Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Sponsorship Identification Requirements for Foreign Government-Provided Programming	)	MB Docket No. 20-299
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	)	
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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE MULTICULTURAL MEDIA, TELECOM & INTERNET COUNCIL

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] and the Multicultural Media, Telecom and Internet Council (MMTC)[2] comment on the FCC's proposed expansion of its rules requiring distinct sponsorship identification for broadcast programming aired pursuant to a lease and sourced from certain foreign governmental entities.[3] The Commission proposes to modify its foreign sponsorship identification rules to obligate all broadcast stations that air programming pursuant to a lease of airtime and all parties who lease time on broadcast stations to make certifications using Commission-mandated language and to

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[1] NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] MMTC is a national nonprofit and non-partisan membership organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications and broadband industries. Its members include owners of radio and television broadcast stations, programmers and prospective station owners of color who rely on leasing arrangements to gain experience programming stations.

[3] *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, Second Notice of Proposed Rulemaking, MB Docket No. 20-299, FCC No. 22-77 (Oct. 6, 2022) (Notice). *See also Sponsorship Identification Requirements for Foreign Government-Provided Programming,* Report and Order, 36 FCC Rcd 7702 (2021) (Order).

place these certifications in the stations' online public inspection files.[4] The Notice requests comment on these proposals and posits that its proposed certification and public file requirements will be less burdensome and costly for broadcasters than the recently-enacted rules.[5] The Notice also seeks comment on a pending request for clarification of the scope of the term "lease" in the foreign sponsorship identification rules filed by the Affiliates Associations.[6]

NAB and MMTC agree with the Commission that American viewers and listeners should be aware if they are seeing or hearing foreign propaganda. Indeed, this should be the case regardless of medium. The approach taken to "reasonable diligence" under the existing rules and expanded upon by the Notice's proposals, however, is beyond the FCC's statutory authority and places unjustifiable – and even unconstitutional – burdens on stations and lessees that do not and never will air foreign propaganda. As currently proposed, the FCC's new rules would not comply with the Communications Act of 1934, as amended (Act), the Administrative Procedure Act (APA), the Paperwork Reduction Act (PRA), and the First Amendment. Below, we urge the Commission to alter course and bring its current and proposed foreign sponsorship identification regulatory regime within the bounds of the law and to reduce the overall unnecessary burdens of its existing and proposed rules.

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[4] Notice at ¶¶ 4, 17 and Appendix A.

[5] Notice at ¶ 4 ("As this Second NPRM proposes to establish standardized certification language for licensees and lessees, the time and cost associated with compliance should be minimal."); ¶ 21.

[6] Notice at ¶ 32, citing ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates' (Affiliates Associations) Petition for Clarification (July 19, 2021), *Sponsorship Identification Requirements for Foreign Government-Provided Programming*, MB Docket No. 20-299, FCC 21-42 (Petition). *See also* Comments of the Affiliates Associations, MB Docket No. 20-299 (Sept. 2, 2021) (Affiliates Associations Comments).

Critically – and apart from issues concerning Commission authority – the Commission should grant the Affiliates Associations' Petition by clarifying that advertising of any length and format for commercial products and services does not constitute a lease. The Commission has no information whatsoever to indicate that any kind of advertising does or even could surreptitiously convey foreign propaganda.

Two other kinds of programming should be excluded from the Commission's existing and proposed "reasonable diligence" investigations, First, the Commission should exclude from its definition of leases or otherwise exempt from its existing and proposed diligence standards all faith-based programming, including content produced and distributed by houses of worship or other entities that lease time to air faith-based programming. Second, the Commission should exempt locally produced and distributed programming, such as local sporting events, from the rule's purview. No commenter, the Commission, or any other party has asserted that foreign propaganda ever has been aired pursuant to advertising of commercial products and services or leases involving religious or locally produced programming, and the Commission should avoid sweeping tens of thousands of agreements involving informercials, local houses of worship, and local small businesses into its extensive diligence regulatory regime.

As always, the Commission must ensure that the burden imposed by its rules is proportionate to the conduct it is seeking to prevent. The FCC's sparse record includes less than a handful of reports – some quite dated – of only a few stations that have aired foreign propaganda.[7] But under the foreign sponsorship identification rules enacted in 2021,

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[7] Notably, the FCC's Order not only failed to examine whether these programs are still being aired, but also failed to examine anything about the existing agreements and whether they would even constitute a leasing arrangement under the rules (or to further narrow the rule to only capture those kinds of agreements in the marketplace).

thousands of stations that have never aired such content have spent untold hours and dollars educating their employees about the foreign sponsorship identification requirements, integrating the required diligence steps into their online or print transaction processes, investigating tens of thousands of program sponsors for fear the FCC might consider them "lessees," and documenting those investigations.[8] Because the Commission refused to stay implementation of its rules pending the outcome of litigation,[9] many broadcasters already have implemented foreign sponsorship ID-related diligence systems and later modified them to reflect the vacatur of the FCC's independent research requirements by the D.C. Circuit Court of Appeals.

As further explained in detail below, the Act does not authorize the Commission to require the newly proposed certifications by broadcasters or lessees, nor does it authorize the Commission to require broadcasters to direct lessees to conduct searches in online government databases or any other source to provide proof of their status. Even if they were lawful under the Act and did not raise First Amendment concerns, the proposed new diligence standards should not be adopted because they would be unduly burdensome. They would require broadcasters to implement new systems *for the third time* in less than

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[8] As discussed further in Section V., for many broadcasters the majority of the parties and arrangements they are investigating are not "lessees" or "leases" but advertisers of commercial products and services and agreements to air such advertising. 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. In our comments, NAB/MMTC use the terms "lease" and "lessee" in a manner that reflects broadcasters' current efforts to comply with the rules and the cautious approach many are taking to compliance.

[9] *Sponsorship Identification Requirements for Foreign Government-Provided Programming,* Order Denying Stay Request, DA No. 21-1518 (Dec. 8, 2021).

two years and collect certifications *for the second time* in less than two years, with little or no justification. The Notice, moreover, does not explain why the court's 2022 decision requires any further rulemaking, let alone justifies the proposed mandatory use of FCC-prescribed language in certifications, or the filing of such certifications in a station's online public inspection file. Accordingly, we urge the Commission to abandon its proposals to mandate certifications in government-specified language and to require the placement of certifications in stations' online public files. At the very least, NAB and MMTC propose that, if the Commission nonetheless determines to mandate specific certification language despite that proposal's legal and practical flaws, it should grandfather all existing leases.

