700 K Street NW Suite 600
Washington, DC 20001

REPLY COMMENTS OF ITIF

to the

Federal Communications Commission

Washington, D.C.

In the Matter of: Petition by Disney's ABC Asking The FCC To Declare That *The View* Qualifies as a Bona Fide News Interview Program and Thus Is Exempt From the Statutory Equal Opportunities Requirements	))))))))	MB Docket No. 26-124

July 6, 2026

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INTRODUCTION AND SUMMARY

The Information Technology and Innovation Foundation appreciates the opportunity to reply to comments on ABC's petition regarding the equal opportunities requirement.[1] In addition to ITIF's initial comments, the record contains strong arguments against the constitutionality of the scarcity rationale.[2] The few comments supporting the scarcity-rationale cases on their merits, rather than merely as undermined precedent, suffer from misapprehensions about the reasoning of those cases, the nature of spectrum, and the category of appropriate First Amendment analysis.

SCARCITY AND THE SCARCITY RATIONALE ARE DISTINCT CONCEPTS

Public Knowledge (PK) brushes away challenges to the scarcity-rationale cases because there is an "ongoing limitation on who may and may not broadcast."[3] It goes on to suggest that normal First Amendment scrutiny can apply only "if scarcity is truly dead," in which case the Commission should revoke all broadcast licenses.[4] The National Republican Senatorial Committee (NRSC) and National Republican Congressional Committee (NRCC) likewise dismiss questions about the validity of the scarcity-rationale cases by claiming "the

[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://www.itif.org; Public Notice, FCC's Media Bureau Seeks Comment on Petition by Disney's ABC Asking The FCC To Declare That the View Qualifies as a Bona Fide News Interview Program and Thus Is Exempt From the Statutory Equal Opportunities Requirements, MB Docket No. 26-124, FCC, May 22, 2026, https://docs.fcc.gov/public/attachments/DA-26-517A1.pdf ("Public Notice"); Communications Act of 1934, Section 315(a) (47 U.S.C. § 315(a)).

[2] Comments of ITIF, filed June 22, 2026, https://www.fcc.gov/ecfs/document/26109837550/1; *See e.g.* Comments of Foundation for Individual Rights and Expression, filed June 22, 2026, https://www.fcc.gov/ecfs/document/26109857257/1; Comments of TechFreedom, field June 22, 2026, https://www.fcc.gov/ecfs/document/26109858805/1.

[3] Comments of Public Knowledge, filed June 22, 2026, 42, https://www.fcc.gov/ecfs/document/26109840351/1.

[4] *Ibid.*

broadcast spectrum is just as limited today as it was in the 1930s," and characterizing arguments for overruling those cases as an "erasure-of-scarcity argument."[5]

These arguments make the mistake of conflating scarcity itself with the scarcity rationale. There is no dispute that spectrum is scarce in the economic sense of being limited in supply. The scarcity-rationale cases correctly invoke this definition of scarcity. For example, the *NBC* Court described spectrum this way: "its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody." And *Red Lion*'s concern about spectrum's scarcity was about the number of potential voices exceeding the capacity of spectrum.[6] The issue is not whether spectrum is scarce but whether spectrum's scarcity removes regulation of speech via spectrum from normal First Amendment scrutiny. It does not.

Though others may equivocate between the economic and colloquial meanings of scarcity, *NBC* and *Red Lion* use the economic one, and they are right to do so.[7] Their mistake was to think the content-based regulation, rather than the market process or some other content-neutral method, had to reconcile mutually exclusive plans to use the same scarce resource, not whether the resource was scarce. PK and the NRSC/NRCC thus make the same unwarranted leap in logic from the fact of scarcity to the necessity and constitutionality of specific government regulations.

SPECTRUM'S SCARCITY MAKES IT LIKE OTHER MEDIA, NOT UNIQUE

A classic definition of economics is that it is the study of the use of scarce resources which have alternative uses.[8] In this way, the scarcity of spectrum places it in the heartland of normal economic analysis, which routinely allocates other communications media without references to the content of communications, rather than in some special category in which different rules must apply.

