

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
Delete, Delete, Delete) MB Docket No. 25-133
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**COMMENTS OF THE
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION**

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The Foundation for Individual Rights and Expression (FIRE) submits this comment in response to the Public Notice, *In Re: Delete, Delete, Delete*, DA 25-219 (Mar. 12, 2025) (“*Public Notice*”) to urge the commission to extend its prudent tradition of updating policies in accordance with technological change so that it includes broadcast content regulations. These policies often exceed the bounds of the Commission’s governing statutes and conflict with the constitutional imperative that the Commission interpret those statutes to minimize any intrusion on protected speech.

As a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought, we believe this proceeding provides an opportunity for the Commission to update its policies to reflect both the FCC’s commitment to the First Amendment—as required by statute—and a modern understanding of the communications environment that flourishes under that commitment. It is also an opportune occasion for the Commission to show its rhetoric about free speech is more than lip service.

I. DEREGULATION SHOULD BEGIN WITH CONTENT RULES

The Commission opened this proceeding for the salutary purpose of reviewing and revising outdated and unnecessary regulations. Such review is part of the Commission’s obligation to serve

the public interest, convenience, and necessity. Doing so is simply part of the Commission's job. Section 11 of the Telecommunications Act of 1996 requires the Commission to review "all regulations" under its governing statutes on a biennial basis, directing it to repeal or modify any rule it "determines to be no longer necessary in the public interest." 47 U.S.C. § 161. This requires that regulations keep pace with market and technological changes. However, the *Public Notice* does not mention any FCC regulations relating to content, and this is a serious omission.

There is perhaps no greater tension in the Communications Act than the FCC's authority over broadcast content that is exercised by virtue of its licensing authority. Given the principle established at our nation's founding that "Congress shall make no law . . . abridging the freedom of speech, or of the press," government licensing of broadcasters is an anomaly. This tension was acknowledged in the Act itself, which expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. This denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with freedom of speech. *Id.* These policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973). Consequently, the Supreme Court has stressed that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *FCC v League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984).

The FCC and the courts have long recognized this "public interest" authority is limited and must adjust to changes in technology. Even when the FCC's authority was at its peak, when the Supreme Court upheld the fairness doctrine, it recognized that if that policy began to have the "net effect of reducing rather than enhancing the volume and quality of coverage" there would be "time

enough to reconsider the constitutional implications.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393 (1969). The constitutional standard governing broadcast regulation that permitted some greater latitude articulated in *Red Lion* was predicated on “‘the present state of commercially acceptable technology’ as of 1969.” *News America Publ’g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388–90). As the D.C. Circuit observed, “some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.” *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), *cert. denied sub. nom. Tobacco Inst., Inc. v. FCC*, 396 U.S. 842 (1969).

Consistent with constitutional and statutory obligations, the Commission in 1985 conducted a comprehensive reexamination of the public policy and constitutional implications of the fairness doctrine. *Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145 (1985) (“1985 Fairness Doctrine Report”). That inquiry culminated in a report concluding that the doctrine “operate[d] as a pervasive and significant impediment to the broadcasting of controversial issues of public importance,” *id.* at 169, and that the public had “access to a multitude of viewpoints without the need or danger of regulatory intervention.” *Id.* at 225. Most importantly, it “found that the ‘scarcity rationale,’ which ha[d] historically justified content regulation of broadcasting . . . is no longer valid,” and the D.C. Circuit upheld this judgment. *Meredith Corp. v. FCC*, 809 F.2d 863, 867-68 (D.C. Cir. 1987); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660–66 (D.C. Cir. 1989) (discussing *1985 Fairness Doctrine Report* and upholding FCC’s decision to repeal the fairness doctrine).

This deregulatory rationale underlies the Telecommunications Act’s biennial review requirement. The Senate Report to the Act noted “[c]hanges in technology and consumer

preferences have made the 1934 [Communications] Act a historical anachronism.” Telecommunications Competition and Deregulation Act of 1995, S. Rpt. 104-23, 104th Cong. 1st Sess. 2–3 (Mar. 30, 1995). It explained “the [Communications] Act was not prepared to handle the growth of cable television” and that “[t]he growth of cable programming has raised questions about the rules that govern broadcasters” among others. *Id.* The House of Representatives’ findings were even more direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years “and the scarcity rationale for government regulation no longer applies. Communications Act of 1995, H. Rpt. 104-204, 104th Cong. 1st Sess. 54 (July 24, 1995).¹

