

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
	)	
Sponsorship Identification Requirements For	)	MB Docket No. 20-299
Foreign Government-Provided Programming	)	

**REPLY COMMENTS OF TECHFREEDOM**

TechFreedom<sup>1</sup> hereby files these Reply Comments in response to the *Second Notice of Proposed Rulemaking*, released October 6, 2022,<sup>2</sup> in the above-referenced proceeding following the remand by the D.C. Circuit vacating portions of the Commission’s prior rules as exceeding its statutory mandate under Section 317 of the Communications Act.<sup>3</sup> Having reviewed the record in this proceeding, TechFreedom submits these limited Reply

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<sup>1</sup> TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere. We are a frequent commenter in FCC proceedings, especially where such proceedings touch on the First Amendment rights of speakers. Comments of TechFreedom in the Matter of NTIA Petition for Rulemaking to Clarify Provisions of Section 230 of the Communications Act of 1934, FCC File No. RM-11862 (Sep. 2, 2020), <https://techfreedom.org/wp-content/uploads/2020/09/NTIA-230-Petition-Comments-9.2.2020.pdf>; Comments of TechFreedom in the Matter of Restoring Internet Freedom, Bridging the Digital Divide, and Lifeline and Link Up Reform and Modernization, FCC Docket WC No. 17-108, 17-287, and 11-42 (May 20, 2020), <https://techfreedom.org/wp-content/uploads/2020/05/TechFreedom-Net-Neutrality-RIFO-Reply-Comments-5-20-20.pdf>; Comments of TechFreedom in the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2021 and Fiscal Year 2022, FCC MD Docket No. 21-190, 22-223 (July 18, 2022), <https://techfreedom.org/wp-content/uploads/2022/07/TechFreedom-Comments-2022-Regulatory-Fees.pdf>.

<sup>2</sup> *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Second Notice of Proposed Rulemaking, 87 Fed. Reg. 68960 (Nov. 17, 2022) (“SNPRM”).

<sup>3</sup> *National Association of Broadcasters v. FCC*, 39 F.4th 817 (D.C. Cir. 2022).

Comments and highlights a heretofore-hidden issue: stations may well believe that the new rules will require them to upload all of their programming contracts as “leases.” This would severely harm the contractual relationship between broadcasters and program producers.

Commenters uniformly oppose the proposed rules. Networks,<sup>4</sup> station affiliate groups,<sup>5</sup> station owners,<sup>6</sup> non-commercial broadcasters,<sup>7</sup> advocacy groups,<sup>8</sup> individual programmers,<sup>9</sup> and churches<sup>10</sup> sing in unison: the FCC’s rules are a solution in search of a problem that doesn’t exist, or if it does exist, it is so limited that its existence will be buried under a burdensome digital mountain of certifications that all say “no, this program is not provided by a foreign government.” Commenters point out that these rules, similar to those

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<sup>4</sup> See Joint Reply Comments of ABC, FOX, NBCUniversal Media, Paramount Global, MB Docket No. 20-299, <https://www.fcc.gov/ecfs/document/101241976115993/1>.

<sup>5</sup> See Comments of The ABC Television Affiliates Association, et al., MB Docket No. 20-299 (Jan. 9, 2023), <https://www.fcc.gov/ecfs/document/1010947849165/1> (“Affiliate Group Comments”).

<sup>6</sup> See Comments of Gray Television Licensee, LLC, MB Docket No. 20-299 (Jan. 9, 2023), <https://www.fcc.gov/ecfs/document/10109250120396/1>; Reply Comments of CMG Media Corporation, MB Docket No. 20-299 (Jan. 24, 2023), <https://www.fcc.gov/ecfs/document/1012472801872/1>.

<sup>7</sup> See Comments of America’s Public Television Stations, National Public Radio, Inc., Public Broadcasting Service, MB Docket No. 20-299 (Jan. 9, 2023), <https://www.fcc.gov/ecfs/document/101091917105138/1> (“APTS Comments”).