II. THE EXISTING AND PROPOSED FOREIGN SPONSORSHIP IDENTIFICATION RULES EXCEED THE FCC'S STATUTORY AUTHORITY

The FCC's proposed foreign sponsorship identification rules once again "ha[ve] decreed a duty that the statute does not require and that the statute does not empower the FCC to impose."[10] The Commission not only overstepped its statutory authority with its existing rules, but again goes beyond the power Congress granted to it with the proposed new ones. NAB and MMTC respectfully request that the Commission amend its rules to comply with Sections 317 and 507 of the Act.

A. The FCC's Proposed Broadcaster Certification Requirements Would Violate Section 317

Section 317(c) requires that a broadcaster "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly … information to enable [the broadcaster] to make the announcement required by this section.'" 47 U.S.C. §

[10] *National Association of Broadcasters et al. v. FCC,* 39 F.4th 817, 819 (D.C. Cir. 2022).

317(c). That is "the only obligation that § 317(c) places on a broadcaster."[11] The proposed rule violates Section 317(c) in multiple respects.

First, the proposed rule requires a broadcaster to certify that it has "sought and obtained" certifications from lessees that the lessee is not a foreign governmental entity and that there is no such entity in the distribution or production chain, and "obtained" the information necessary to make the required sponsorship identification announcement. *See* proposed § 73.1212(j)(3)(iv)(1)(d), (e), and (f). This proposal exceeds Commission authority in part because broadcasters do not have a statutory duty to actually *obtain* information, much less "certifications" from lessees as to the information in their possession. Broadcasters "simply need to be diligent in their efforts 'to obtain' the necessary information 'from' employees and sponsors. . . . Nothing more."[12] The Commission may prescribe what counts as reasonable diligence to obtain information, but may not require that information or certifications actually be obtained from a lessee. The statute does not require – or grant the Commission the power to require – the broadcaster to certify that it has obtained information or certifications, and (as the Commission recognizes) the broadcaster has no obligation to refuse the leased programming if it does not receive an adequate response.[13] A broadcaster satisfies Section 317(c) when it makes an announcement of the true identity of the program sponsor based on the information available to it after reasonable diligence.

Furthermore, a broadcaster's certification that it obtained a certification is completely unnecessary. If a response is received and the lessee is a foreign governmental entity, then the station will provide the relevant on-air and online public file disclosures of the program's

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[11] *NAB*, 39 F.4th at 819.

[12] *NAB*, 39 F. 4th at 819-20.

[13] *See* Notice at Appendix A (proposed § 73.1212(j)(3)(vii)).

source under the foreign sponsorship identification rules. The public has no interest in whether a program is *not* foreign propaganda. The proposed rule also relies on an assumption – which appears unlikely – that *anyone* beyond broadcasters and FCC personnel would look at the public file in the first instance.

Second, the proposed rules would require licensees to inquire whether the lessee is aware of any individual/entity further back in the chain of production or distribution of the programming that may qualify as a foreign governmental entity and has provided compensation (including the programming itself, in the case of political programming or programming involving a controversial issue) as an inducement to air the programming.[14] Broadcasters have no duty, however, to inquire affirmatively about payments entities may have received to include certain matter in their programming; broadcasters only have a duty to announce disclosures "where a report has been made to a radio station, as required by Section 508 of this title." 47 U.S.C. § 317(b). The inquiries the Commission proposes to require of the broadcaster with regard to Section 317(b) payments do not track Section 507 and cannot form the legal basis for the rules the Commission is considering. The only persons with a duty to disclose payments for inclusion of subject matter in the preparation or production of programming are persons who made or received payments (or agreed to do so), 47 U.S.C. §508(b), or suppliers of programming who have knowledge (or received disclosure) of such payments, *id.* § 508(c). A broadcaster only has a duty to make an announcement if it receives a report "required by Section 508 of this title." *Id.* § 317(b).

The imprecise formulations of the proposed rule requiring inquiry into whether "there is an individual/entity further back in the chain of producing or distributing the programming

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[14] *See* Notice at Appendix A (proposed rule 47 C.F.R. § 73.1212(j)(3)((iii)); *see also* 47 C.F.R. § 73.1212(j)(3)((iii).

. . . that qualifies as a 'foreign governmental entity'" and that "provided some type of inducement to air the programming," are also impermissibly different from Section 507 of the Act. *See* proposed § 73.1212(j)(3)(iv)1.c-e; 73.1212(j)(3)(iv)(1)c-g; *see also* proposed § 73.1212(j)(3)(iii). The statute requires disclosure of payment of money, service, or other valuable consideration (not any "inducement") to include matter in the programming (not to air it). *See* 47 U.S.C. §508(b), (c).

*Third***,** broadcasters do not have any duty to inform lessees of regulatory requirements, including statutory definitions or the lessee's legal obligations of certification (which, as discussed below, are themselves unlawful). The broadcaster's duty is only to exercise reasonable diligence to obtain information to announce the true program sponsor. The Commission should therefore strike the requirements placing upon the broadcaster the duties of "[i]nforming the lessee of the foreign sponsorship disclosure requirement in section (j) above," proposed § 73.1212(j)(3)(i), and "[c]ertifying that it has informed lessee about the section (j)(1) foreign sponsorship disclosure requirement," proposed § 73.1212(j)(3)(iv)(1).

B. The FCC's Lessee Certification Requirements Lack Statutory Basis

Although NAB and MMTC did not initially closely examine the FCC's view that it had the power to regulate lessee disclosures, more careful statutory analysis reveals that the Commission lacks such power. More specifically, the Commission lacks the power to impose the proposed certification requirements on lessees.

Broadcast programming, including sponsored programming, is speech protected by the First Amendment.[15] No doubt cognizant that regulation could deter protected speech, Congress imposed no direct duties on persons who sponsor programming in Section 317. The broadcaster is required to announce the program sponsor, and to "exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section." 47 U.S.C. § 317(a), (c). But the statute provides no duty upon the program sponsor or its agent to disclose, much less certify, information. 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), does not extend to imposing duties on First Amendment-protected content providers who have no Section 317 duties. Congress did not intend for the Commission to regulate program providers.[16]

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[15] *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) (stressing that "broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties*"); CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 116 (1973) (finding that in the Communications Act, "Congress pointedly refrained from divesting broadcasters of their control over the selection of voices"); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940) (concluding that the Act "does not essay to regulate the business of the [broadcast] licensee" and that the "Commission is given no supervisory control of the programs, of business management or of policy" of the licensee); *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (stating that the "Government cannot control the content or selection of programs to be broadcast" over noncommercial or commercial television; "in making such decisions," both noncommercial and commercial broadcasters "are entitled to invoke the protection of the First Amendment and to place upon the Government the burden of justifying any practice which restricts free decisionmaking").