PK disagrees, rejecting the *Miami Herald v. Tornillo* standard as "irrelevant" because there must be some "limitation on who may and may not broadcast."[9] But this claim is merely a restatement of the fact of scarcity, it does nothing to defend the scarcity rationale, which requires that content-based regulation be the *only* way to resolve that limitation.[10] Moreover, the fact of scarcity existed in *Tornillo*: There was a limitation on who may and may not possess and use the resources necessary to produce a newspaper. This limitation was simply resolved by the market for those resources. The Miami Herald possessed the right to use certain printing presses, paper, and ink in the same way that ABC possesses the right to use certain radio frequencies.

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[5] Comments of NRSC/NRCC, filed June 22, 2026, 11, https://www.fcc.gov/ecfs/document/26109845075/1.

[6] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969).

[7] And the scarcity rationale makes even less sense today if one takes the colloquial meaning. *See*, Comments of ITIF, filed June 22, 2026, 5, https://www.fcc.gov/ecfs/document/26109837550/1.

[8] Thomas Sowell, *Basic Economics: A Common Sense Guide to the Economy*, 5th ed. (New York: Basic Books, 2015), 2 (paraphrasing Lionel Robbins, *An Essay on the Nature and Significance of Economic Science* (London: Macmillan and Co., 1932), 15.).

[9] PK comments at 42.

[10] ITIF comments at 3-4.

If the government had instead assumed control of those resources and, on that basis, claimed the ability to control the content of the newspaper, that would make the First Amendment violation worse, not better.

Similarly, NRSC/NRCC claim,

> While an individual who wishes to disseminate his views publicly can freely create, and speak through, a new social media platform or a new newspaper without meaningfully impinging upon the rights of others to do likewise, the same is simply not true in the broadcasting context. In any geographic area, there are a finite number of wavelengths suitable for use by broadcasters. Unlike other media, broadcasting is subject to an inherent physical limitation.[11]

This view ascribes a uniqueness to spectrum it does not possess. Social media platforms and newspapers are scarce in the same way spectrum is. The resources used to produce one newspaper or website cannot be used to produce a different newspaper or website. One person's use of a computer or printing press *does* directly impinge on the ability of others to do so. Two people trying to print two newspapers using the same finite resources will quickly learn of their inherent physical limitations. Scarcity, or "finiteness," is just as much a characteristic of these resources as it is for spectrum. The fact that spectrum is subject to physical limitations makes it like other media, not unique.

The NRSC/NRCC confuse cause and effect: mutually exclusive uses of other communications media seem trivially resolved because the market process is very good at rationing, incentivizing economization, and increasing productivity compared to government regulation.[12] Broadcast spectrum allocation seems more fraught and political because government regulation, including content-based rules like the equal opportunities requirement, has made it that way, not because of some inherent quality of spectrum.

Indeed, we have seen that spectrum allocation by different means is possible. The Commission has allocated radio usage rights through spectrum auctions, lotteries, and unlicensed allocations. Spectrum allocated in these ways has all the same physical limitations as broadcast spectrum, yet it has not required content-based regulation to manage mutually exclusive uses of the same finite resource. So, contrary to the claim that the equal opportunities requirement "encapsulates a commonsense principle rooted in the government's natural role in stewarding a limited physical good," it is that requirement that is unnatural.[13]

In sum, spectrum's scarcity makes it like other resources allocated without government regulation of their use. One final example: the ink pen used by one person cannot simultaneously be used by another. So, how should we decide who gets the pen? The scarcity rationale would allow the government to say, "it depends on what each will write with it." But that answer is clearly wrong, unconstitutional, and unnecessary. In the

[11] NRSC/NRCC comments at 9.

[12] *See generally*, Friedrich A. Hayek, "The Use of Knowledge in Society," *American Economic Review* 35, no. 4 (September 1945): 519–530, https://statisticaleconomics.org/wp-content/uploads/2013/03/the_use_of_knowledge_in_society_-_hayek.pdf.

[13] NRSC/NRCC comments at 9.

American economy, we use the market process to allocate pens successfully. We can do, and have done, the same with spectrum. Content-based regulation is not required, and it is, therefore, unconstitutional.[14]

STATE ACTION DOES NOT IMMUNIZE CONTENT REGULATION; IT INVITES FIRST AMENDMENT SCRUTINY

PK lists certain "uniquely intrusive" aspects of spectrum management and claims that because the FCC can regulate these, it must also be able to regulate speech.[15] But the "intrusions" PK enumerates are technical rules or radio operation, that is, conduct.[16] While the First Amendment does not protect all conduct; it does protect the freedom of speech. In fact, it is precisely the technical, content-neutral aspects of radio transmissions that the FCC can constitutionally set to serve the public interest of interference management, and it is the expansion of FCC regulations beyond those boundaries that creates First-Amendment and separation-of-powers injuries.[17]