<sup>8</sup> See Joint Comments of the National Association of Broadcasters and The Multicultural Media, Telecom and Internet Council, Inc., MB Docket No. 20-299 (Jan. 9, 2023), <https://www.fcc.gov/ecfs/document/10109099325607/1> (“NAB/MMTC Comments”).

<sup>9</sup> See Comments of Chip Howard’s Sports Talk, MB Docket No. 20-299 (Dec. 2, 2022), <https://www.fcc.gov/ecfs/document/10112984813235/1>.

<sup>10</sup> See Reply Comments of Coalition of Religious Programmer, MB Docket No. 20-299 (Jan. 24, 2023), <https://www.fcc.gov/ecfs/document/10124474706530/1>.

struck down by the court in *NAB v. FCC*, continue to exceed what the statute requires,<sup>11</sup> and could act to chill the speech of broadcasters and program producers.<sup>12</sup>

TechFreedom’s interest in this proceeding is that the solution proposed by the Commission in an effort to clearly identify foreign government-provided programming is a technological solution designed to solve a non-technological problem. Whenever governments attempt to layer on such a “fix,” the unintended consequences can increase exponentially. That’s exactly what is occurring in this proceeding.

The Commission’s 2021 Order identified a discrete problem: exactly two reports of Chinese- and Russian-controlled entities block-leasing substantial amounts of airtime on a few radio stations without a proper sponsorship identification required under Section 73.1212.<sup>13</sup> This has led the Commission down a regulatory road that, if left unaltered, will

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<sup>11</sup> See, e.g., Comments of Gray Television, at 6 (“A requirement that broadcasters obtain certifications from third parties and complete certifications themselves (or require lessees to obtain and provide documentation such as screen shots) would likewise exceed the Commission’s power under Section 317(e) by mandating more than the reasonable diligence required by the statute.”); Comments of NAB/MMTC, at 9 (“Accordingly, the FCC’s rulemaking power to “prescribe appropriate rules and regulations to carry out the provisions of this section,” 47 C.F.R. § 317(e) (emphasis), but does not extend to imposing duties on First Amendment-protected content providers who have no Section 317 duties.”).

<sup>12</sup> See Comments of Coalition of Religious Programmers, at 13-14 (“The *McManus* Court held that the First Amendment prohibited the government from putting a thumb on the scale against a particular type of speech in the competitive market for access to a particular expressive forum.” (citing *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019))); Comments of NAB/MMTC, at 9 (“the FCC’s rulemaking power to ‘prescribe appropriate rules and regulations to carry out the provisions of this section,’ 47 C.F.R. § 317(e), does not extend to imposing duties on First Amendment-protected content providers who have no Section 317 duties.”).

<sup>13</sup> *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Report and Order, 36 FCC Rcd 7702, 7702-03, ¶ 1 & n.1 (2021) (“2021 Order”). See also *Affiliate Group Comments*, at 3 (“There is no evidence that foreign entities have tried to use commercial advertising of any type or length to spread foreign propaganda. The very limited evidence that any such foreign entity has sought to use broadcast time for that purpose centers around programming that bears no resemblance to commercial advertising.”).

again result in rules that exceed the Commission’s authority, place huge burdens on the entire broadcasting ecosystem, and ultimately may infringe the First Amendment rights of a broad swath of speakers.

**A. The Term “Lease” Is Overbroad**

First, the definition of “lease” in both the 2021 Order and the *SNPRM* is wildly overbroad and confusing. The problem identified stems from large block leases of time on a few stations.<sup>14</sup> The definition of “lease” adopted by the Commission has prompted some stations to believe that the certification rules apply to everything from traditional large block-time leases (to which they should apply), to all barter programming, to advertising (up to and including infomercials),<sup>15</sup> to local football games,<sup>16</sup> to local church services.<sup>17</sup> Many stations, out of an abundance of caution, are seeking certifications from virtually all of their programming sources.<sup>18</sup> Several commenters have requested that the Commission exclude

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<sup>14</sup> *Id.*

<sup>15</sup> See ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates’ Petition for Clarification In the Matter of Sponsorship Identification Requirements for Foreign Government-Provided Programming, MB 20-299 (July 19, 2021), (the “Petition”).