The FCC over the years has acted in accordance with these changing conditions. As part of a process of “retrospective review” in 2011, it announced a plan to eliminate 83 “outdated and obsolete media-related rules” that included the last codified remnants of the fairness doctrine.² The Commission followed these actions in 2012 with an instruction to Commission staff to “commence a review of the Commission’s broadcast indecency policies and enforcement to ensure they are fully consistent with vital First Amendment principles.” The ensuing review included a Public Notice issued in 2013. FCC, *FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comments on Adopting Egregious Cases Policy*, 78

¹ Since then, an FCC staff report concluded the spectrum scarcity rationale “no longer serves as a valid justification for the government’s intrusive regulation of traditional broadcasting.” John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* 8 (Med. Bur. Staff Research Paper, Mar. 2005). It added that “[p]erhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices.” *Id.* at 11.

² Press Release, FCC, *Chairman Genachowski Continues Regulatory Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules* (Aug. 22, 2011), <https://docs.fcc.gov/public/attachments/DOC-309224A1.pdf>.

Fed. Reg. 23563 (Apr. 19, 2013). The *Notice* did not result in notable changes to policy, but it did set the stage for further review of the Commission’s content rules.

The current FCC Chairman has pledged to maintain “a consistent pattern of always basing ... decisions at the FCC” on “the law, the facts, and the First Amendment.” Testimony of Brendan Carr, Commissioner, FCC, Before the H. Comm. on Oversight & Accountability, 118th Cong. (Sept. 19, 2024), <https://www.congress.gov/event/118th-congress/house-event/LC73236/text>. This promise dictates that any regulatory review proceeding shouldn’t just include content-related regulations—it should start with them. Given the statutory mandate to uncover regulations “no longer necessary in the public interest,” 47 U.S.C. § 161, the Commission can best fulfill its duty by living up to its traditional understanding that “the public interest is best served by permitting free expression of views.” FCC, *The FCC and Free Speech*, FCC.gov, <https://www.fcc.gov/consumers/guides/fcc-and-speech> (last visited Apr. 9, 2025).

II. POLICIES THAT REQUIRE IMMEDIATE REFORM

The Commission should periodically review all content regulations over which it has discretion and eliminate any that deviate from the First Amendment protections traditionally enjoyed by non-broadcast media. With that principle in mind, the following sections describe matters that require the Commission’s immediate attention.

A. The Commission Must Cease Unnecessary Investigations Based on Content

Under the current Administration, the Commission and its Chairman have announced a number of formal and informal investigations spurred by real or imagined deviations by the media from the government’s preferences.³ The Chairman has stated publicly he is taking these actions

³ See, e.g., Letter from Brendan Carr, Comm’r, FCC, to Disney, FCC (Mar. 27, 2025), <https://www.fcc.gov/sites/default/files/Carr-Letter-to-Disney-DEI-03252027.pdf>; Letter from Brendan Carr, Comm’r, FCC, to Disney, FCC (Dec. 21, 2024), <https://www.fcc.gov/sites/default/files/Carr-Letter-to-Disney-12212024.pdf>; Letter from Brendan

because the FCC “follows precedent” and such actions are dictated by those of previous administrations. Brendan Carr, Chairman, FCC, Interview by Ben Smith, Editor-in-Chief, Semafor, at Semafor’s Innovating to Restore Trust in News Summit (Feb. 27, 2025), in User Clip: Brendan Carr and Ben Smith (full conversation), C-SPAN, <https://www.c-span.org/clip/public-affairs-event/user-clip-brendan-carr-and-ben-smith-full-conversation/5155312>. However, this proceeding belies that explanation and provides the Commission an opportunity to align its actions and policies with past rhetoric.⁴

Given its regulatory authority over broadcasting in general, the threat of an investigation or other oversight has real-world consequences. This is not a new problem. *See* Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 119 (1967). The D.C. Circuit has recognized the various ways the Commission can put pressure on regulated firms, “some more subtle than others.” *MD/DC/DE*