[16] *See Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (stating that "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating [broadcast] program content").

Merely leasing airtime for a program does not qualify as supplying broadcast programming (which refers to the origination or resale of programming). But even if it did, the disclosure duties are narrowly limited to information that the supplier knows or that has been disclosed to it. The only disclosure duties that a lessee may have are precisely prescribed in Section 507. If any person "pays or agrees to pay" a station employee "any money, service, or other valuable consideration for the broadcast of any matter over such station," it shall make advance disclosure of that fact to the station. 47 U.S.C. § 508(a). If "in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station," a person "accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter," it shall make advance disclosure to the payee's employer, the person for whom the program is produced, or the station. *Id.* § 508(b). Finally, a program supplier has a duty in advance of broadcast to disclose to the person supplied "any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter." *Id.* § 508(c). This section does not grant the Commission free-ranging authority to impose additional disclosures or other obligations on lessees or other third parties.

Finally, the provisions of Section 507 are enforced criminally, not by the Commission.[17] Congress notably did not grant the Commission rulemaking power to carry

[17] *See* 47 U.S.C. § 508(g) (specifying under "[p]enalties" that "[a]ny person who violates any provision of this section shall, for each such violation, be fined not more than $10,000 or imprisoned not more than one year, or both.").

out Section 507, as it did to carry out Section 317. The Commission simply has no statutory power to require lessee certifications, even if lessees may have a limited and carefully prescribed duty of disclosure under Section 507.[18]

C. The Commission Lacks the Power to Require Proof from Lessees of FARA or Section 722 Registration

The Commission seeks comment on whether it should require broadcasters to "seek or obtain" proof from lessees that they are (or are not) either registrants under the Foreign Agents Registration Act (FARA) or U.S.-based foreign media outlets under Section 722 of the Act (for example, by providing screenshots of searches of FARA databases).[19] Nothing in the statute authorizes the Commission to demand proof of status from lessees or to require broadcasters to do so. Such a requirement would fail to yield the information necessary for

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[18] The Notice's statutory missteps go beyond misapplying Section 507 and the other core issues identified above. For example, the FCC's rules even fail to properly distinguish between the announcement requirements of Sections 317(a) and (b). Section 317(a) is concerned solely with disclosures of the sources of actual, charged, or promised payments to broadcasters. 47 U.S.C. § 317(a) ("[a]ll matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly *paid, or promised to or charged or accepted by, the station so broadcasting, from any person*, shall, at the time the same is so broadcast, *be announced as paid for or furnished, as the case may be, by such person*.") (emphasis added). Thus, if there is an actual or agreed payment to a broadcaster from a person to broadcast any matter, that matter must be accompanied by an announcement that it is paid for or furnished "by such person." *See also* 47 C.F.R. § 73.1212(a). Section 317(b) requires a separate announcement of certain payments to parties other than the station, if the station receives such a report: "In any case *where a report has been made to a radio station, as required by section 508 of this title*, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station." 47 U.S.C. § 317(b) (emphasis added). Those circumstances are: (1) payments to station employees, 47 U.S.C. § 508(a); and payments for the inclusion of certain matter in programming, either (2) by a person who makes or accepts, or agrees to make or accept, such payment in connection with the production or preparation of programming, *id.* § 508(b), or (3) by a person who supplies such programming and has knowledge of such payments, § 508(b). The FCC's rules conflate the two statutory standards.

[19] Notice at ¶ 31.

the broadcaster to make the requisite announcements and would be unduly burdensome on both broadcasters and lessees.

The Act does not authorize the Commission to require lessees to provide proof of their status. It is also not part of a broadcaster's duty of reasonable diligence to demand such proof. First, negative proof that the lessee does not appear in a FARA or Section 722 search would not "enable such licensee to make the announcement required by this section," 47 U.S.C. § 317(c), because the evidence would not disclose the true identity of the sponsor of the programming, or even whether the lessee was a foreign governmental entity. All it would indicate is that the lessee is not a FARA or Section 722 registrant.

Positive proof that the lessee is registered under FARA would likewise not "enable such licensee to make the announcement required by this section," 47 U.S.C. § 317(c). Registration would not mean that the lessee was acting as a foreign governmental entity in this particular leasing transaction, and would not disclose which foreign country was represented (especially since FARA registrants often represent multiple foreign principals). Furthermore, the FARA registrant is already under a statutory duty to include a conspicuous statement identifying its foreign principal in the programming, at pain of criminal liability, *see* 22 U.S.C. §§ 614(b), 618(a), so merely confirming a FARA registrant's status is not likely to affect the accuracy of a proper disclosure. Whether the contemplated proof is negative or positive or not supplied, the broadcaster would still have to rely on the lessee's direct responses to its inquires whether a foreign governmental entity paid or furnished money or consideration for this particular programming, and on behalf of which foreign country.

Even if requiring such proof were within the FCC's power, it would be bad policy, arbitrary and capricious, and unduly burdensome on protected speech. 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. Not only is this regulatory overkill, but the risk of error is high. The FARA system contains multiple databases, which are not user-friendly or easy to navigate, and their accuracy depends on using search terms with the exact names, abbreviations, or acronyms that are registered. Thus, it is by no means evident that a screenshot will be reliable proof one way or the other, especially if the lessee is not properly trained on FARA searches. A lessee may be reluctant to offer proof for fear of doing an incorrect search and risking a false submission. Rather than spend the time or resources to become proficient in using the FARA database, or risk making a false submission, many potential lessees may forego entering into lease agreements, at considerable cost to public welfare, expression, and broadcaster revenue. The game is not worth the candle.

The Commission also should not require broadcasters to supply proof of listing *vel non* in its Section 722 reports as a U.S.-based foreign media outlet. No such outlet has been listed in the past year.[20] 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.