<sup>16</sup> See NAB/MMTC Comments, at 12-13 (“Thousands of lessees—including small entities without counsel, such as local houses of worship and high school football programs—would have to train themselves to navigate the FARA databases to prove their status, even though the vast majority of lessees are domestic private entities.”).

<sup>17</sup> See *generally* Reply Comments of Coalition of Religious Programmers.

<sup>18</sup> See NAB/MMTC Comments at 4, n.8 (“Although the Order repeatedly emphasized that the Commission was applying its rules only to “leases” and “lessees,” it also included vague language that, as the Affiliates Associations’ Petition explains, created uncertainty about the possible application of the rules to some advertising. This uncertainty has led many broadcasters to err on the side of caution and conduct diligence with respect to a very broad array of sponsored content, including advertising for commercial products and services.”).

certain contractual relationships from the rules,<sup>19</sup> but even that does not go far enough because of how poorly the 2021 Order defined a “lease.” For example, the 2021 Order indicates that there has never been an instance of foreign government-provided programming discovered related to barter contracts (programming provided in exchange for being able to sell all or a portion of the commercials inside that programming):

Despite our seeking comment on the extent to which foreign governmental entities may have entered into barter-type arrangements to provide programming to U.S. broadcast stations, no commenters addressed this issue. Nor are we aware of any circumstances in which a foreign governmental entity is providing programming to a station pursuant to a barter-type arrangement of the type noted in Sonshine. Accordingly, we need not address this issue today, but may revisit if warranted in the future. Sonshine Family Television, Inc., Forfeiture Order, 24 FCC Rcd 14830, 14834-35, para. 14 (2009). In Sonshine, the Commission noted that: In barter-type arrangements, which can include network affiliation agreements, the program supplier provides the station its program, which the station purchases by allowing the program provider to use some or all of the station’s advertising airtime during the program. Thus, in barter arrangements the broadcaster effectively purchases programming in exchange for valuable consideration in the form of advertising time, thereby immunizing the exchange from the sponsorship identification requirement.<sup>20</sup>

Yet the 2021 Order also contains the following instructions to stations, which appear to apply to *all* their programming, not just large block-leasing of time:

While we expect that such consideration received by the station directly will be apparent from the terms and exercise of any lease agreement, as discussed below, we note that under section 507 of the Act, parties involved in the production, preparation, or supply of a program or program material that is intended to be aired on a broadcast station also have an obligation to disclose to their employer or to the party for whom the programming is being produced or to the station licensee, if they have accepted or agreed to accept, or paid or agreed to pay, any money or valuable consideration for inclusion of any program or material. Thus, as detailed further below, we require that

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<sup>19</sup> See Comments of Gray Television (exclude paid commercial time and religious programming); APTS Comments (exclude all non-commercial programming); Comments of NAB/MMTC (exclude all locally produced, religious programming, and advertising).

<sup>20</sup> 2021 Order, n. 91.

licensees will exercise reasonable diligence to ascertain whether consideration has been provided in exchange for the lease of airtime or in exchange for the airing of materials directly or indirectly to the station, as well as whether *anyone involved in the production, preparation, or supply of the material* has received compensation, and that an appropriate disclosure will be made about the involvement of any foreign governmental entity.<sup>21</sup>

Because of this broad language (and other language in the *SNPRM* discussed below), stations are now seeking certifications from program providers whose contractual relationship with the station could never rationally be deemed a “lease.” In its forthcoming order, therefore, the Commission should clarify what should be obvious: that the rules apply only to block-time leases and not to traditional programming contracts that stations and program producers have used for over a century.

**B. Uploading Hundreds of Thousands of “No” Certifications to Station Online Public Information Files (OPIFs) Is a Recipe for Disaster**

Coupled with the overly broad definition of “lease,” the Commission’s proposal to have stations upload all of the certifications they receive to their OPIFs will be an unmitigated disaster. Commenters suggest this could result in hundreds of thousands of certifications being uploaded into the FCC’s system.<sup>22</sup> The burden on stations could be overwhelming, especially smaller stations in smaller markets. With virtually all of these

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<sup>21</sup> *Id.* ¶ 31 (emphasis added).

