

Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER

Adopted: July 12, 2012

Released: July 12, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. On July 3, 2012, the National Association of Broadcasters (“NAB”) filed a petition¹ requesting a stay of the Commission’s Second Report and Order in MM Docket Nos. 00-168 and 00-44, which requires broadcast television stations to post their public inspection files, including their political files, online in a Commission-hosted database.² Specifically, NAB seeks a stay of the implementation of the Second Report and Order pending the completion of judicial review.³ For the reasons stated below, we deny the petition for stay.

II. BACKGROUND

2. In the Second Report and Order, the Commission modernized the procedures television broadcasters use to inform the public about how they are serving their communities by requiring stations to post their public files online in a central, Commission-hosted database, rather than maintaining the files locally at their main studios.⁴ In all cases, these procedures relate to information that is already public and has been for decades. These updated procedures are intended to make it easier for candidates, as well as the public, journalists, educators, and the research community, to access information concerning broadcast service without having to travel to the station’s main studio, search the station’s paper files, and pay for paper copies.⁵ In addition, over time, broadcasters will benefit from the lower costs of sending

¹ National Association of Broadcasters, Petition for Stay, MM Docket Nos. 00-168 and 00-44 (filed July 3, 2012) (“NAB Petition”).

² Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children’s Television Programming Report, Second Report and Order, 27 FCC Rcd 4535 (2012) (“Second Report and Order”). The effective date of the new online public file requirements is August 2, 2012. See Public Notice, Effective Date Announced for Online Publication of Broadcast Television Public Inspection Files, DA 12-1057 (rel. July 3, 2012).

³ NAB Petition at 1-2. NAB has filed a petition for review of the Second Report and Order with the U.S. Court of Appeals for the District of Columbia Circuit. Nat’l Assoc. of Broadcasters v. FCC, No. 12-1225 (D.C. Cir. docketed May 21, 2012).

⁴ Second Report and Order at ¶ 1.

⁵ Id. at ¶ 16.

documents electronically to the Commission, as opposed to creating and maintaining a paper file at the station.⁶

3. The procedures adopted in the *Second Report and Order* reflect the Commission's commitment to maximizing the public benefits of an online public file while avoiding unnecessary burdens on broadcasters.⁷ Under these procedures, the Commission will host all television stations' online public files in a centralized database; stations will not be required to post their public files on their own websites.⁸ Television stations will not be responsible for uploading to the Commission-hosted database materials in the public file that have previously been filed with the Commission or are otherwise available on the Commission's website.⁹ The Commission will itself import to the online public file any documents that must be included in the public file but that are also filed electronically with the Commission in the Consolidated DataBase System or maintained on the Commission's website.¹⁰ The Commission exempted letters and emails from the general public from the online posting requirement, instead permitting broadcasters to continue to retain these materials in a correspondence file at the station.¹¹

4. To minimize burdens on broadcasters, the *Second Report and Order* also significantly tailors the online public file requirements for the political file¹² — the file that must include all specific requests for broadcast time made by or on behalf of a candidate and the disposition of those requests (including the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased);¹³ information regarding other appearances by candidates (excluding those in certain news programming exempt from the equal opportunities provision);¹⁴ and information about issue advertising that “communicates a message relating to any political matter of national importance.”¹⁵ Television stations are not required to upload their existing political files to the online public file.¹⁶ Rather, stations need to upload political file documents to the online public file only on a going-forward basis.¹⁷ Further, for the next two years, only stations that are affiliated with the top four national networks (ABC, NBC, CBS, and Fox) and licensed to serve communities in the top 50 Designated Market Areas

⁶ *Id.* at ¶ 11.

⁷ *Id.*

⁸ *Id.* at ¶ 14.