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[20] *See Ninth Semi-Annual Report* (released November 10, 2022); *Eighth Semi-Annual Report* (released May 9, 2022). Indeed, only two entities have ever been disclosed under Section 722, *see https://www.fcc.gov/united-states-based-foreign-media-outlets* (Submissions), given the very narrow statutory definition of a U.S.-based foreign media outlet. *See* 47 U.S.C. § 624(d)(2).

III. THE EXISTING AND PROPOSED RULES IMPOSE UNDUE BURDENS ON BROADCASTERS AND LESSEES

A. The Existing Rules Are Unduly Burdensome

Although the Order asserted at many points that the Commission was limiting the reach of the rules to "leases" and thus limiting their impact and burden,[21] the Order itself undercut those repeated assertions with vague and uncertain language that left open the possibility of broader application to at least some advertising. As predicted by the Affiliates Associations' Petition, this has led many broadcasters, in an excess of caution, to conduct investigations of advertisers as well as other program sponsors in ways that wildly increase the already unnecessary burdens imposed by the rules.[22] Although very few lease arrangements involve foreign-sponsored propaganda, under the current expansive and ill-defined rules, thousands of stations[23] are conducting many thousands of investigations of advertisers and providers of sponsored content to determine whether they and the content they provide fall into that tiny segment. In each case, this includes communication with each

[21] *See, e.g.,* Order, 36 FCC Rcd at 7702, ¶ 3 (by focusing its rules on the lease of airtime, the FCC would "go[] no further than necessary," thereby balancing First Amendment considerations with the goals of its rules and minimizing burdens on broadcasters); *id*. at 7707, 7725-26, 7735, 7737 ¶¶ 12, 45, 70, 74.

[22] *See* Affiliates Associations' Petition at 3 (stating that the FCC's "reference to 'traditional, short-form advertising' has already caused confusion among the Affiliates Associations' members . . . [t]he problem is that the phrase 'traditional, short-form advertising' is not defined in the [Order] and is not a term commonly understood in the industry"), *citing* Order, 36 FCC Rcd at 7715-16, ¶ 28; Affiliates Associations Comments at 2 (arguing that clarification is necessary to ensure that broadcasters are definitively aware of the reach of the new rules and do not waste valuable resources performing unnecessary diligence and reporting).

[23] Significantly, the FCC's sponsorship identification rules are not limited in application to only full power television and radio stations, which means that, in addition to impacting 1,373 full power commercial television and 11,185 full power commercial radio stations, the rules also affect the 383 Class A TV stations and 1,865 low power TV stations that air programming pursuant to leases that are not rebroadcasting programming of a full power station. Notice at Appendix B, ¶ 8.

content provider about the rules, whether they (or anyone in the chain of program production/distribution) are foreign governmental entities, and documenting that diligence – every time a new content sponsorship agreement ("lease" or otherwise) is signed *or* renewed.

Although the number of true "leases" is difficult to quantify, NAB and MMTC reviewed the total number of leases identified by the broadcasters that submitted declarations in connection with NAB *et al*.'s 2021 request to stay implementation of the initial foreign sponsorship identification rules.[24] The total number of leases ranged from three to nearly three thousand, with an average of 15.7 leases per station.[25] If this holds true across the entire broadcast industry, full power television stations are analyzing a combined total of 21,556 leases, and full power radio stations are analyzing a combined total of 175,604 leases, or *nearly 200,000 leases* across all full power commercial television and radio stations. Remarkably, the FCC never discusses, in the original rulemaking or this Notice, the scope of agreements affected. The Commission did not collect – or even request – these critical data. The Commission misses, therefore, that its proposal is a *massive* collective

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[24] NAB, *et al.,* Petition for Stay Pending Judicial Review, MB Docket No. 20-299 (Sept. 10, 2021) at Exhibits 1-6.

[25] Again, and as described in Section V., many of the parties and arrangements broadcasters are currently investigating in an effort to comply with the foreign sponsorship identification rules are not "lessees" or "leases" but rather are advertisers of commercial products and services and agreements to air such advertising. Because of statements in the Order suggesting – in contrast to other statements throughout the Order – that some advertising *may* be subject to the rules, many broadcasters are erring on the side of caution and conducting diligence with respect to a very broad array of sponsored content. For purposes of this discussion, NAB/MMTC have inquired of broadcasters what burdens they are facing based on their current efforts to implement the rules, and what they anticipate they would need to do if the proposed rules are implemented without necessary clarifications concerning the application of the rules to advertising. Numbers as to "leases" may well include many arrangements that are not "leases" at all but rather advertising that the Commission should make clear as soon as possible does not fall within the rules.

burden on stations and their lessees, particularly given that the FCC's 2021 Order mentions only a handful of dated examples of stations airing foreign government propaganda, and some of the stations that previously aired such content no longer do so.[26]

Some declarants also estimated the costs and burdens associated with the initial foreign sponsorship identification rules (the rules that stations implemented and followed prior to the D.C. Circuit's vacatur of the independent research requirements).[27] While their costs will be lower in the future due to elimination of the requirements for broadcasters to search online databases, that does not change the fact that, because the Commission declined to stay implementation of its rules[28] and the rules took effect months before the court vacated the independent research requirement, every broadcaster with any leases had to develop and implement systems for compliance under the original rules, including modifying their lease agreements or developing other means of informing lessees of the rules, making the necessary lessee inquiries, and conducting research in the relevant FARA and FCC databases and documenting the results of that research. For many broadcasters, the process of setting up a compliance program involved advice from outside legal counsel and/or significant in-house legal time, modifications to online or print documents (or the creation of separate documents), and employee training.

Once these compliance systems were developed and staff were trained, tracking down every lessee to ensure they were informed and had responded to the inquiries (in

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[26] *See Report: Washington DC AM Station Drops Chinese Programming Following Scrutiny*, INSIDE RADIO (Jan. 24, 2022) (reporting that Station WCRW stopped airing programming from China Radio International).

[27] NAB, *et al.,* Petition for Stay Pending Judicial Review, MB Docket No. 20-299 (Sept. 10, 2021) at Exhibits 1-6.

