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PUBLIC INTEREST COMMENT

REPLY COMMENT IN THE MATTER OF MODERNIZATION OF MEDIA REGULATION INITIATIVE

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INTRODUCTION

The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts independent analyses to assess agency rulemakings and proposals from the perspective of consumers and the public. Therefore, this reply comment does not represent the views of any particular affected party but is designed to assist the agency as it explores these issues.

The proliferation of online video content in the past decade has expanded viewer choice and disrupted broadcast and cable markets. Outmoded laws and regulations hamper the increasingly competitive television marketplace and raise compliance costs for TV providers. Accordingly, it is commendable that the Federal Communications Commission (FCC) and a wide range of

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commenters have expressed support for comprehensive media law reform. The following rules should be modernized or eliminated in light of competitive changes in the media marketplace:

1. The news distortion rule, an uncodified FCC rule that allows the commission to sanction broadcasters that "slant" the news in ways that harm the public interest.

2. The must-carry rule, a rule that requires cable operators to carry programming from certain local broadcasters.

3. The network nonduplication and syndicated exclusivity rules, which are cable regulations about broadcast programming distribution of network programs and syndicated programs, respectively.

Finally, the FCC should work with the United States Copyright Office to advise Congress on how to repeal the complex regulations and copyright requirements surrounding retransmission consent, must-carry regulations, and compulsory licenses for TV broadcasting.

RESCIND NEWS DISTORTION RULES

As broadcast TV has lost viewers to cable and satellite TV over the last 30 years, the FCC and courts have wisely eliminated many of the FCC's legacy content regulations for broadcasters. Significantly, the FCC repealed the Fairness Doctrine in 1987,[1] and in 2000 the DC Circuit Court of Appeals required the FCC to eliminate its existing personal attack rule and political editorializing rule.[2] These actions helped to free broadcast programming from arbitrary rule enforcement by removing the threat of license revocation for airing controversial TV content.

Nonetheless, another FCC rule for broadcast programmers—the news distortion rule—remains. Uncodified and largely overlooked, the FCC rule against news distortion threatens a broadcaster's ability to renew or transfer its license if the licensee is deemed to have deliberately engaged in news distortion, staging, or slanting.[3] The FCC reaffirmed its commitment to enforce the news distortion rule in 1986, 1999, and 2008.[4] The conditions for news distortion, as summarized in the 1998 case *Serafyn v. CBS*, are twofold:

1. The distortion deliberately slants or misleads and is supported by extrinsic evidence other than the broadcast itself, such as written or oral instructions from station management or outtakes.

1. Syracuse Peace Council, 2 FCC Rcd. 5043 (1987).
2. Radio-Television News Directors Assn. v. FCC, 229 F.3d 269 (D.C. Cir. 2000). However, these latter rules are not dead letter. Radio-Television News Directors Assn. v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) ("Of course, the Commission may institute a new rule-making proceeding to determine whether, consistent with constitutional constraints, the public interest requires the personal attack and political editorial rules.").
3. Serafyn v. CBS, 149 F.3d 1213 (D.C. Cir. 1998).
4. Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1211–12 (1986); Complaints about Broadcast Journalism, 1999 FCC LEXIS 4302 (1999); The Media Bureau, "The Public and Broadcasting: How to Get the Most Service from Your Local Station," FCC, revised July 2008.

2. The distortion involves a significant event and not merely a minor or incidental aspect of the news report.

The news distortion rule intrudes upon the editorial judgments of broadcasters in a selective manner that is irreconcilable with the First Amendment.[5] The ambiguity of what constitutes a "significant" versus a "minor" news distortion impermissibly chills speech.[6] Even though the FCC shows little interest in enforcing the rule strictly, slighted parties can compel an FCC investigation as long as the FCC maintains the rule, as *Serafyn v. CBS* showed. In the *Serafyn* controversy, the FCC had dismissed the original complaint that a CBS program had unfairly edited video to smear Ukrainians. Nevertheless, the DC Circuit Court of Appeals vacated the dismissal.[7] (CBS settled the matter privately with the Ukrainian complainants before the FCC could intervene.[8])

The Supreme Court warned of the risk of speech infringement inherent in regulations such as the news distortion rule in a 1988 case, *City of Lakewood v. Plain Dealer Publishing Co.*, regarding a city's licensing of newspaper racks. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[9] In that case, the Supreme Court established that a licensing law with a "nexus to expression" that gives discretionary power to a governmental official is presumptively unconstitutional and subject to facial challenge.[10]

"Slanted" news, while undesirable in the abstract, is hopelessly subjective; moreover, it is protected by the First Amendment.[11] Satirical and news-infused broadcast programs such as *The Late Show with Stephen Colbert* and *Late Night with Seth Meyers* have blurred the lines between news slanting and entertainment. Exempted and, in the eyes of many, "slanted" news programming is widely available through cable, satellite, and online TV providers. To strengthen the First Amendment rights of broadcasters and to restore regulatory consistency, the commission should abandon spectrum limitations as a justification for programming regulations and, in particular, for its dormant news distortion rule.

