Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of
Applications for Renewal of Station License of

WBBM-TV, Chicago, IL	)	BRCT20050801AFV
WMAQ-TV, Chicago, IL	)	BRCT20050801CEL
WLS-TV, Chicago, IL	)	BRCT20050801CUZ
WGN-TV, Chicago, IL	)	BRCT20050801BXY
WCIU-TV, Chicago, IL	)	BRCT20050801ADO
WFLD-TV, Chicago, IL	)	BRCT20050729DSN
WCPX-TV, Chicago, IL	)	BRTTA20050729AGG
WSNS-TV, Chicago, IL	)	BRCT20050801CFO
WPWR-TV, Gary, IN	)	BRCT20050401AQB
WTMJ-TV, Milwaukee, WI	)	BRCT20050729CYF
WITI-TV, Milwaukee, WI	)	BRCT20050729DRL
WISN-TV, Milwaukee, WI	)	BRCT20050801CEF
WVTV, Milwaukee, WI	)	BRCT20050801BDQ
WCGV-TV, Milwaukee, WI	)	BRCT20050801BBZ
WVCY-TV, Milwaukee, WI	)	BRCT20050801AGS
WMLW-CA, Milwaukee, WI	)	BRTTA20050801ADM
WJJA-TV, Racine, WI	)	BRCT20050725ABE
WWRS-TV, Mayville, WI	)	BRCT20050729DNH
WPXE-TV, Kenosha, WI	)	BRCT20050729AIH
WDJT-TV, Milwaukee, WI	)	BRCT20050801ADL

TO: Chief, Video Division, Media Bureau

REPLY TO BROADCASTERS' OPPOSITION

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REPLY TO BROADCASTERS' OPPOSITION

Chicago Media Action ("CMA") and Milwaukee Public Interest Media Coalition ("MPIMC") respectfully submit this Reply to the Broadcasters' Opposition to CMA's and MPIMC's (collectively "Petitioners") *Petition for Reconsideration* of the Media Bureau's decision to grant the license renewals of the above captioned stations. Broadcasters mainly argue Petitioners have not provided sufficient reason or relevant evidence to warrant a reconsideration of the Staff's decision. Broadcasters also argue that the Staff did not err as a matter of law since the decision is supported by legal precedent. As is described more fully below, the new evidence provides more than the required justification for a reconsideration of the Staff's decision, which did not take into account appropriate legal standards. Thus, Petitioners request the Staff to reconsider its decision in light of the new NewsLab Study ("Study") and based on the public's interest in receiving programming that meets their needs, rather than a preconceived notion that a broadcaster's First Amendment right can so easily trump the public interest.

I. THE NEWSLAB STUDY IS NEW EVIDENCE SUPPORTING A RECONSIDERATION OF THE STAFF'S DECISION.

Reconsideration of the Staff's decision is appropriate when a petitioner provides additional facts not known or not existing until after the petitioner's last opportunity to raise such evidence. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 CFR §1.106(c). In this case, Petitioners have provided the Commission with a new study that demonstrates the lack of local election coverage. However, Broadcasters argue that the Study could have been conducted and/or submitted prior to the Staff's decision, the Study is flawed and not relevant since it does not cover the relevant license period, and the Study fails to meet the *prima facie* standard for designating the license applications

for hearing.

Despite Broadcasters' assertions, the Study could not have been submitted prior to the Petitioners last opportunity to present the evidence. The Study was not commissioned by Petitioners, and Petitioners were not in a position to dictate the timing of the release of the Study. Further, the Study was released on June 12, 2007 - just one day prior to the Staff's June 13, 2007 decision. It is silly to say that Petitioners should have raised the Study as evidence to the Commission on the very same day that the Study was released; it would have been unethical for Petitioners to present the Study without taking some time or effort to review the Study to assess its importance and relevance.

Broadcasters also argue the Study is not relevant since it is based on programming outside of the relevant license period and not material to this issue. Broadcasters have consistently argued that they are entitled to editorial discretion and have exercised their editorial discretion in good faith. The Study's relevance goes directly to the issue of whether Broadcasters are exercising their editorial discretion in good faith and corroborates the initial findings that Broadcasters have failed to serve their communities by a lack of relevant, local election coverage. Both studies considered together create a qualitative and comprehensive analysis of the Broadcasters' efforts to fulfill the public interest.

Moreover, regardless of the fact that the Study reviews programming outside of the license period, the Staff is not foreclosed from considering evidence which furthers the public interest. As the D.C. Circuit has held,

> [r]egardless of the formal status of a party, or the technical merits of a particular petition, the FCC "should not close its eyes to the public interest factors" raised by material in its files. We have noted that, as a general matter, the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They "should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent."

Retail Store Employees Union, Local 880 v. FCC, 436 F.2d 248, 254 (D.C. Cir. 1970) (internal citations omitted). Thus, including the Study as further evidence of the Broadcasters failure to meet the needs of their communities is well within the Staff's discretion.