[28] *Sponsorship Identification Requirements for Foreign Government-Provided Programming,* Order Denying Stay Request, DA No. 21-1518 (Dec. 8, 2021).

whatever manner the broadcaster chose to implement the rules) often required follow-up efforts. From speaking with member stations, we understand that many content providers required repeated reminders because the new rule was just one more (new) thing to do and didn't appear remotely applicable to them, since they did not perceive themselves to be engaged in "lease" arrangements as commonly understood and/or because they do not provide anything resembling propaganda, let alone foreign-oriented. Thus, multiple content providers were confused about why they would need to certify that they are not foreign governmental entities. Others were reluctant to sign because they had concerns about signing unfamiliar legal documents. Still others, including several broadcast TV multicast networks, or "diginets," had always conceptualized their agreements with stations as affiliation agreements, not "leases," so they did not understand why these new rules applied. The confusion, reluctance, and inertia means that diligence efforts for even a single lease often involve multiple calls, emails and explanations.

NAB/MMTC have reached out to stations to obtain estimates of their costs and burdens of compliance to date:

- One broadcaster with a mix of television and radio stations estimates it has already spent $10,000-$15,000 on outside counsel and has devoted significant in-house counsel and paralegal resources to foreign sponsorship ID compliance (including requesting, collecting, recording, and tracking lessee information).

- Another group of television stations estimates that in-house counsel is spending 20 hours per quarter on foreign sponsorship identification compliance (the equivalent of two full business weeks per year).

- One station group logged approximately 170 emails with lessees (excluding correspondence with diginets and long-form advertisers).

- While leases were often renewed by station personnel without legal review prior to the adoption of the foreign sponsorship identification rules, at least one broadcast group has implemented a new process to restrict individual stations within the group from entering or renewing any arrangement which could be deemed a lease without legal review.

- Station personnel spend significant time circling back with lessees and advertisers to ensure they have either signed revised agreements that reflect the foreign sponsorship identification rules or that they have signed separate certifications. A frequently asked question has become "Do you want me to sell (advertising or brokered) time or track down signatures?"

The efforts licensees undertook to develop and implement their compliance systems are frequently compared to the compliance systems they have in place for political broadcasting. The difference, however, is that broadcasters who must comport with the political broadcasting standards actually air political programming/advertising, and the compliance requirements result in disclosures about political content. The heavy burdens imposed by the foreign sponsorship identification rules, by contrast, are borne primarily by broadcasters and lessees or advertising partners that have never aired any foreign governmental programming. Even if all the diligence steps for every single lease required zero hours of outside counsel assistance and only five hours of staff time per lease for initial compliance efforts, and assuming 200,000 leases (as currently being interpreted under the FCC's vague definition) across the broadcast industry, compliance with the foreign sponsorship identification rules has already diverted *one million hours* of employee time away from broadcasters' normal activities. And that does not include the additional efforts being undertaken at every lease renewal. A burden of this magnitude cannot be justified by the need to ensure that a handful of broadcasters that actually air foreign government-sponsored content are properly disclosing its source. Accordingly, the Commission should reduce the burdens on broadcasters by clarifying its definition of "lease" and limiting the scope of leases subject to the due diligence requirements as described in detail below.[29]

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[29] Specifically, the FCC should eliminate advertising from the definition of "lease" and exclude religious and local programming leases from the scope of the diligence requirements. *See* Section V, *infra*.

These actions would reduce unnecessary burdens substantially and permit the FCC to instead focus on programming arrangements that have at least a remote chance of involving foreign-sponsored propaganda.

B. The Proposals in the Notice Will Exacerbate the Undue Burdens Imposed by the Existing Rules

Even if the FCC's proposed new requirements were within the scope of its statutory authority, the Commission should not adopt them because they would only increase the undue burdens imposed on broadcasters by the existing foreign sponsorship identification rules without justification. As detailed above, broadcasters already have devoted extensive resources to determining how the sponsorship identification rules fit into their existing systems for developing new lessee relationships and lease renewals, educating staff, completing the required diligence, and memorializing it. Because the Commission did not stay its rules pending the outcome of litigation, many broadcasters expended significant resources searching online governmental databases before the D.C. Circuit vacated the independent research requirements, and after the vacatur, stations revised their processes again to ensure that staff responsible for diligence efforts were instructed not to search governmental databases for lessees. Thus, if the proposed new rules are adopted, many local station groups would be developing and implementing a new diligence system *for the third time in less than two years*. The Commission should not mandate specific language to be used for certifications and require broadcasters to develop and implement new systems, educate their staff and lessees, obtain certifications (including from the same lessees) all over again, or place those certifications in their online public inspection files. It is important to note here that the FCC could have offered required language from the outset but elected not to do so.

Importantly, the Notice contains no justification for the proposed new rules and the burdens they impose. The Commission illogically asserts that the proposed rule changes are warranted by the court's vacatur of its independent research requirements.[30] But it remains entirely unclear how using FCC-specified language in certifications, obtaining revised certifications, or placing them in stations' online public inspection files would fill any alleged gap in the rules resulting from the D.C. Circuit's decision or would make the FCC's rules more effective in identifying foreign governmental propaganda.[31] The Commission did not even wait two months to evaluate its new regime and whether there was any merit to such concerns.[32] These additional requirements would only increase burdens on stations and lessees, and would add nothing to FCC's or the public's understanding of the source of leased programming or otherwise strengthen the rule.

The Notice also fails to acknowledge the burdens that would result from requiring broadcasters to use specified language after they have already implemented the existing rules. The Commission suggests that its proposal would *reduce* compliance burdens on licensees because they would no longer need to consult lawyers to either alter their lease agreements or develop separate documents.[33] However, stations have already expended significant funds to consult with outside experts and/or relied on their own staff to develop language for their leases or related agreements and have completed diligence efforts

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[30] Notice at ¶ 12.

[31] *See* Notice at ¶ 3 (observing that the D.C. Circuit's decision left "untouched the bulk of the foreign sponsorship identification requirements").

[32] The rules took effect with respect to existing leases on September 15, 2022, less than six weeks before the issuance of the Notice.

[33] Notice at ¶ 21 ("The establishment of standardized certification language would eviscerate any need for licenses or lessees to seek outside assistance in crafting or reviewing certifications.").

concerning an estimated 200,000 potentially applicable agreements. While mandatory language might have been an efficient option had the Commission adopted it from the start, stations cannot now obtain refunds from their legal counsel (or recoup their own time and effort) because the Commission has proposed to change its rules to mandate the use of specific language just 18 months after its adoption of rules *without* FCC-specified mandatory language, and several months after those rules took effect.

