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COMMENTS OF ITIF

Before the

Federal Communications Commission

Washington, D.C.

In the Matter of:	)	
Empowering Local Broadcast TV Stations to Meet Their Public Interest Obligations: Exploring Market Dynamics Between National Programmers and Their Affiliates	)	MB Docket No. 25-322

December 10, 2025

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INTRODUCTION AND SUMMARY

The Information Technology and Innovation Foundation appreciates the opportunity to comment on the Public Notice regarding Empowering Local Broadcast TV Stations to Meet Their Public Interest Obligations.[1] The Commission is right to seek to remove regulatory impediments that hinder licensees from complying with their licenses and serving consumers, but the Public Notice rests on flawed premises that lead it to propose unwise and ineffective policy.

THE PUBLIC NOTICE MISSTATES THE LAW

The Public Notice's premise of an open-ended public interest obligation on broadcast licensees is contrary to the text of the Communications Act, the First Amendment, and the nondelegation doctrine.

Section 307 of the Communications Act Imposes Public Interest Obligations on the Commission, Not on Licensees

The Public Notice asserts without citation that "broadcasters are required by both the Communications Act and the terms of their FCC-issued licenses to operate in the public interest."[2] It goes on to cite section 307 of the Communications Act for the proposition that "The obligation to operate a broadcast television station in

[1] Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. For more, see: "About ITIF: A Champion for Innovation," https://itif.org/about; Public Notice, Empowering Local Broadcast TV Stations to Meet Their Public Interest Obligations: Exploring Market Dynamics Between National Programmers and Their Affiliates, MB Docket No. 25-322, FCC, November 19, 2025, https://docs.fcc.gov/public/attachments/DA-25-961A1.pdf.

[2] PN at 1.

the public interest is fundamental to holding Commission licenses."[3] But each of the three references to the "public interest" in that section have the Commission as the object of the obligation, not the licensee. Specifically, that statute states that "The Commission, if public convenience, interest, or necessity will be served thereby… shall grant to any applicant therefor a station license."[4] The plain text of that provision indicates the thing that must serve the public interest is the Commission's decision to grant a license, not anything the licensee does.

The fact that the statute places the obligation to act in the public interest on the Commission rather than the party to which it grants a license makes a difference both the content of the obligation and the time at which it occurs. What it means for the *Commission* to find that its grant of a license would serve the public interest is substantively different from what it would mean for the Commission to impose a public interest obligation on the *licensee*. The Commission and the licensee are differently situated and thus have different powers and scope for exercising them. The Commission can set technical limitations and the essential terms of the license to prevent harmful interference. The licensee can decide what content to broadcast (or not broadcast) within those technical limits. Therefore, Congress's decision to impose the public interest obligation on the Commission reflects its determination that Commission decisions be subject to a public interest obligation, not the different decisions unique to a licensee.

Section 307 envisions the public interest evaluation taking place at the time the license is issued, rather than being an ongoing obligation. The license may not be issued until the obligatory public interest evaluation is complete, and an applicant is not a licensee until the FCC issues it a license. It would be nonsensical for the statute to impose an obligation on a licensee that doesn't exist yet at the time the obligation arises.

The Public Notice then invokes "FCC precedent" to support its efforts to ensure licensees are "meeting their public interest obligations."[5] But the fact that the FCC has traditionally applied the public interest standard as an obligation of licensees, does not change the unambiguous terms of the statute. Indeed, even if the statute could be considered ambiguous, in a post-*Chevron* world, the FCC can no longer expect deference to rescue its nontextual swapping of the object of the Act's public interest obligation.[6]

The Public Notice Relies on *NBC v. United States* and *Red Lion v. FCC* Which Were Wrongly Decided and Unlikely to Represent the Current State of First Amendment Law

Insofar as the Commission uses its licensing authority to impose content-based conditions on a license, its actions are unconstitutional. While the Supreme Court allowed the Commission to bypass First Amendment scrutiny in the past, the underlying logic of those cases is now known to be false, and real-world considerations make their holdings wrong even under the old logic.