⁹ *Id.* at ¶ 21. These materials include citizen agreements, certain Equal Employment Opportunity (“EEO”) materials, issues/programs lists, children’s television commercial limits records, donor lists for noncommercial educational stations, local public notice announcements, time brokerage agreements, must-carry or retransmission consent elections, joint sales agreements, Class A continuing eligibility documentation, materials related to FCC investigations (other than investigative information requests from the Commission), and any new political file materials. *Id.*

¹⁰ *Id.* at ¶ 20. Documents falling into this category include station authorizations, applications and related materials, contour maps, ownership reports and related materials, EEO materials, The Public and Broadcasting manual, children’s television programming reports, and Letters of Inquiry and other investigative information requests from the Commission, unless otherwise directed by the inquiry itself. *Id.*

¹¹ *Id.* at ¶¶ 62-64.

¹² *Second Report and Order* at ¶ 11.

¹³ 47 C.F.R. § 73.1943.

¹⁴ *Id.*

¹⁵ 47 U.S.C. § 315(e).

¹⁶ *Id.* at ¶ 44.

¹⁷ *Id.* at ¶ 21.

are required to post political file documents online.¹⁸ The Commission exempted all other stations from posting their political file documents to their online public file until July 1, 2014.¹⁹

5. NAB seeks to stay the implementation of the *Second Report and Order* until the D.C. Circuit Court of Appeals acts on its petition for review.²⁰ NAB's arguments in support of a stay focus exclusively on the political file requirements and do not relate to the other portions of the *Second Report and Order*.²¹ NAB argues, among other things, that imposing an online publication requirement for television broadcasters' political files is arbitrary and capricious and inconsistent with the Bipartisan Campaign Reform Act of 2002 ("BCRA").²² NAB further claims that its members will suffer irreparable harm absent a stay because the *Second Report and Order* compels television stations to post the prices for specific advertisements to a public website immediately, which will place them at a disadvantage to non-broadcast competitors who are not required to post rate information on the Internet.²³ The Public Interest Public Airwaves Coalition ("PIPAC") filed an opposition to NAB's motion for stay.²⁴ For the reasons discussed below, we deny NAB's petition for stay.

III. DISCUSSION

6. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, as modified in *Washington Metropolitan Area Transit Cmm'n v. Holiday Tours, Inc.*²⁵ Under this standard, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.²⁶ The relative importance of the four criteria will vary depending on the circumstances of the case,²⁷ but a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order.²⁸

7. In this case, we conclude that NAB has satisfied none of the four factors in the stay calculus. Critically, NAB has failed to demonstrate irreparable injury. NAB has also failed to show that it is likely to prevail on the merits of its claims, that other interested parties will not be harmed if a stay is granted, or that a stay would serve the public interest. Accordingly, we find that a stay is not warranted.

¹⁸ *Id.* at ¶ 46.

¹⁹ *Id.* at ¶¶ 33, 48.

²⁰ NAB Petition at 1.

²¹ *Id.* at 1-2.

²² *Id.* at 1.

²³ *Id.* at 1-2.

²⁴ Public Interest Public Airwaves Coalition, Opposition to National Association of Broadcasters' Petition for Stay Pending Judicial Review, MM Docket Nos. 00-168 and 00-44 (filed July 10, 2012) ("PIPAC Opposition").

²⁵ *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum*"); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*Washington Metro*").

²⁶ *Virginia Petroleum*, 259 F.2d at 925; *Washington Metro*, 559 F.2d at 843; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008) ("*Winter*").

²⁷ See, e.g., *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009).

²⁸ See *Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction."); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only the second factor) ("*Wisconsin Gas*").