NAB/MMTC asked several individual broadcasters about the potential burdens of compliance with the proposed new rules. Below are some of the compliance challenges broadcasters anticipate if the Commission implements its new rules as proposed, absent NAB/MMTC's proposed clarifications and modifications to the scope of the term "lease":

- A group of television broadcast stations stated that new rules would necessitate an additional round of staff training to learn both new law and new operations processes.

- At least several station groups have integrated foreign sponsorship identification certifications into their online systems (such as Wide Orbit).
    - One group observed that its system would need to be redesigned for the two-way certification functionality and to output the signed certifications in a format that could be uploaded to OPIF.
    - Another group notes that its online system for certifications includes various defined terms but keeps the certification at a reasonable length for lessees and station personnel to manage. Revising existing systems to include the 2.5 pages of legal jargon proposed in the Notice would be a significant burden (and would apparently eliminate the current flexibility to summarize defined terms).

- A station group reports that it would have to set up an entirely new and different system to allow for uploading large numbers of certifications, noting that the OPIF system does not have an API that allows for mass uploads without manual intervention. This group notes that based on experience with uploads to the political file, the OPIF system sometimes experiences difficulties with large numbers of uploads at the same time. This broadcaster anticipates that the new rules would add hundreds of hours per year per station to the existing burdens of the foreign sponsorship identification rules.

- One station group anticipates that the proposed new rules would force station personnel to divert time away from their normal duties. Instead of account executives selling advertising time, they would spend significant time ensuring that all traffic system processes are completed and "chasing after" lessees for signatures.

- A station group expects "a lot of confusion and frustration" for both station personnel and lessees if another round of certifications using FCC-specified language is required, especially given how recently certifications were completed. The group anticipates that significant paralegal time would be required to track down certifications.

- The same group anticipates that if a public file requirement is added to the existing certification process, the centralized process it has developed will need revision so that the individual stations that currently manage OPIF uploads can add the certifications to their list of responsibilities. This station group also expects needing to augment station uploading efforts with help from law firm paralegals.

- Another broadcast television group estimates that it would need to devote at least one full-time staff position to the proposed new requirements to (1) obtain the proposed new standard certification with every new or renewed arrangement (including week-to-week and other short-term arrangements), and (2) upload these certifications to every affected station's online public inspection file.

The addition of an FCC-specified language mandate and broadcaster and lessee certification mandates to the existing rules therefore would not reduce but would notably increase the costs and burdens of the foreign sponsorship identification rules, particularly now, when stations have already implemented systems to comply with the FCC's new 2021 rules and conducted the requisite diligence. Similarly, adding an online public file mandate to the diligence process would significantly increase the burdens on broadcasters with no discernible countervailing public interest benefits. Because these mandates would disrupt many existing broadcaster diligence systems and require stations and lessees to conduct

burdensome diligence steps yet again within a short time frame, NAB and MMTC urge the Commission not to adopt these proposals.[34]

The Notice also ignores that its proposals would further complicate (i.e., burden) existing business relationships. Each time a broadcaster is required to request a lessee to sign a lease-related document, it creates an opportunity for lessees to seek renegotiation of other lease terms (particularly for stations that integrate their foreign sponsorship identification certifications into their agreements). It also puts broadcasters in the position of having to explain and justify FCC rules, especially ones that make no sense in the context of any given business relationship. Making these repetitive inquiries additionally risks offending longtime local partners, especially those who may be immigrants and/or are offering foreign language programming.[35] Imposing undue burdens on leasing arrangements furthermore potentially deters stations from entering into such arrangements, harming the quantity, quality, and diversity of programming.[36] The FCC cannot simply ignore these

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[34] If, in spite of the multiple legal and policy issues raised from the proposed new certifications, the Commission chooses to adopt rules requiring certifications by broadcasters and lessees with FCC-prescribed language and the uploading of such certifications into the online public file, we urge the Commission to permanently grandfather all due diligence completed before any new rules go into effect. Any lessee that has already certified it is not a foreign governmental entity should not have to do so again unless or until it enters a new lease, and no broadcaster that has already undertaken diligence with respect to all of its leases should have to repeat that process with the same lessees. Any new rules should apply only to new leases and lease renewals.

[35] *See* Letter from Rick Kaplan, NAB to Marlene H. Dortch, Secretary, FCC, MB Docket No. 20-299 (Apr. 15, 2021) (NAB 4/15/21 Ex Parte); Petition for Stay Pending Judicial Review, MB Docket No. 20-299 (Sept. 10, 2021) at Exhibit 6, Declaration of Amador Bustos, Bustos Media Holdings, LLC, ¶¶ 3, 7 (describing three TBAs involving foreign language programmers and expressing concerns that investigating these programming partners after years of working together "would jeopardize those relationships" and "may be perceived by our programmers as ethnic profiling, simply because the radio programming is in a language other than English.").

[36] *See* Section V, *infra*, for further discussion.

business realities as it inserts itself into the marketplace. It must tread carefully, understanding and accounting for the repercussions that inevitably occur when the Commission inserts itself into private business dealings.

IV. THE FCC'S FOREIGN SPONSORSHIP IDENTIFICATION REGULATORY REGIME IS CONTRARY TO THE FIRST AMENDMENT AND THE ADMINISTRATIVE PROCEDURE ACT

As shown in Section II, the Commission lacks statutory authority to force licensees to obtain the proposed new certifications from all their lessees or to compel those certifications from lessees, let alone to require proof from lessees of FARA or Section 722 registration. But even if the Commission possessed the requisite authority, the new proposals, as detailed in Section III, are unduly burdensome for stations and program lessees and, as explained below, their adoption thus would only exacerbate the First Amendment and APA problems inherent in the entire foreign sponsorship identification regulatory scheme.

The Notice neglects even to mention the First Amendment, despite the raft of existing and proposed rules directly impacting speech. These regulations currently or would require broadcast stations to air sponsorship disclosures at prescribed intervals with FCC-specified language; burden the arrangements thousands of stations and lessee program providers make for the airing of diverse content, both initially and upon renewal of those arrangements; and force both broadcast licensees and non-licensee third parties to make, sign, and attest to the truth of certifications – including ones involving legal terms in complex statutes – that contain not just mandated content but specific FCC-chosen

language.[37] For the reasons discussed below, this regulatory regime would be inconsistent with the First Amendment and arbitrary and capricious under the APA.

