central and anonymously accessible file would create market distortions and place broadcasters at a disadvantage vis-à-vis their competitors . . . if competitors attempt to use the data in the file to undercut their rates.”<sup>23</sup> For example, one commenter states

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<sup>17</sup> *Id.*; National Association of Broadcasters, Reply Comments, at 8-9 (Jan. 17, 2012) (“NAB Reply”); Joint Broadcasters Reply at 5.

<sup>18</sup> North Carolina, Ohio, and Virginia Association of Broadcasters Comments at 9.

<sup>19</sup> Joint TV Broadcasters, Joint Comments, at 4 (Dec. 22, 2001) (stating “stations include in their political files: (i) the NAB PB-17 form or an equivalent record, which is not transmitted through the online traffic system, and is necessary because it includes required information including a summary of each request, the disposition and the names of a candidate’s committee’s officers; (ii) the order form; and (iii) one or more related invoices.”); NAB Comments at 17-18 (“While it may be true that many broadcasters handle much of their advertising sales electronically, including political ad sales, the electronic sales invoices do not include, or are not designed to include, all the necessary information required to be included in the political file. That information is often input, sometimes electronically, and sometimes in handwritten form, before it is coupled with a sales invoice and included in the political file.”).

<sup>20</sup> See 2007 Order, 23 FCC Rcd at 1282 ¶ 20.

<sup>21</sup> See CBS Corporation, ABC Television Stations, Fox Television Stations, Inc., NBC Owned Television Stations and Telemundo Stations, and Univision Television Group, Inc., Reply Comments, at 13 (“Network Station Owners Reply”).

<sup>22</sup> *Id.* at 14.

<sup>23</sup> National Association of Broadcasters, Comments, at 21-22 (Dec. 22, 2011); see also Network Station Owners Reply at 12-13 (“Requiring that the entire political file be placed online . . . would make sensitive price information available to a television station’s customers and competitors at the click of a mouse. This proprietary information would be available to commercial as well as political advertisers, to other local stations, and to competing advertising media such as cable operators, newspapers and web sites.”); The North Carolina Association of Broadcasters, The Ohio Association of Broadcasters and The Virginia Associations of Broadcasters, Joint Reply, at 8 (Jan. 17, 2012) (“North Carolina, Ohio, and Virginia Association of Broadcasters Reply”) (“The market for political time is, of course, competitive. And requiring television broadcasters, but not their competitors to post . . . information regarding advertising rates will impact the market for political time. . . .”); Joint Broadcasters Reply at 15 (requiring television stations to make rate and purchase information available online could create “market distortions” that favor other media.).

that “[this] rule would afford a significant intelligence advantage to one side in private commercial negotiations. . . . One poker player would, in effect, have had at least partial glance at the other’s hand.”<sup>24</sup> Given these alarming scenarios, the Commission should have issued a further notice of proposed rulemaking to ask specific questions about and consider the possibilities of such anticompetitive activity and market distortions.

Further, the Commission is also inequitably singling out television broadcasters for these disclosure requirements even though political campaigns spend money on a plethora of outlets to contact and influence voters including, but certainly not limited to, advertising expenditures on radio, newspapers, the Internet, cable television, satellite radio and TV. Requiring the political file to be online may result in a chilling of speech.<sup>25</sup> Political advertisers may turn to other outlets if advertising on broadcast television imposes disclosure obligations that do not exist for the providers of similar services. Additionally, individuals may be less likely to engage in political discourse if their personal information available on the worldwide web.<sup>26</sup>

The majority argues that, given the statutory requirement to place the specific rate for each political advertisement in the public file, excluding such information from the online requirement “would be contrary to the statutory directive to make the political file publicly available.”<sup>27</sup> I respectfully disagree. In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA) amending section 315 of the Communications Act to codify and expand the Commission’s political advertising disclosure rules to include, among other things, reporting requirements for political issue ads.<sup>28</sup> Section 315(e) states that “[a] licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time” and that this information must “be placed in a political file as soon as possible. . . .”<sup>29</sup> There is no statutory requirement that the Commission place any of this information, either in whole or in

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<sup>24</sup> Network Station Owners Reply at 13-14.