ELIMINATE MUST-CARRY OBLIGATIONS

Although an amendment to streamline the must-carry and retransmission processes would be preferable to its current state,[12] the commission ideally should eliminate its must-carry

5. See Lili Levi, "Reporting the Official Truth: The Revival of the FCC's News Distortion Policy," *Washington University Law Quarterly* 78, no. 4 (2000): 1008, 1109–10.
6. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 759–60 (1988).
7. *Serafyn*, 149 F.3d 1213.
8. Lili Levi, "Reporting the Official Truth," 1109–10.
9. *City of Lakewood*, 486 U.S. at 757.
10. *Id.* at 759–60.
11. Provided that it does not amount to tortious or criminal conduct, such as defamation or bribery.
12. Comments of the National Association of Broadcasters, "In the Matter of Modernization of Media Regulation Initiative," MB Dkt. No. 17-105, July 5, 2017; Comments of CBS Corporation, the Walt Disney Company, 21st Century Fox, Inc., and Univision Communications Inc., "In the Matter of Modernization of Media Regulation Initiative," MB Dkt. No. 17-105, July 5, 2017 (suggesting an amendment to allow for online submission of must-carry and retransmission consent election notices); Comments of the American Cable Association, MB Dkt. No. 17-105, July 5, 2017 (requesting a reduction of information filing requirements).

obligations altogether.[13] The FCC's must-carry rules require cable operators to distribute any broadcast programming that a local broadcaster wishes to be distributed on the local cable system. As the Supreme Court held in *Turner I*, the must-carry rules infringe on the speech rights of cable operators.[14] While those regulatory infringements were narrowly sustained against First Amendment challenge in 1994, the TV competitive landscape has changed markedly since then, and the Court's reason for sustaining the regulations—cable TV dominance—has evaporated. Further, the Court has broadened its view of what content-based regulation looks like in recent years,[15] and it is unlikely that the must-carry rules would be sustained if litigated today.

The must-carry statute was upheld in part because of FCC and congressional findings that cable operators possessed "bottleneck monopoly power."[16] At the time, according to FCC data, cable operators possessed about 95 percent of the multichannel video programming distributor (MVPD) market.[17] Today, cable's market share has plunged to 53 percent because satellite TV and "telco" TV offerings have attracted millions of subscribers.[18] Quite simply, cable no longer possesses monopoly power over broadcast programming that the Court relied on for sustaining the rules. It is noteworthy to add that online distributors such as YouTube TV offer local affiliate stations in certain markets to distinguish themselves from competitors.[19] In short, local programmers have far more options to distribute their programming than they had in 1992, when the must-carry statute was codified, and in 1994, when the *Turner I* case was decided. The "bottleneck monopoly power" found in the early 1990s has disappeared, or at least diminished, and the rules require reappraisal.

Further, in light of recent Supreme Court jurisprudence, the must-carry rules are unlikely to survive a First Amendment challenge. The Supreme Court in *Turner I* found that the must-carry rules were not content based.[20] Four justices, however, dissented because they believed the must-carry rules were content based.[21] The dissent's arguments appear to have won the day at the Court because the conception of which regulations are content based has broadened since *Turner I*. The Court stated this broader conception of content-based regulation in 2015 in *Reed v. Town of Gilbert*: "Government regulation of speech is content based if a law applies to particular

13. 47 U.S.C. § 534 and § 325(b)(3) (2012).
14. Turner Broad. Sys. v. FCC, 512 U.S. 622, 636–37 (1994) (recognizing that "the must-carry rules regulate cable speech").
15. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).
16. *Turner*, 512 U.S. at 661. While "monopoly" has an understood definition in antitrust and regulatory law, "bottleneck" does not. It is not clear which firms are bottlenecks—and thus subject to more regulation—and which are not.
17. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Dkt. No. 96-133, Third Report (January 2, 1997).
18. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report, 32 FCC Rcd. 568 (2017).
19. Jonathan Vanian, "'YouTube's TV Service Is Now Available in These 10 New Cities," Fortune 500, *Fortune*, July 20, 2017; Sling Television, "How Do Local Channels Work on Sling TV?," Help Center, accessed July 26, 2017, http://help.sling.com/articles/en_US/FAQ/How-do-local-channels-work-on-Sling-TV.
20. *Turner*, 512 U.S. at 652.
21. Turner Broad. Sys. v. FCC, 512 U.S. 622, 675–77 (1994) (O'Connor, J., dissenting).

speech because of the topic discussed or the idea or message expressed."[22] The dissenting justices in *Turner I* pointed out that the must-carry statute requires the FCC to consider the content of the broadcast programming.[23] The must-carry statute, for instance, requires the FCC to "afford particular attention to the value of localism by taking into account such factors as . . . whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community."[24]

The FCC should reevaluate the need for and the constitutionality of the must-carry rules. In light of cable's substantial loss of market power in the last 25 years and the Supreme Court's increased scrutiny on regulations that apply to speech, the must-carry rules should be rescinded.