A. NAB's Members Would Not Suffer Irreparable Harm

8. NAB fails to show that its members would be irreparably harmed if a stay is not granted. In claiming irreparable harm, NAB asserts that, absent a stay, its members will be required to post the rates they charge for specific advertising spots immediately to the Internet, which will enable non-broadcast competitors to determine in a matter of seconds exactly what prices local broadcast stations are charging for specific spots.²⁹ As a result, NAB argues, non-broadcast competitors will acquire an unfair advantage over broadcasters in the competition for political and commercial advertising.³⁰ Since political advertisers spend more than a billion dollars on television advertising in election years, NAB asserts that its members will lose millions of dollars in revenue if non-broadcast media are allowed to shift even a small percentage of this advertising away from broadcast television.³¹ NAB claims that broadcasters will have no means of recouping this lost revenue.³² NAB also claims that broadcasters will be unable to recoup the substantial costs of complying with the *Second Report and Order*.³³ According to NAB, these losses constitute irreparable harm.³⁴ NAB asserts that, although economic harm generally does not constitute irreparable injury, the general rule does not apply where, as here, a party seeking a stay cannot recover monetary damages to recoup its losses.³⁵

9. NAB has failed to demonstrate “irreparable harm.” The *Second Report and Order* does not require broadcasters to make any information publicly available that they are not already required to make public.³⁶ Broadcasters have long been required to make available political file information, including political rates, and anyone, including non-broadcast competitors, can access these data in the stations’ public files.³⁷ Similarly, the political files of broadcasters’ competitors have been available in paper form to television broadcasters for years.³⁸ NAB’s claim of resulting harm – *i.e.*, that requiring television stations to post the rates they charge for specific advertising spots immediately to the Internet will give non-broadcast competitors an unfair advantage over broadcasters in the competition for political and commercial advertising, which may result in loss of revenue for the television stations – is not persuasive given that the information is already publicly available under existing rules.³⁹ NAB offers no proof that the rules will result in harm that “is certain to occur in the near future.”⁴⁰ Indeed, to the extent that competitors, potential advertisers, or media buyers have an economic incentive to access this data, they *already* have the ability to review the material at the stations.⁴¹ In view of this mutual, long-standing

²⁹ NAB Petition at 19.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 20.

³⁵ *Id.*, citing *Robertson v. Cartinhour*, 429 F.App’x 1, 3 (D.C. Cir. 2011).

³⁶ *Second Report and Order* at ¶ 39.

³⁷ *Id.* Competitors and advertisers apparently do seek review of information in broadcast stations’ political files on a regular basis, as Commission staff frequently receives inquiries from stations as to whether they must provide such entities access to the political file. *Id.* at n.121.

³⁸ *Id.* at ¶ 39. See also 47 C.F.R. §§ 25.701(d), 76.1701(a).

³⁹ NAB Petition at 19.

⁴⁰ *Wisconsin Gas*, 758 F.2d at 674 (“Bare allegations of what is likely to occur” are not sufficient because the test is whether the harm “will in fact occur.”).

⁴¹ *Second Report and Order* at ¶ 39. Competitors and advertisers apparently do seek review of information in broadcast stations’ political files on a regular basis, as Commission staff frequently receives inquiries from stations

public availability of political rate information,⁴² we find it speculative that the online posting of this information will provide a significant advantage to non-broadcast competitors, which in turn will result in loss of revenue for the television stations.

10. In addition, NAB has failed to show that online posting of advertising rate information would threaten broadcasters' ability to compete effectively to retain their advertisers.⁴³ Notwithstanding that Americans' viewing habits are becoming more fragmented, the portion of time devoted to watching broadcast television remained relatively constant between 2008 and 2010, and broadcast television "has retained some clout as an effective way to reach large numbers—not to the extent it has in the past but still more than most cable networks."⁴⁴ Thus, television broadcasters' uniquely large audience share will ensure that "significant ad spending on broadcast television will continue."⁴⁵ Nothing in our rules would change that fact. In addition, "stations are in control of setting lowest unit rates, and have final determination of how low they are willing to set their commercial rates."⁴⁶