PK and the NRSC/NRCC characterize spectrum licenses as government-granted monopolies and suggest this characterization necessarily justifies content-based regulation.[18] PK writes, "Broadcasters cannot have it both ways, claiming the government right to suppress the speech of others because spectrum scarcity requires managed licensing while claiming unbridled freedom from regulation for themselves."[19] This claim is essentially that because a mechanism has been successful at managing interference, it is therefore unnecessary and illegitimate for it to continue. This reasoning is obviously wrong for any other scarce resource. All rights to use scarce resources exclude some other alternatives, but for no other medium does PK's proposal seem plausible. Imagine once more its application to the limited resource of ink pens: "A pen owner cannot both claim a monopoly over her pen *and* an unbridled freedom in what she writes with it." On the contrary, freedom of speech by means of a communications medium to which one possesses the usage rights is exactly what the First Amendment guarantees.

NRSC/NRCC make a similar argument that, even without the scarcity rationale, spectrum licensing is a program by which "government has conferred a right to exclusive use, which carries with it certain obligations."[20] And it later suggests content-based regulation must be constitutional since "it is beyond peradventure that broadcast licensees like ABC continue to receive valuable benefits from a federal licensing scheme that parcels out a limited public resource without charge."[21] In *Matal v. Tam*, however, it was beyond

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[14] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[15] PK comments at 42-43.

[16] *Ibid.*

[17] 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/.

[18] PK comments at 43 ("Licenses are government monopolies, uniquely protected by law from even non-interfering uses."); NRSC/NRCC comments at 13 ("If the show wishes to continue to enjoy the benefits of a state-conferred monopoly over a portion of a public resource, without an obligation to provide equal access opportunities to all candidates for public office, it must engage in the business of bona fide news interviews—not partisan activity.").

[19] PK comments at 43.

[20] NRSC/NRCC at 10.

[21] *Ibid.* at 11.

peradventure that Tam would receive benefits from the government-grant of a trademark registration. The Court did not find that fact allowed the government to impose content-based regulations as a quid pro quo for that benefit.[22] The fact that broadcasters did not initially pay for their spectrum licenses is immaterial to the constitutional analysis. It is not ABC's fault that the government allocated these licenses without an auction, nor were the licenses issued pursuant to constitutional conditions under the spending clause.[23] The government cannot get out of First Amendment scrutiny by not charging money for the right to communicate via a certain medium. The government provided free access to the land on which Clyde Reed sought to put his signs, but that didn't save content-based regulations of those signs from strict scrutiny.[24]

Furthermore, as a factual matter, broadcasters do pay annual regulatory fees to the FCC because they hold licenses; they may have gotten the licenses for free, but they do not hold them for free.[25] Indeed, *Tam* explicitly distinguished trademark registration from government subsidies on the basis that trademarks require a fee from their holder while subsidies require payments from the government.[26]

The fact that the government grants and enforces spectrum usage rights via licenses does not create an exception to the First Amendment through either monopoly or government-subsidy theories.

CONCLUSION

Spectrum scarcity is a fundamental concept for all radio regulation. The Commission should approach it with economic rigor and derive its legal implications within constitutional limits. When it does so, it will find the scarcity rationale does not justify content-based regulations like the equal opportunities requirement.

Thank you for your consideration.

Joe Kane
Director of Broadband and Spectrum Policy

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[22] *Matal v. Tam*, 582 U.S. 218, 240–41 (2017).

[23] The Center for American Rights invokes *Rust v. Sullivan* for a similar argument, but that is a spending clause case. Spectrum licenses are more like the government-granted trademark registrations at issue in *Tam* than they are like the Congressionally appropriated monetary payments for family planning services at issue in *Rust*. (*See*, Matal v. Tam at 241, "Cases like *Rust* and *Finley* are not instructive in analyzing the constitutionality of restrictions on speech imposed in connection with such services."). Comments of The Center for American Rights, filed June 22, 2026, 32, https://www.fcc.gov/ecfs/document/26109836115/1.

[24] *See*, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

[25] *See generally*, FCC, "Regulatory Fees," https://www.fcc.gov/licensing-databases/fees/regulatory-fees.

[26] *Matal v. Tam* at 241.