The key premise of *Red Lion v. FCC*, and its predecessor *NBC v. United States*, is the scarcity rationale. That rationale may be summarized as follows:

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[3] Ibid.

[4] Communications Act of 1934 Section 307(a) (47 U.S.C. 307(a)).

[5] PN at 1.

[6] *Loper Bright v. Raimondo,* 603 U.S. 369 (2024), https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

1. Spectrum is scarce.
2. Therefore, without a coordination mechanism, interference will destroy spectrum's usefulness.
3. The only viable coordination mechanism is content-based government regulation.

This rationale is flawed because the conclusion (number 3) does not follow from the premises.[7] There are other viable mechanisms to manage interference in the face of spectrum scarcity. Allowing the market, rather than FCC beauty contests, to assign spectrum rights is one such example. The existence of alternative assignment methods that do not require the government to make policy decisions about the content transmitted via radio waves breaks the logic of *NBC* and *Red Lion*.

Moreover, those cases were decided in reliance on the mid-twentieth-century media landscape, in which a few broadcast stations were the main source of news and entertainment for the entire country. The current media landscape could not be more different. The Internet has brought an explosion of new media, including even more local news, such that the necessity of special rules for broadcasting requires implausible definitions of the marketplace.

While the Supreme Court has not yet overruled the scarcity-rationale cases (*Red Lion* and *NBC*), those cases satisfy the factors for departure from *stare decisis*.[8]

First, for the reasons described above, the scarcity-rationale cases are egregiously wrong. They are contradicted by both theoretical and practical realities.

Second, the scarcity-rationale cases are poorly reasoned. As described above, the core of the scarcity rationale is an invalid syllogism. Ronald Coase exploded its logic at length in a 1959 article which formed part of the basis for his Nobel Prize. More recently, Justice Thomas has identified that the cases on which the Public Notice relies as doctrinally incoherent.[9]

Third, the policies enabled by scarcity-rationale cases are unworkable, as evidenced by the fact that the FCC has repealed the very policy the Court used to the scarcity rationale to justify in *Red Lion*.[10] Other content-based rules, such as the news-distortion policy or even the statutory equal-time rule, have fallen into disuse, the very essence of unworkability.

Fourth, far from disrupting other areas of law, overruling the scarcity-rationale cases would repair an aberration in First Amendment law. Content based rules face strict scrutiny for every type of scarce media except that using broadcast spectrum; therefore, overruling the scarcity-rationale cases would bring this discordant area into harmony with the rest of First Amendment jurisprudence.[11]

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[7] Joe Kane, "Expression Over Radio Waves Is Not Exempt from the First Amendment," *Federalist Society*, February 11, 2025, https://fedsoc.org/commentary/fedsoc-blog/expression-over-radio-waves-is-not-exempt-from-the-first-amendment.

[8] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 2228, 2265 (2022).

[9] *FCC v. Fox Television Stations, Inc.*, 556 US 502, 530 (Justice Thomas concurring).

[10] [[repeal of Fairness Doctrine]]

[11] *Miami Herald Publishing Co. v. Tornillo* is 418 U.S. 241 (1974).

Fifth, overruling the scarcity-rationale cases would not upend concrete reliance interests. The robust invocation of the scarcity rationale for FCC regulation has long since fallen into disuse. Indeed, the current FCC Chairman has lamented this fact and cast his policy agenda as reinvigorating this defunct area of law.[12] This effort to return to content-based regulation has been met with surprise precisely because the public and regulated entities were not relying on the policy framework of the scarcity-rationale cases.

In sum, the Public Notice's statement of the legal authority for its undertaking is based on flawed precedents that are no longer likely to represent the state of First Amendment law, and the Commission should back away from, not double down on, it.

