ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

January 6, 2026

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: 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, Public Notice (November 19, 2025)

Dear Ms. Dortch,

In reply comments in the above-referenced proceeding, the Center for American Rights (CAR) objects to the arguments in the Information Technology and Innovation Foundation's (ITIF's) comments that scarcity-rationale cases are unlikely to represent the current state of First Amendment law and that the news-distortion policy is an instance that would fail under properly applied judicial review.[1] CAR's contentions, however, rely on mistaken claims about what the FCC may do under current Supreme Court precedent and on misstatements of what the Supreme Court did in the *Fox* cases.

First, CAR claims that, regardless of the merits of the scarcity-rationale cases, those cases remain binding on the Commission until they are formally overturned.[2] But those cases merely permitted the Commission to act; the Commission was not *obligated* to act. Even the most stringent adherence to those cases would not result in an obligation for the Commission to take content-based regulatory action. Indeed, the Commission long ago repealed the very policy the Supreme Court upheld in *Red Lion*.[3] On CAR's reading, the FCC would be obligated to maintain every policy that survives judicial review. That reading is incorrect. The Commission need not operate at the outer limit of what old precedents permit, and it should not do so when

[1] Comments of ITIF, Empowering Local Broadcast TV Stations to Meet Their Public Interest Obligations: Exploring Market Dynamics Between National Programmers and Their Affiliates, filed December 10, 2025, https://www.fcc.gov/ecfs/document/121093281155/1; Reply Comments of CAR at 7, Empowering Local Broadcast TV Stations to Meet Their Public Interest Obligations: Exploring Market Dynamics Between National Programmers and Their Affiliates, filed December 23, 2025, https://www.fcc.gov/ecfs/document/122391976989/1.
[2] Reply Comments of CAR at 6-7.
[3] Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987).

the merits of those precedents are grievously wrong and ripe to be overturned. The Commission should follow the Constitution of its own volition, not violate the First Amendment until a court tells it to stop.

Second, CAR claims that the Supreme Court would not strike down the scarcity-rationale cases because it did not do so in *Fox I*.[4] While CAR uses this fact to brush off Justice Thomas's detailed analysis of the incoherent and outdated nature of those cases, the majority opinion, which Justice Thomas joined, explained that it did not reach the First Amendment issue because the lower court did not do so.[5] When the case returned to the Supreme Court, the FCC lost on vagueness grounds and, because that resolved the case, the Court did not opine on the constitutionality of content-based regulation of broadcast media under the First Amendment.[6] The fact that the Supreme Court procedurally did not need to reach the First Amendment issue in *Fox I* or *II* says nothing about the merits of *NBC*, *Red Lion*, or *Pacifica*, and concurring opinions cast doubt on whether the Court would uphold them were the issue squarely presented. Notably, CAR makes no arguments for the substance of the scarcity-rationale cases, and its filing does not dispute ITIF's analysis of the *stare decisis* factors that weigh in favor of overturning them.[7]

Finally, CAR encourages the Commission to arbitrarily and capriciously reject arguments against the news-distortion policy.[8] The Commission should decline that invitation as inconsistent with the Administrative Procedure Act.

The record in this proceeding shows why the Commission should rein in, not expand, its regulatory scope with respect to broadcast spectrum. The Commission should follow the statute, the Constitution, and good policy sense by conforming its public interest policies to the text of the Communications Act and the First Amendment.

Sincerely,

Joe Kane
Director of Broadband and Spectrum Policy
Information Technology and Innovation Foundation

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[4] Reply Comments of CAR at 7.
[5] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532–35 (2009) (Thomas, J., concurring)
[6] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 249–50 (2012).
[7] ITIF Comments at 4-5.
[8] CAR reply comments at 8.