Additionally, Broadcasters point to a series of alleged flaws with respect to the Study's methodology and conclusions. However, this is not the appropriate forum for the Staff to investigate the methodology or conclusions of the Study. Rather, the Staff "must look into the possible existence of a fire only when it is shown a good deal of smoke" not "when it is shown the existence of a fire." *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). In other words, the Staff is prohibited from considering a merits standard to the Study, and at this phase of the challenge, Petitioners are not required to "fully establish...what it is the very purpose of the hearing to inquire into...." *Id.*

Finally, Broadcasters claim Petitioners have failed to make out a *prima facie* case of the Broadcaster' failure to provide programming responsive to its viewers' needs. The Study more than adequately provides the *prima facie* evidence required to designate the applications for hearing. Petitioners' burden is to provide evidence of "prima facie sufficiency." *Id.* at 397. As a result, the results of the Study must be presumed to be true and the evidence cannot be judged based on whether it can make a "fully persuasive case, but rather what a reasonable factfinder *might view* as a persuasive case." *Id.* (emphasis in original). On its face, the Study provides clear, reasonable, and persuasive evidence of the Broadcasters' failure to provide local election coverage. Thus, at a minimum, the Staff is required to designate the license applications for hearing to more fully determine whether the Broadcasters have, in fact, met the public interest.

II. IN REVIEWING THE NEW FACTS, THE STAFF MUST CONSIDER THE VIEWERS' RIGHT TO RECEIVE PROGRAMMING THAT SERVES THEIR INTERESTS.

Reconsideration is also appropriate when consideration of the facts is required in the public interest. *See* 47 CFR §1.106(c). Here, reconsideration is especially in the public interest in light of the fact that the Staff's decision did not consider the rights of the viewers. However, Broadcasters claim Petitioners are asking the Commission to ignore legal precedent by ignoring the editorial discretion of the Broadcasters and that Petitioners are advocating for a new standard to determine if the *prima facie* showing has been made.

As discussed in detail in the *Petition for Reconsideration*, the Staff failed to consider the rights of the viewers in granting the license renewal applications. Nonetheless, Broadcasters claim the Staff's decision appropriately concluded that Petitioners failed to demonstrate that "television programming in Chicago or Milwaukee has generally been unresponsive." *Dismissal Letter* at 3. However, the Staff's conclusion was based solely on the premise that there was very little the Staff could do because it had to defer to the Broadcasters' discretion. Had the Staff viewed the evidence in light of the public's interest, it would have reached a different conclusion; nowhere in the Staff's decision is there mention or even acknowledgment that viewers have a right to expect programming responsive to their needs.

As more fully discussed in the *Petition for Reconsideration*, a basic value afforded to citizens under the First Amendment is the access to speech concerning governmental elections. Thus, an increase of the Broadcasters' news programming related to local elections would not result in the restriction of the Broadcasters' First Amendment rights. Rather it would enhance the First Amendment rights of the viewers, allowing the viewers to make informed decisions in local politics. The Staff

cannot claim an infringement on the Broadcasters' rights to freedom of speech, yet ignore the relevance of those same rights to the citizens that the licences are intended to serve.

The Broadcasters also argue that Petitioners are advocating a new *prima facie* standard by limiting the showing of a *prima facie* case to the Broadcasters failure to air local election programming and by advocating a return to a quantitative standard. Broadcasters urge the Staff to consider the Broadcasters overall programming service, rather than their efforts on a single issue. However, a necessary and critical component of that overall effort is local election news programming, which in turn, is a critical component of serving the public interest. The findings of the Study show that the Broadcasters failed in their duty to serve the public interest by providing a minimal amount of local election news programming.

Moreover, although there is no longer a quantitative standard, a licensee still has an obligation to address local and community issues. *Deregulation of Radio*, 84 FCC2d 968, 982 (1981); *recon. granted in part and denied in part*, 87 FCC2d 797, *aff'd in part and remanded in part sub nom., Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). And although the licensee is afforded discretion as to how and whether to address certain issues, the licensee is not entitled to a renewal of its license if it has abused that discretion. *Deregulation of Television*, 98 FCC2d 1075, 1094-1095. It is that very discretion that the Study addresses.

The Broadcasters would like to evade the issue of minimal local election coverage by pointing to their overall programming and claiming that the minimal amount of local election news programming is sufficient to meet their public interest duty. However, simply providing some programming does not lead to the conclusion that the Broadcasters have met their duty and therefore deserve an automatic renewal of their broadcast license. *See In the Matter of Revision of Programming and*

Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 104 FCC2d 357, 359 (1986) ("[A]n allegation that a licensee has failed to address an issue of particular relevance to a significant segment of the community, may be raised even where some issue-responsive programming has been provided."). The Study provides evidence that despite some local election coverage, that coverage was so minimal that the Broadcasters failed in their duty to provide programming that is in the public interest.

III. CONCLUSION

The *Petition for Reconsideration* is appropriately before the Staff August 6, 2007since the Study constitutes new evidence, raising substantial and material questions of fact as to whether the Broadcasters have fulfilled their duty to serve the public interest during the license period. Additionally, review of the Study, in the context of the viewers' right to receive programming that meets their need, is in the public interest. Accordingly, the Staff must grant the *Petition for Reconsideration*, designate the above-captioned applications for hearing, and grant all such other relief as may be just and proper.

Respectfully submitted,

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August 6, 2007

Certificate of Service

I, Parul Desai, hereby certify that on this 6th day of August 2007, a copy of the foregoing *Reply To Broadcasters' Opposition*, was served by first-class mail, postage prepaid, upon the following:

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