Carr, Comm’r, FCC, to Sundar Pichai et al., Chief Executive Officer, Alphabet Inc. (Nov. 13, 2025), <https://www.fcc.gov/sites/default/files/DOC-407732A1.pdf>; Letter from Brendan Carr, Comm’r, FCC, to Comcast, FCC (Feb. 11, 2025), <https://www.fcc.gov/sites/default/files/Chairman-Carr-Letter%20to-Comcast-02112025.pdf>; News Distortion Complaint Involving CBS Broad., Inc., Licensee of WCBS, Letter Order, GN Docket No. 25-11, at 1 (Enf. Bur. Jan. 22, 2025), <https://docs.fcc.gov/public/attachments/DA-25-85A1.pdf>; News Distortion Complaint Involving NBCUniversal Media, LLC, Licensee of WNBC, Letter Order, GN Docket No. 25-11, at 1 (Enf. Bur. Jan. 22, 2025), <https://docs.fcc.gov/public/attachments/DA-25-84A1.pdf>; News Distortion Complaint Involving ABC, Inc., Licensee of WABC-TV, Letter Order, GN Docket No. 25-11, at 1 (Enf. Bur. Jan. 22, 2025), <https://docs.fcc.gov/public/attachments/DA-25-83A1.pdf>.

⁴ For example, when several members of Congress urged the FCC to block the sale of a Miami radio station Caracol 1260 AM on the basis of its perceived ideological leanings, then-Commissioner Carr condemned the pressure as “a deeply troubling transgression of free speech and the FCC’s status as an independent agency” and called on his fellow commissioners to publicly rebuke the congressman, “assuring the public that the FCC will review this proposed transaction free from political pressure.” Press Release, Brendan Carr, Comm’r, FCC, *Democrats Pressure FCC to Deny Sale of Spanish-Language Radio Station in Fla. Based on Political Viewpoints* (Apr. 19, 2021), <https://docs.fcc.gov/public/attachments/DOC-371715A1.pdf>.

Broads. Ass’n. v. FCC, 236 F.3d 13, 19 (D.C. Cir. 2001). In particular, it has observed the FCC “has a long history of employing . . . ‘a variety of sub silentio pressures and “raised eyebrow” regulation of program content . . . The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry . . . all serve as means for communicating official pressures to the licensee.” *Id.* (citation omitted). In this regard, an investigation “is a powerful threat, almost guaranteed to induce the desired conduct.” *Id.*; see *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998).

Historic practices aside, this is precisely the kind of abuse of regulatory authority the Supreme Court unanimously condemned last term in *NRA v. Vullo*, 602 U.S. 175 (2024). The Court reaffirmed that the “‘threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression’ of disfavored speech violates the First Amendment.” *Id.* at 180. Given its statutory and constitutional obligation to respect the First Amendment, this proceeding is a perfect opportunity for the Commission to implement a course correction. When it comes to freedom of speech, it is “put up or shut up” time for the FCC.

B. The Commission Should Eliminate the News Distortion Policy

The news distortion policy is a throwback to the days of the now-defunct fairness doctrine and is entirely within the Commission’s power to eliminate. The policy flies in the face of the bedrock constitutional rule that prohibits the government from compelling editors and publishers “to publish that which ‘reason tells them should not be published.’” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (citation omitted). Under the First Amendment the “choice of material to go into a newspaper”—or news broadcast—must reflect “editorial control and judgment,” not official decree. *Id.* at 258. Given changes in the media marketplace that have narrowed the public interest doctrine and withered away the spectrum scarcity rationale, the news

distortion policy represents an excellent candidate for regulatory removal that would further align the Commission with the First Amendment.

The Commission asks in the Public Notice “are there existing Commission rules for which the costs exceed the benefits?” One of the best cases for removing the news distortion policy is that its extremely limited number of applications suggests few, if any, benefits to the public. It also suggests doubts about its utility. Originally announced in 1969, the policy sought to address deliberate falsification in broadcast news—providing there exists “extrinsic evidence” of “deliberate distortion or staging” that “involves the licensee [and] includes its principals, top management, or news management.” *Complaints Covering CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 150–51 (1969). Yet even in its early days, the Commission admitted it lacked institutional competence to distinguish between news distortion and protected editorial discretion, “[i]t would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy—dependent always on journalistic judgment—across which broadcasters must not stray.” *See Complaints Concerning the CBS Program “The Selling of the Pentagon,”* 30 F.C.C.2d 150, 153–54 (1971). The policy’s mere presence creates an enduring risk that it could be revived or applied inconsistently, particularly under political pressure.

That risk is no longer hypothetical. This year the FCC reopened a previously dismissed complaint involving the editing of a *60 Minutes* interview with then–Vice President Kamala Harris. As FIRE noted in its formal comments, the underlying complaint failed to allege any deliberate falsification or provide extrinsic evidence of distortion, as the Commission’s own precedent requires. The proceeding, nonetheless, moved forward, in parallel with other forms of regulatory scrutiny, including review of a proposed merger involving the broadcaster’s parent company. In this context, the investigation bears all the hallmarks of unconstitutional regulatory

pressure. *See Vullo*, 602 U.S. at 180. Of all the content regulations that have outlived their purpose and justification, the news distortion policy represents a particularly easy call for removal.