A. The Existing and Proposed Requirements Suffer from Vagueness and Are Not Narrowly Tailored to Serve a Sufficiently Important Government Interest, Thus Violating the First Amendment

The FCC's foreign sponsorship identification regime unconstitutionally impinges on speech rights in at least three ways. *First*, the current and proposed rules burden the underlying constitutionally protected choice to air leased programming. Broadcasters have an express right of editorial control over the programming they transmit, by leasing or otherwise.[38] As further explained in Section V, unnecessary regulatory burdens may effectively force some broadcasters to decline certain types of program leasing agreements (particularly those involving minimal renumeration, such as with houses of worship), thus chilling stations' speech in the form of editorial selection.[39] Parties have explained,

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[37] *See* Section III, describing in detail the time and resources broadcasters have expended to comply with the current rules and the undue burdens the proposed mandates would impose on local stations and lessees.

[38] *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) (reemphasizing that "broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties" and stressing how the public relies on broadcasters' "editorial initiative and judgment") (citations omitted); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (finding that cable operators are entitled to First Amendment protection in exercising editorial discretion over which programs to carry on their channels).

[39] Beyond chilling speech, the existing and proposed rules also burden religious exercise under the First Amendment. Free exercise concerns are another reason for the FCC to decline to burden, through additional regulations impacting both stations and lessees, houses of worship and other faith-based organizations seeking to lease airtime to reach their members and the general public with their services and messages. *See* Letter from Troy Miller, CEO, National Religious Broadcasters to Marlene H. Dortch, Secretary, FCC, MB Docket No. 20-299, at 3 (Apr. 15, 2021) (NRB 2021 Ex Parte) (expressing concern that FCC's proposals burdening leasing arrangements could deter station owners from entering into such arrangements, making it more difficult for religious programmers to find broadcast platforms for their content and impeding the flow of religious programming over the nation's airwaves).

moreover, that diverse programmers seeking to gain experience through leasing arrangements with the ultimate goal of purchasing broadcast stations may experience greater difficulties in finding broadcasters willing to enter leasing arrangements, impeding their ability to disseminate their content and become broadcast station owners.[40] And the complex and legalistic proposed certifications, as well as the alternative proof of registration proposal, would impinge on the speech rights of lessees, even discouraging some potential lessees from entering into program leases to speak to the listening and viewing public.

Second, the "vice of vagueness" infects the foreign sponsorship identification regulatory regime.[41] As the pending Petition for Reconsideration of the Affiliates Associations explained, the Order lacks clarity as to the applicability of the FCC's rules to advertising of varying length and formats.[42] This lack of clarity and the threat of enforcement has led numerous broadcasters to err on the side of extreme caution and spend both time and treasure undertaking extensive diligence on even commercial advertising to avoid running afoul of the FCC's impermissibly vague rule. The Supreme Court has repeatedly stressed the necessity for clarity in speech-related regulations and has frequently opined about the problem of vagueness in this area.[43] "When speech is involved, rigorous

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[40] *See, e.g.,* Letter from James Winston, NABOB to Marlene Dortch, FCC, MB Docket No. 20-299, at 2-3 (Apr. 14, 2021) ("NABOB 2021 Ex Parte"); Letter from Maurita Coley, MMTC to Marlene Dortch (FCC), MB Docket No. 20-299, at 1-2 (Apr. 15, 2021) ("MMTC 2021 Ex Parte").

[41] *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683-84 (1968) (recognizing that "vice of vagueness" produces chilling effect on distributors and creators of media products).

[42] Affiliates Associations' Petition at 3; *see* Section V.A., *infra* (explaining in detail why the FCC should grant the Affiliates Associations' Petition and clearly exclude all broadcast matter advertising commercial products or services from the definition of "lease" under the rules).

[43] .*See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (if "law interferes with the right of free speech or of association, a more

adherence to th[e] requirement[]” of clarity in regulation “is necessary”;[44] a standard that the FCC’s foreign sponsorship identification rules do not currently meet.

Third, the existing and proposed rules compel speech by both broadcasters and lessees.[45] Because “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech,”[46] compelled speech generally requires strict scrutiny,[47] under which the government must prove that the “restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”[48] Even assuming *arguendo* a lesser standard applies, “exacting scrutiny” requires that the speech compulsion be “narrowly tailored” to a “sufficiently important” government interest.[49]

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stringent vagueness test should apply”); *FCC v. Fox Television Stations, Inc.*, 557 U.S. 239, 254-55 (2012) (*Fox II*) (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect.”) (citation omitted).

[44] *Fox II*, 557 U.S. at 253-54.

[45] “[M]easures compelling speech are at least as threatening” as those proscribing it. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018).

[46] *Riley v. Nat’l Fed’n of the Blind of N.C., Inc*., 487 U.S. 781, 795 (1988).

[47] *Centro Tepeyac v. Montgomery City*, 722 F.3d 184, 193 (4th Cir. 2013) (*en banc*).

[48] *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (internal quotations omitted).

[49] *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). In a plurality opinion in *Bonta*, the Supreme Court found that compelled disclosure requirements under the First Amendment require “exacting scrutiny” (although one Justice favored strict scrutiny and two others did not decide whether strict or exacting scrutiny should apply because the disclosure requirements at issue were constitutionally invalid under either level of review). *See id*. at 2390-92. NAB submits, however, that requirements forcing broadcasters and, especially, third-party lessees – who are not subject to the constraints historically imposed on broadcasters compared to other speakers – to use FCC-chosen language in making certifications requiring understanding of complex federal statutes go beyond a mere “disclosure” requirement. *See also League of Women Voters*, 468 U.S. at 380 (explaining that the Supreme Court has upheld certain restrictions on broadcaster speech only when the court was “satisfied that restriction is narrowly tailored to further a substantial governmental interest”).

Whether applying strict or exacting scrutiny, the current and proposed foreign sponsorship identification rules are not narrowly tailored because they "burden substantially more speech than is necessary to further the government's legitimate interests."[50] Even after its 2020-2021 rulemaking and its 2022 Notice, the Commission still has not established a sufficiently important problem – let alone a compelling one – warranting the nationwide regulation of *all* leased programming aired on approximately 27,000 broadcast outlets across the country.[51]

Notably, the Notice cites no recent or additional examples of foreign governmental content on U.S. airwaves but merely refers in one footnote to a single footnote in the 2021 Order, which cited two press reports dating back to 2015 of foreign government programming being transmitted over U.S. radio stations at that time.[52] That hardly indicates a wave of foreign propaganda on radio and TV stations (let alone an "increase" of such propaganda) justifying a burdensome nationwide regulation applicable to all leased programming of all the nation's broadcasters, including leases that have no or only an infinitesimal risk of any connection to a foreign governmental entity. The Commission also continues to fail to establish that foreign agents are hoodwinking the broadcast industry by leasing airtime on radio and TV stations, unbeknownst to those licensees, so as to justify imposing extensive diligence requirements on thousands of broadcasters and lessees to

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[50] *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (citation omitted).