11. NAB also claims that broadcasters will be unable to recoup the substantial costs of complying with the *Second Report and Order*.⁴⁷ In support, NAB provides declarations from four broadcast licensees that estimate the amount of time and associated costs for station personnel to upload political file information.⁴⁸ We conclude, however, that these estimates greatly overstate the burden and cost of uploading political file information. For example, the declarations provide estimates of the time required for station personnel to upload political file information *in addition to* the time it currently takes station personnel to file the documents in the station's paper file and conclude that the *additional* steps required to upload political file information "would essentially double the time and cost devoted to maintaining the political file" and require the hiring of additional staff.⁴⁹ As the Commission stated in the *Second Report and Order*, "given that the requirement to upload the files will replace rather than add to the existing file requirements, we expect that stations will be able to assign these responsibilities to

as to whether they must provide such entities access to the political file. *Id.* at n.121. *See also* PIPAC Opposition at 11 (noting that there is nothing in the record to support the claim that competitors have ever used public file information to gain competitive advantage).

⁴² *Id.* at ¶ 39.

⁴³ *See Access Charge Reform*, Order, 12 FCC Rcd 10175, 10190, ¶ 33 (1997) ("*Access Charge Reform*") (finding claimed losses to competition inadequate to support a claim of irreparable harm where there was no evidence that the petitioners would be unable to compete effectively to retain their customers).

⁴⁴ *See* "The Information Needs of Communities: The Changing Media Landscape in a Broadband Age," by Steven Waldman and the Working Group on Information Needs of Communities at 75 (June 2011), available at www.fcc.gov/infoneedsreport.

⁴⁵ *See id.*

⁴⁶ *Second Report and Order* at n.123.

⁴⁷ NAB Petition at 19.

⁴⁸ Declaration of Janene Drafts, Vice President, Station Manager/General Sales Manager, Fisher Broadcasting—Seattle TV, L.L.C., Licensee of KOMO-TV, Seattle, Washington, at Exhibit 1 ("Drafts Declaration"); Declaration of John Tamerlano, Senior Vice President/General Manager, Fisher Broadcasting—Portland TV, L.L.C., Licensee of KATU(TV), Portland, Oregon, at Exhibit 2 ("Tamerlano Declaration"); Declaration of Pamela Baratta, Vice President Sales Operations, Media General, Inc., Licensee of 18 Television Stations, at Exhibit 3 ("Baratta Declaration"); and Declaration of Steve Wexler, Executive Vice President, Journal Broadcast Group, Licensee of 14 Television Stations, at Exhibit 4 ("Wexler Declaration").

⁴⁹ *See* Drafts Declaration at 5-7; Tamerlano Declaration at 5-7; Wexler Declaration at 4-5. *See also* Baratta Declaration at 3-4 (stating that the additional steps would "add an estimated one hundred (100) hours of work per week across all Media General Stations during the sixteen weeks prior to an election" and require hiring "up to 16 additional temporary staff persons").

existing staff, rather than hire additional staff.”⁵⁰ Furthermore, three of the declarations indicate that 80 to 90 percent of the stations’ requests for political time are handled electronically,⁵¹ yet the time/cost estimates in these declarations include printing and manually scanning all documents.⁵² To the extent that a portion of a station’s political time requests are handled electronically, it should be relatively easy for the station to upload these documents to their online public files in a universally readable format without the need for printing and manual scanning.⁵³ Indeed, for stations such as these that already maintain a substantial portion of their political file information in electronic form, the transition to an online public file should result in significant cost savings on a going-forward basis.

12. We further note that the Commission is working to facilitate the broadcasters’ transition to the online database, thereby minimizing any potential costs. The Commission has developed a database to host the online public inspection file for television stations, and testing of the database is underway.⁵⁴ On July 17, 2012, the Commission will conduct a public demonstration of the database to inform broadcasters and others of the design and content of the online file, how stations will upload information to the file, how file sharing tools such as Dropbox and Box can be used for uploading, and other ways in which the Commission is working to facilitate access to the database.⁵⁵ The Commission also plans to schedule user testing and educational webinars shortly to ensure that the uploading of materials by broadcasters can be conducted smoothly and efficiently. The Commission will act promptly if any problems arising during user testing. Moreover, the Commission will provide telephonic support and post the answers to frequently asked questions online on an ongoing basis as needed to help broadcasters. Thus, broadcasters should have sufficient information about the database and time to come into compliance by the August 2, 2012 effective date. Accordingly, we conclude that NAB has failed to show irreparable harm.