<sup>22</sup> See NAB/MMTC Comments, at 13 (“It would be Kafkaesque to require thousands of lessees each to make copies of Commission reports and send them to each of their station lessors for every single lease and lease renewal to prove their absence from the report, when no such listed entities exist.”); CMG Comments, at 3 (“Rather than an approach under which broadcasters are required to review thousands of programming agreements and ad sales contracts related to content and then place information in station public files about programming that is not a potential threat, broadcaster efforts should focus on reviews of program leases where foreign governmental entities might actually be a party and disclosure of the foreign governmental entity would benefit the public.”).

certifications stating that the programming was not provided by a foreign government, this will be an exercise in futility: It will be virtually impossible to find the few (if any) instances where programming actually is being provided by a foreign government. The *SNPRM* proposes no way for the interested public to cull through a digital mountain of “no” certifications. What possible benefit could result from such regulations? More importantly, given the potential for chilling speech, such a burdensome regulatory regime can’t possibly pass muster under the First Amendment.

There is one final problem with the Commission’s proposal, however, which no party has yet raised: In addition to uploading the hundreds or thousands of certifications, stations will also feel compelled to upload all their programming contracts. The *SNPRM* virtually assures this will happen:

Given that a licensee must already upload copies of its lease agreements to its online public inspection file (OPIF), and that this certification process will essentially occur at the time of entering into, or renewing a lease, we tentatively conclude that the licensee should upload both its own and the lessee’s certifications into the same designated public inspection file subfolder in which it places its lease agreements.<sup>23</sup>

If stations currently are seeking certifications from virtually all of their program sources, with the intention of uploading those certifications to their OPIF, how many will also read paragraph 17 of the *SNPRM* to require that their programming contracts must also be uploaded? In addition to clogging up the FCC’s OPIF system with hundreds of thousands of documents that don’t answer the question as to the ultimate source of the programming, such uploading invariably would constitute a breach of the confidentiality provisions that are normal in those agreements (potentially excusable as being mandated by FCC rules). The

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<sup>23</sup> *SNPRM*, ¶ 17, citing 47 CFR § 73.3526(e)(14).

impact on the entire broadcasting ecosystem would be devastating: the private contractual relationship between station and program provider would be on full display for anyone willing to take the time to mine the data contained in the OPIFs of the broadcast industry. Highly sensitive business terms would be public for the first time, potentially forever altering the relationship between stations and programmers, who have for many decades assumed that these contractual provisions were confidential.

At a minimum, the FCC should make clear that Section 73.3526(e)(14)'s requirement of uploading "leases" applies only to traditional leases and time brokerage agreements (with allowed-for redactions), and not every programming contract a station enters into.

### **C. Conclusion**

The goal of providing the public with proper information concerning the source of programming has always been important.<sup>24</sup> This is especially true if such programming is provided by a foreign government and designed to influence Americans. But this goal is not served by creating a massive make-work program for broadcast stations that will actually make it harder to discern whether a program sources from a foreign government does nothing to advance this goal. Nor is such a program consistent with the requirements of Section 317, or the Commission's sponsorship identification rules. The FCC should define "lease" to encompass just those block-time leases that it is most concerned about, and not

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<sup>24</sup> *SNPRM*, n.3 ("The Commission's words from nearly sixty years ago, in the context of adopting changes to the sponsorship identification rules, remain equally applicable today: 'Perhaps to a greater extent today than ever before, the listening and viewing public is being confronted and beseeched by a multitude of diverse, and often conflicting, ideas and ideologies. Paramount to an informed opinion and wisdom of choice in such a climate is the public's need to know the identity of those persons or groups who solicit the public's support.' Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules, Report and Order, 34 FCC 829, 849, para. 59 (1963).").



require stations to investigate every contract they enter into, and upload hundreds of thousands of certifications and contracts into the Commission OPIF database, rendering that system essentially useless.

Respectfully submitted,

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