RESCIND NETWORK NONDUPLICATION AND SYNDICATED EXCLUSIVITY RULES

Network nonduplication and syndicated exclusivity rules[25] allow regulatory penalties and FCC intervention for what are, essentially, breaches of contract between broadcast programmers and TV distributors. These rules are unnecessary and ill suited for the modern stage. As the R Street Institute notes, licensing and carriage agreements do not require special FCC enforcement—in the event of copyright violation or contract breach, Article III courts are sufficient.[26] Hundreds of cable programmers and online distributors, in fact, contract for programming without being subject to the nonduplication and syndicated exclusivity rules, which shows that markets can effectively handle even complex copyright and distribution negotiations. The FCC moved in that free-market direction with the 2014 elimination of sports blackout rules when it affirmed that private contractual agreements with programmers and MVPDs can protect distribution rights.[27] The sports blackout rules similarly imposed regulatory penalties for breach of programming distribution agreements. The continued distribution of broadcast and cable sports programming shows that private parties can enforce their own distribution agreements without FCC intervention.

WORK WITH THE COPYRIGHT OFFICE ON ELIMINATING COMPULSORY LICENSES

The FCC's must-carry and retransmission consent rules form a large part of the FCC's complex regulations about when and how cable operators can distribute broadcast programming.

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22. *Reed*, 135 S. Ct. at 2227.
23. Turner Broad. Sys. v. FCC, 512 U.S. 622, 677 (1994) (O'Connor, J., dissenting) (citing provisions in 47 U.S.C. § 534 (2012)).
24. 47 U.S.C. § 534(h)(1)(C)(ii) (2012).
25. 17 U.S.C. § 111(c) (2012); 47 C.F.R. §§ 76.92(f) and 76.106(a) (2012).
26. Comments of R Street Institute, "In the Matter of Modernization of Media Regulation," MB Dkt. No. 17-105, July 5, 2017.
27. "In the Matter of Sports Blackout Rules," Report and Order, MB Dkt. No. 12-3, September 30, 2014.

Parties defending must-carry and retransmission consent rules often object that rescission would upset the balance Congress created when it instituted compulsory licenses for broadcast content. Likewise, parties defending compulsory licenses for broadcast content object that their removal would upset the operation of FCC retransmission and must-carry regulations.[28] The FCC should break this deadlock and coordinate with Copyright Office officials to present a unified front to Congress, asking it to repeal the compulsory licenses and retransmission consent regime. The Copyright Office has examined repeal of the compulsory license for years at the request of Congress and because officials at the Copyright Office have opposed compulsory broadcast licenses since 1981.[29]

The empirical evidence justifying compulsory licenses is dubious.[30] In particular, the common defense of compulsory licenses—that transaction costs would deter cable operators from obtaining licenses from individual programmers—has not proved valid. That defense sounds sensible, but there is powerful contradictory evidence: for decades, hundreds of TV channels requiring the bundling of thousands of copyright licenses have been distributed seamlessly and completely outside of the compulsory license regime.

TV distributors outside of the compulsory license scheme complete such complex content acquisition deals routinely. Hundreds of nonbroadcast channels—such as ESPN, CNN, Bravo, HGTV, MTV, and Fox News—are distributed to tens of millions of households via private contractual agreements and without regulated compulsory licenses. TBS, uniquely, in the late 1990s went from a broadcast channel, subject to a compulsory license, to a cable channel distributed via direct licensing with no apparent ill effects. Analysts who cite transaction costs as a reason for keeping compulsory licenses never explain why the market failure they predict is absent for these hundreds of cable and satellite channels.

CONCLUSION

We concur that the commission should review its administrative process to offer a streamlined approach that will benefit both existing distributors and new providers to enter the video marketplace. More than 100 streaming video services debuted in 2015 alone.[31] Media is increasingly converging onto IP networks, and the FCC, in anticipation, should reassess and eliminate many of its media regulations in order to comply with congressional policy to keep internet-based TV services "unfettered from Federal . . . regulation."[32] Elimination of the aforementioned rules would help free MVPDs and online video providers from the regulatory thicket created over the last 50 years.

28. US Copyright Office, *Satellite Television Extension and Localism Act, Section 302 Report 49-50*, August 29, 2011.
29. David Ladd, Dorothy Schrader, David E. Leibowitz, and Harriet L. Oler, "Copyright, Cable, the Compulsory License: A Second Chance," *Communications and the Law* 3, no. 3 (1981) (recommending elimination of the compulsory license).
30. Bruce M. Owen, "Consumer Welfare and TV Program Regulation" (Mercatus Center at George Mason University, Arlington, VA, May 24, 2012).
31. Jeff Baumgartner, "INTX 2016: SVOD Reaches Its Second Stage," Multichannel News, May 20, 2016.
32. 47 U.S.C. § 230(b).