B. NAB Is Unlikely to Prevail on the Merits

13. NAB has also failed to show that it would likely prevail on the merits. NAB contends that it is likely to succeed on the merits because imposing an online publication requirement for television broadcasters’ political files is arbitrary and capricious.⁵⁶ NAB asserts that disclosure of detailed rate information on the Internet is arbitrary and capricious because it raises serious antitrust concerns⁵⁷ and will distort competition by giving non-broadcast media asymmetrical access to information about local advertising rates.⁵⁸ We disagree. Congress has explicitly required broadcasters to make this information

⁵⁰ *Second Report and Order* at ¶ 31.

⁵¹ See Drafts Declaration at 5 (“For approximately 80 percent of the station’s requests, correspondence and negotiations are done electronically via email.”); Tamerlano Declaration at 4 (“For approximately 80 percent of the station’s requests, correspondence and negotiations are done electronically via email.”); Baratta Declaration at 3 (“Approximately ninety percent (90%) of all political requests are handled electronically.”). The Wexler Declaration simply states that requests for political time are handled both telephonically and electronically, without providing any percentage breakdown. See Wexler Declaration at 3.

⁵² See Drafts Declaration at 5-6; Tamerlano Declaration at 5-6; Baratta Declaration at 4.

⁵³ See *Second Report and Order* at ¶ 36.

⁵⁴ See Public Notice, *Demonstration of Online Public Inspection File Interface*, MM Docket Nos. 00-168 and 00-44, DA 12-1088, rel. July 6, 2012.

⁵⁵ See *id.*

⁵⁶ NAB Petition at 7.

⁵⁷ *Id.* at 7-10.

⁵⁸ *Id.* at 11-12.

publicly available.⁵⁹ In addition, as stated above, both broadcasters and their non-broadcast competitors already make this information publicly available “immediately absent unusual circumstances,”⁶⁰ and, where it is economically beneficial to do so, competitors, advertisers, and media buyers already review this information.⁶¹ Nevertheless, while detailed political rate information has been available to broadcasters and non-broadcast competitors for decades, we have seen no evidence, and NAB has offered none, that broadcasters have used this information anticompetitively to fix advertising rates or will be more likely to do so when this information is made available online.⁶² To the contrary, as PIPAC points out, “NAB’s real concern is apparently just the opposite — that increased disclosure will lead to greater competition and ad prices will go down as a result.”⁶³

14. Nor do we believe that increasing the ease of access to this already-available information by placing it online will result in significant market distortions by creating an “information asymmetry” that will give non-broadcast media the opportunity to shift advertising away from broadcast stations.⁶⁴ Notably, as the Commission observed in the *Second Report and Order*, “[w]hile the political file lists the lowest unit charge that a candidate receives, it does not reveal significant information about the commercial transaction that established that lowest unit charge. Various factors unknown to another commercial buyer — including that the advertiser establishing the lowest unit charge bought a higher volume of ads, committed to a long-term advertising relationship, or other variables — can justify denying the lowest unit charge rate to a different commercial buyer under different circumstances.”⁶⁵ The existence of many additional variables for any given lowest unit charge (such as lengths, classes of time, and time periods) further increase the difficulty for any potential purchaser to find a lowest unit charge that is comparable to the ad purchase it is seeking to make or to compare the lowest unit charges of competing stations.⁶⁶