<sup>25</sup> National Religious Broadcasters, Comments, at 11 (Dec. 15, 2011) (“NRB Comments”) (listing, on the Internet, people in leadership positions of issue advocacy groups would burden political speech); Target Enterprises, Ex Parte Presentation, at 15-16 (Apr. 19, 2012) (“Target Ex Parte”).

<sup>26</sup> Target Ex Parte at 16 (“This type of online disclosure raises serious privacy concerns and places an unreasonable burden on individuals’ First Amendment right to participate in political speech.”); NRB Comments at 15-16 (“Further, citizens, faced with . . . national exposure of their names, identities, and organizational affiliations, may well balk at participating in these kinds of civic activities, particularly involving controversial issues, as they face the specter of government-coerced lack of privacy of national proportions. . . . Issue-advocacy groups might avoid advertising on television altogether.”).

<sup>27</sup> Order at 21 ¶ 39.

<sup>28</sup> Bipartisan Campaign Reform Act of 2002 § 504, 47 U.S.C. § 315(e) (2002), stating:

- (1) A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time –
  - (A) is made by or on behalf of a legally qualified candidate for public office; or
  - (B) communicates a message relating to any political matter of national importance, including –
    - (i) a legally qualified candidate;
    - (ii) any election to Federal office; or
    - (iii) a national legislative issue of public importance.”

<sup>29</sup> 47 U.S.C. § 315(e)(1), (3). The Commission’s rules state that “[a]s soon as possible means immediately absent unusual circumstance.” 47 C.F.R. § 73.1943.

part, on the Internet. Similarly, there is no prohibition against placing a subset of this information online, such as aggregate advertising prices, while maintaining the commercially-sensitive information at the station for the use of candidates, campaigns, other political advertising buyers, and anyone else who is interested. Further, BCRA is not new to the Commission. It was enacted when the Commission determined, in 2007, that it was best to make the political file “available to public inspection” at broadcast stations.<sup>30</sup>

In any event, if the public policy goal of new rules is to produce greater transparency in campaign spending, the Commission is not the best agency to achieve this end. It is the role of the legislative branch and the Federal Election Commission (FEC) to debate, craft, and implement new laws and disclosure requirements in the campaign finance arena.<sup>31</sup> In fact, Congress mandated in BCRA that the FEC must coordinate with other federal executive agencies with election-related information<sup>32</sup> and, unlike the Commission, “shall maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information.”<sup>33</sup> Thus, the FEC already has extensive information on its website regarding political campaign spending, including the aggregate amount spent for political broadcast buys.<sup>34</sup> The FEC website also has detailed information regarding the treasurers of campaign committees and the members of the executive committee or board of directors of an entity buying an issue ad. This information is also required to be maintained in the political file and, therefore, will be placed on the Commission’s website, duplicating information already available to the government.<sup>35</sup> The record here does not demonstrate that the information provided on the FEC website is not adequate to meet the needs of the general public, including academics, researchers and public interest groups.

It is troubling that the Commission has not adequately analyzed the costs and burdens that these rules will place on broadcasters vis-à-vis any potential benefit to the public interest as outlined in President Obama’s 2011 executive order.<sup>36</sup> These requirements will be especially

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<sup>30</sup> I note that section 504 of BCRA was challenged and affirmed by the Supreme Court in *McConnell v. Federal Election Com’n*. 540 U.S. 93, 233-246 (2003). While it is true that this decision upheld section 504, the court did not consider an online filing requirement for the political file or the implications thereof. In fact, Justice Breyer, on behalf of the majority, upholds the broadcaster disclosure, because it is virtually identical to what was in the Commission’s rules, at that time, and the regulation caused little burden. The majority, in this order, is now changing the disclosure mechanism in a manner that will increase burdens.