C. The FCC Should Review its Indecency and Other Content Policies

News distortion is far from the only content-related regulation that warrants Commission review. Content administration in areas like broadcast indecency and children’s programming may be backed by statutory mandate, but where the Commission retains discretion in implementing these mandates, it has a concurrent constitutional mandate to minimize burdens on speech in line with modern First Amendment standards and its own historical practice.

Under 18 U.S.C. § 1464, the FCC is required to enforce restrictions on obscene, indecent, and profane broadcasts. While the statute mandates some regulation, the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), emphasized it was not endorsing broad censorship and made clear “speakers cannot be licensed except under laws that carefully define and narrow official discretion.” *Id.* at 746–48. Since *Pacifica*, courts have reined in the FCC when it went too far, forcing the Commission to reevaluate its enforcement policies in this area. *E.g.*, *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2nd Cir. 2010), *aff’d on other grounds*, 567 U.S. 239 (2012); *CBS Corp. v. FCC*, 663 F.3d 122 (3rd Cir. 2011), *cert. denied*, 567 U.S. 953 (2012). This led the Commission to initiate a proceeding in 2013 (GN Docket No. 13-86) asking whether it should focus enforcement on only the most “egregious” indecency cases. But twelve years have passed, and the Commission has yet to answer that question. It should use this proceeding to do so.

Similarly, the Commission should review its policies toward children’s television in general given the media landscape has transformed entirely. Children and teenagers have moved

past “appointment viewing [of television] on a handful of broadcast networks.”⁵ They now use online streaming services, such as YouTube, Amazon Prime, Disney+, and Netflix. Those online streaming services offer vast content options and are either commercial-free or not subject to the FCC advertising limitations.⁶ These regulations thus create a lopsided regulatory burden on a nearly obsolete delivery channel. And it prevents that delivery channel from becoming more relevant, “lead[ing] to less than optimal use of limited air time to the detriment of stations and their local audiences.”⁷ Data indicates that fewer than 1% of U.S. households with children rely exclusively on broadcast television.⁸

Those seismic changes in the media landscape should inform the Commission’s approach to enforcing the Children’s Television Act of 1990, 47 U.S.C. §§ 303a, 303b, which requires the FCC to impose limits on advertising during programming aimed at children and to encourage educational content. The FCC has exercised its discretion to reduce burdens in applying these statutory requirements. In 2019, for example, the Commission modernized the “KidVid” rules to give broadcasters more flexibility in scheduling and reporting educational programming, while

⁵ Kate Knibbs, *The Future of Children’s Television Isn’t Television*, WIRED (July 18, 2023 6:00 AM), <https://www.wired.com/story/future-of-childrens-television-youtube-roblox/>.

⁶ John Koblin, *What Happened to Our Ad-Free TV?*, N.Y. Times (May 26, 2024), <https://www.nytimes.com/2024/05/26/business/media/ads-tv-streaming.html> (noting that “[m]ost streaming services still have an ad-free version”); *The FCC and Speech*, FCC, <https://www.fcc.gov/consumers/guides/fcc-and-speech> (last visited Apr. 10, 2025) (“The FCC does not regulate online content.”).

⁷ Comments of the National Association of Broadcasters, MB Docket No. 18-202, at 4 (Sept. 24, 2018).

⁸ *Broadcasters Seek Flexibility in Meeting Childrens TV Programming Needs*, National Association of Broadcasters, <https://www.nab.org/advocacy/issue.asp?id=4689> (last visited Apr. 10, 2025) (“Only 0.5 percent of TV households with children ages 2-17 lack both pay TV and internet access.”).

still fulfilling the Act’s requirements. *See Children’s Television Programming Rules, Report and Order*, 34 FCC Rcd. 5822 (2019). These reforms suggest ways the Commission can fulfill statutory obligations while minimizing regulatory burdens and advancing First Amendment interests.

Where Congress has required action, the Commission is not free to ignore its mandate. But it remains obligated to implement statutory responsibilities in ways that avoid unnecessary intrusion on protected speech. As the Supreme Court has emphasized, even in the context of broadcasting, “the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area.” *League of Women Voters*, 468 U.S. at 378. In these and other areas, the FCC should take every opportunity to limit speech restrictions to what is strictly necessary to fulfill its legal obligations. Doing so is not only prudent policy—it is a constitutional imperative.

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