15. NAB further asserts that the Commission, in the *Second Report and Order*, arbitrarily and capriciously rejected an alternative proposal that would largely avoid its concerns about potential anticompetitive effects.⁶⁷ Under that alternative proposal, stations would post online the total number of dollars spent by each candidate or political advertiser, aggregated on a weekly, every-other-day, or daily basis depending on the political season.⁶⁸ Stations would continue to make more detailed spot-by-spot information available in their paper files, but would not post this information in their online public files.⁶⁹ NAB argues that the Commission summarily rejected this alternative approach on the ground that it would “deprive the public of the benefits of immediate access to all the information in the political file,” but failed to explain why weekly or more frequent posting of aggregated data, supplemented by review of paper files as needed, is not sufficient to meet the goals of public disclosure.⁷⁰ We disagree that the

⁵⁹ See Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-55, 116 Stat. 81, § 504 (codified at 47 U.S.C. § 315(e)).

⁶⁰ *Second Report and Order* at ¶¶ 39, 55.

⁶¹ *Id.* at 39.

⁶² NAB concedes that “television stations will be compelled to publish the price information (and therefore there will be no ‘agreement’ in restraint of trade for purposes of Section 1 of the Sherman Act).” NAB Petition at 8 n.19.

⁶³ PIPAC Opposition at 6.

⁶⁴ See NAB Petition at 11-12.

⁶⁵ *Second Report and Order* at 39.

⁶⁶ *Id.* at n.123.

⁶⁷ NAB Petition at 13-15.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.*

⁷⁰ *Id.*

Commission acted arbitrarily and capriciously in rejecting the alternative proposal. The Commission discussed at length the importance of both improving public access to the public file, including the political file, and the longstanding immediacy requirement for political files.⁷¹ Requiring the public to view aggregated data online and separately review complete political rate data in the paper file by traveling to the station would not provide the efficiencies promoted by online disclosure. Moreover, as an additional basis for rejecting the alternative proposal, the Commission found that it would be significantly more burdensome on broadcasters because it would require both the maintenance of paper files with detailed spot-by-spot information and the creation and uploading of new aggregated data.⁷²

16. Additionally, NAB argues that it is likely to prevail on the merits because requiring online publication of television broadcasters' political files is inconsistent with BCRA.⁷³ NAB states that, while BCRA expressly required the FEC to make certain election-related records available online,⁷⁴ it adopted only a hard-copy inspection requirement for broadcasters' public files and did not expressly require online publication.⁷⁵ NAB asserts that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."⁷⁶ NAB argues that the Commission erroneously concluded in the *Second Report and Order* that "the language and structure of BCRA is either (i) ambiguous or (ii) indicates congressional approval of the Commission's then-two-year-old proposal to require Internet publication."⁷⁷ NAB also maintains that interpreting BCRA to allow online publication of political files raises First Amendment concerns.⁷⁸

17. The Commission in the *Second Report and Order* rejected this argument, finding that NAB overlooked relevant facts relating to the adoption of BCRA.⁷⁹ The Commission observed that, when Congress adopted the political file retention requirements of Section 315(e) of the Communications Act as part of BCRA,⁸⁰ it essentially codified the existing political file regulations as reflected in Section 73.1943 of the Commission's rules,⁸¹ and placed no new restriction on the Commission's discretion to implement the public availability requirement.⁸² The Commission found this particularly significant because, at the time of BCRA's passage, the Commission had tentatively concluded in this proceeding that stations should place their public inspection files — including their political files — online.⁸³ Although Congress was presumably aware that the Commission was actively considering online

⁷¹ See *Second Report and Order* at ¶¶ 10, 13, 55-58.

⁷² See *Second Report and Order* at n.177.

⁷³ NAB Petition at 15.

⁷⁴ *Id.*, citing BCRA § 501 (codified at 2 U.S.C. § 434(a)(11)(B)) and § 502(a) (codified at 2 U.S.C. § 438a(a)).

⁷⁵ *Id.*, citing BCRA § 504 (codified at 47 U.S.C. § 315(e)).