<sup>31</sup> See generally National Association of Broadcasters, Supplemental Comments (Mar. 8, 2012) (“NAB Supplemental Comments”).

<sup>32</sup> Bipartisan Campaign Reform Act § 502(c).

<sup>33</sup> *Id.* § 502(a), 2 U.S.C. ¶ 438a(a). See also 2 U.S.C. § 434(a)(11)(B) (“The Commission shall make a designation, statement, report, or notification that is filed with the Commission under this Act available for inspection by the public in the offices of the Commission and accessible to the public on the Internet not later than 48 hours (or not later than 24 hours in the case of a designation, statement, report, or notification filed electronically) after receipt by the Commission.”).

<sup>34</sup> See NAB Supplemental Comments at 4 (citing 2 U.S.C. § 434(b)(6)(B)(iii), (c), (f)).

<sup>35</sup> 47 U.S.C. § 315(e)(2)(F), (G).

<sup>36</sup> See Exec. Order No. 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011).

onerous for 1,006 small commercial broadcasters<sup>37</sup> and 391 noncommercial educational stations. Although the requirement to post the political file is prospective, stations nonetheless incur upwards of \$80,000 to \$140,000 per year, according to the record, in recurring costs to maintain the information.<sup>38</sup> The extra capital and personnel resources needed to maintain an online political file will require broadcasters to make tough choices, such as diverting funds from their newsgathering operations and local programming. These costs will disproportionately harm small and independent broadcasters, especially those owned by women and minorities, which are already experiencing financial pressures in these challenging economic times.<sup>39</sup>

Finally, these online requirements will hamper the Commission's personnel and financial resources.<sup>40</sup> Although I have the utmost confidence in the Commission's staff, I do have reservations regarding our ability to host and maintain such databases. The Commission must test any system before going live to ensure reliability, ample capacity, and efficiency. We must fully understand the capabilities of the proposed database in determining filing requirements and deadlines. In these times when the government is making do with less, I question whether implementing a new and complex database is the best use of Commission assets.

Accordingly, I respectfully approve in part and dissent in part.

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<sup>37</sup> See Order, Appendix B – Final Regulatory Flexibility Act Analysis, at 61 ¶ 8 (recognizing that this number is likely to overstate the number of small entities because the revenues of affiliated companies and not included). These stations have revenues of \$14 million or less and qualify as small entities under the Small Business Administration definition.

<sup>38</sup> NAB Reply at 12 (stating that the online political file would cost nearly \$80,000 per election cycle for temporary sales employees alone); State Broadcaster Association Comments at 12 (stating that the political file and sponsorship identification requirements could cost up to \$140,000 per year).

<sup>39</sup> Duhamel Broadcasting Enterprises filed an *ex parte* letter, along with a Declaration from its Chief Operating Officer, discussing the hardship that an online political file would have on smaller television broadcasters. See Letter from Richard R. Zaragoza, Pillsbury Winthrop Shaw Pittman LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (Apr. 10, 2012). Access.1 Communications, a woman- and minority-owned business, filed an *ex parte* letter expressing concerns about the burdens of an online political file and the harms of placing commercially-sensitive rate data on the Internet. See Letter from Chesley Maddox-Dorsey, Chief Executive Officer, Access.1 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (Apr. 20, 2012).

<sup>40</sup> In this order, the Commission committed to undertake the following: establishing and maintaining a website; importing broadcasters' documents that are already on the Commission site; creating specific organizational subfolders for candidates and issue ads that relate to a political matter of national importance; programming the database to use optical character recognition on materials that are scanned and non-searchable and generate electronic backup copies of online files; making Commission staff available to assist stations with any issues; exploring the creation of user or peer support groups; creating a mechanism to identify documents beyond the retention period to be flagged for review by broadcasters to be eliminated from the database; amongst others.