The Conception of the "Public Interest" Assumed by the Public Notice Lacks an Intelligible Principle

Independently and in the alternative, the Public Notice states the public interest standard in a vague and open-ended way without reference to statutory limitations such that its application would likely exceed the authority Congress delegated to the Commission.[13]

While the Supreme Court has upheld Congressional delegations that use "public interest" language, it has done so only by narrowing the meaning of that term in accordance with statutory boundaries. The Public Notice's invocation of "the public interest" adheres to no such boundaries. It assumes broadcasters' public interest obligation and purports to seek ways of enabling them to meet that obligation without ever defining what that obligation even by Commission standards, much less by statutory ones.

The Commission cannot use non-statutory policy judgments to determine whether a broadcaster is complying with any hypothetical public interest obligation without exercising more discretion than Congress has delegated to the Commission.

THE COMMISSION SHOULD NOT PUT A THUMB ON THE SCALE IN PROGRAMMING NEGOTIATIONS

Independently of flawed legal foundations of the Public Notice, much of the enterprise it envisions would be harmful to consumers.

The Public Notice seeks ways to "restore the balance" in negotiated affiliation agreements. To the extent that a perceived imbalance occurs because of market conditions and technological developments, such as the rise of streaming platforms, the Commission should not seek to alter those market dynamics. The fact that parties using older technology do not like the deal they get in the face of new technologies is not a policy problem.

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[12] See e.g., Statement of Chairman Brendan Carr, November 2025 Open Commission Meeting Press Conference, November 20, 2025, https://www.youtube.com/watch?v=A7SBDssWCSc ("If you go back the last ten or twenty years, the FCC has effectively, in my view, said, you know, broadcast potentially should be treated by the agency the same as cable, the same as podcasts, the same as the person on the street, and, again, there's no public interests standard there…And so we're trying to reinvigorate the FCC's enforcement of the public interest…Some of this may be reaching back a little bit, but I think it's important to reinvigorate.")

[13] Joe Kane, "The FCC Has No Mandate to Police Speech in the 'Public Interest'," *Broadband Breakfast*, September 19, 2025, https://broadbandbreakfast.com/joe-kane-the-fcc-has-no-mandate-to-police-speech-in-the-public-interest/.

Rather, the shift away from the older technology is the result of changes in consumer choices, and the Commission would be attempting to overrule those choices by regulating agreements so that the older technologies get a better deal. Insofar as the Commission is enforcing a public interest obligation on licensees, that obligation runs to the public, not to the interests of the Commission, the licensee, or any other private subset of the public.

To cast a licensee's dislike of the content deals it negotiates as a violation of that licensee's hypothetical public interest obligation would be to extend that obligation to the networks and programmers. Such a move is even more of a stretch than the invention of content-based obligations for the Commission licensee itself. To the extent that any such obligation exists, it cannot be a defense to noncompliance that the licensee didn't like the financial terms of contracts necessary to fulfill it. For example, a licensee should be free to refuse to broadcast any content it doesn't want to, but if it makes a contract that requires it to broadcast that content (or pay damages if it does not), the Commission should not impair it.

The Commission should look to ways its own rules may overregulate broadcast, especially relative to streaming services, and deregulate to put all parties on a level playing field.[14] Rather than trying to fix the problem of outdated regulations with additional regulatory kludges, the Commission should get out of the way and let the market work.

CONCLUSION

The Commission should let the free market, driven by consumer choices, drive broadcasting decisions. The Commission does not have the legal authority to regulate that content, and, even if it did, consumers are better served by allowing all parties to freely negotiate rather than putting a thumb on the scale for or against any of them.

Thank you for your consideration.

Joe Kane
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[14] Joe Kane, "Pro/Con: Should Congress Regulate Streaming?" in The Future of Streaming, edited by Alan Greenblatt, CQ Researcher (CQ Press: 2023), https://cqpress.sagepub.com/cqresearcher/report/future-of-streaming-cqresrre20231110#_.