⁷⁶ *Id.* at 15-16, citing *Russello v. U.S.*, 464 U.S. 16, 23 (1983).

⁷⁷ *Id.* at 16.

⁷⁸ *Id.* at 17, citing *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("[C]ourts make every effort to construe statutes so as to avoid needless constitutional confrontations.").

⁷⁹ See *Second Report and Order* at ¶ 52.

⁸⁰ See 47 U.S.C. §§ 315(e)(1) (requiring a licensee to "maintain, and make available for public inspection, a complete record of a request to purchase broadcast time"), 315(e)(3) (providing that "[t]he information required under this subsection be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years.").

⁸¹ 47 C.F.R. § 73.1943.

⁸² *Second Report and Order* at ¶ 52.

⁸³ *Id.*

publication of the political file, it expressed no intent to prevent such updating of the rules and placed no restriction in BCRA on how the Commission may direct stations to make the political file “available for public inspection.”⁸⁴ The statute does not, as NAB suggests, specify hard-copy disclosure. Because the statute is silent on the question of how stations should make the political file “available for public inspection,” the Commission concluded that, as the expert agency required to implement the Communications Act, it has discretion in determining how to do so, provided that its decision “is based on a permissible construction of the statute.”⁸⁵ In light of the circumstances surrounding the adoption of BCRA, we are unpersuaded by NAB’s assertion that the Commission acted erroneously in concluding that the requirement of availability for public inspection allows the Commission to require that such records be made available for public inspection online.

18. We are likewise unpersuaded by NAB’s claim that interpreting BCRA to allow online publication of political files raises First Amendment concerns. As the Supreme Court stated in *Citizens United v. FEC*, “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages,” and, “[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.”⁸⁶ We believe that making already-public political file information accessible via the Internet will promote First Amendment values, not chill speech.⁸⁷ In this regard, as previously noted, broadcasters have been required to make their political files publicly available in paper for many years.⁸⁸

C. Harm to Others and Public Interest Considerations

19. NAB has also failed to show that the balance of hardships and the public interest favors a stay. NAB states that no party would be injured because a stay would leave the existing public file rules in effect pending NAB’s appeal and that any public interest benefit from immediate online access to detailed, current rate information is outweighed by the serious harms that would likely result from that requirement.⁸⁹ PIPAC asserts that a stay would harm its members and other organizations “because they would need to devote many more resources to gathering political advertising information directly from broadcast stations, rather than a single website.”⁹⁰ It also asserts that a stay would harm the public interest “because it will be difficult for members of the public as well as political candidates to access the information to which they are entitled by law.”⁹¹ We find that the public has a strong interest in implementation of the online public file rules as currently scheduled because these new rules will largely eliminate the substantial expense and inconvenience to the public of traveling to the station and paying for paper copies⁹² and greatly enhance transparency in political spending in particular. Moreover, as discussed above, NAB has failed to demonstrate that implementation of the online public file requirements would cause its members irreparable harm.

⁸⁴ *Id.*

⁸⁵ *Id.*, citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

⁸⁶ *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 916 (2010).

⁸⁷ See *Second Report and Order* at ¶ 80.

⁸⁸ *Id.* at 39.

⁸⁹ NAB Petition at 20.

⁹⁰ PIPAC Opposition at 13.

⁹¹ *Id.*

⁹² See *Second Report and Order* at ¶¶ 10, 13.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended,⁹³ and Section 1.43 of the Commission's Rules,⁹⁴ NAB's Petition for Stay IS DENIED.

21. This action is taken under delegated authority pursuant to Sections 0.61 and 0.283 of the Commission's Rules.⁹⁵

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau

⁹³ 47 U.S.C. §§ 151, 154(i) and (j).

⁹⁴ 47 C.F.R. § 1.43.

⁹⁵ 47 C.F.R. §§ 0.61, 0.283.