[51] FCC, *Broadcast Station Totals as of September 30, 2022*, Public Notice, DA 22-1057 (Oct. 5, 2022) (reporting 26,955 outlets, counting full power commercial radio and TV stations, Class A and low power TV stations, TV translators, and FM translators/boosters, but excluding full power FM and TV noncommercial educational stations and low power FM stations). Most full power commercial radio and TV stations are small businesses, and Class A stations, low power TV stations, and translator/booster stations are typically even smaller operations. *See* Notice at Appendix B, Initial Regulatory Flexibility Act Analysis at ¶¶ 6-11.

[52] *See* Notice at n. 2, citing Order, 36 FCC Rcd at 7702, n. 1.

attempt to discover these allegedly hidden propagandists.[53] But even if the Commission had demonstrated that its foreign sponsorship identification regime serves a legitimate interest, blanket requirements that all stations in the U.S. with any leases engage in the existing and proposed diligence requirements is not remotely tailored to the "problem" (un)documented in the record.

The scope of the existing and proposed rules reveals their lack of narrow tailoring, as these rules are both underinclusive and overinclusive.[54] The current and proposed rules are wildly underinclusive. The Commission continues to decline to consider whether it has authority to impose any disclosure obligation on cable or satellite operators, or to evaluate what (if any) jurisdiction it may or should have over online platforms. It has regulated and continues to propose regulating broadcasters alone, while imposing no disclosure requirements applicable to cable or satellite programming under the sponsorship identification rules, and even though the overwhelming majority of disinformation or propaganda sponsored by foreign governments, as NAB previously pointed out, is distributed over pay TV channels, social media, and the internet.[55] Tellingly, when the Commission

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[53] As NAB previously explained, the "problem" of such undisclosed foreign entities secretly leasing program time on unsuspecting broadcast stations remains unestablished. *See NAB, et al. v. FCC*, No. 21-1171 (D.C. Circuit), Final Initial Joint Brief of Petitioners, at 42-43 (Feb. 25, 2022); NAB 4/15/21 Ex Parte at 2-3; *see also* NRB 2021 Ex Parte at 2. The Commission did not earlier show and has not shown now that the few broadcast stations that have aired foreign governmental content were tricked into airing such content by disguised foreign governmental entities.

[54] A regulation compelling speech that is both under- and over-inclusive is by definition not narrowly tailored. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Ruggiero v. FCC*, 317 F.3d 239, 244 (D.C. Cir. 2003); *Cahaly v. Larosa*, 796 F.3d 399, 406 (4th Cir. 2015).

[55] Letter from Rick Kaplan, NAB to Marlene H. Dortch, Secretary, FCC, MB Docket No. 20-299, at 1-2 and notes 2-3 (Apr. 13, 2021) (NAB 4/13/21 *Ex Parte*). *See also, e.g.*, W. Marcellino, C. Johnson, M. Posard & T. Helmus, *Foreign Interference in the 2020 Election:*

asserted "an increase in the dissemination of programming in the United States by foreign governments and their representatives" to attempt to justify its regulation of broadcasters in 2021, it cited two articles focusing on internet and cable propaganda unaddressed by its Order.[56] So, the FCC has forced, and now proposes to additionally require, thousands of the nation's broadcasters and private third-party lessees to engage in increased and cumulatively expensive due diligence on the basis of foreign propaganda that barely exists on the airwaves, while the real problem festers elsewhere unchecked.

But even if some asymmetric regulation of broadcasters were permissible here, the FCC's existing and proposed rules are also significantly overinclusive. The Commission previously refused to impose any reasonable limit on the type of leased programming subject to due diligence requirements as NAB, MMTC and other commenters had suggested, such as programming that the broadcaster would have reason to believe was sponsored by a governmental entity.[57] Now the Commission proposes additional burdens on stations and lessees, requiring both to attest to certifications with extensive FCC-specified language involving complex legal terms and statutes (or requiring lessees to provide proof relating to FARA and Section 722 registration). Broadcasters, moreover, must conduct the mandated and proposed diligence in thousands of instances to determine the obvious – that foreign

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Tools for Detecting Online Election Interference, RAND CORP. (2020); J. Kao, ProPublica, and R. Zhong, P. Mozur and A. Krolik, THE NEW YORK TIMES, *How China Spreads Its Propaganda Version of Life for Uyghurs*, ProPublica (June 23, 2021) (discussing propaganda distributed through Twitter and YouTube videos); K. Hoa, *Troll farms reached 140 million Americans a month on Facebook before 2020 election, internal report shows,* MIT TECHNOLOGY REVIEW (Sept. 16, 2021) (reporting that Eastern European troll farms were reaching nearly half of all Americans via Facebook in run-up to 2020 election).

[56] *See* Order, 36 FCC Rcd at 7704 & n. 10.

[57] *See* NAB 4/15/21 Ex Parte at 3; NAB 4/13/21 Ex Parte at 3; MMTC 2021 Ex Parte at 1-2; NABOB 2021 Ex Parte at 1, 3; NRB 2021 Ex Parte at 2.

governments are not sponsoring infomercials (whether for Snuggies, a Beachbody workout program, or the latest cosmetic skin cream); radio programs by local individuals and businesses; or local church broadcasts of their weekly services. The absurd overkill of the FCC's sponsorship identification scheme underscores its unlawfulness.

The FCC's failure to narrowly tailor its foreign sponsorship identification rules is further shown by the Order's discussion of advertising. While the Order on numerous occasions limits its applicability to "leases," it also arguably exempts only "short-form" and "traditional" advertising,[58] leaving broadcasters to worry that the Commission might still apply its rules to other forms of advertising that do not fall within those vague and undefined categories. This inconsistency demonstrates the failure to narrowly tailor the rules to the FCC's stated concerns with foreign governmental propaganda and the over-expansiveness of the Order.

Given this vast overbreadth of the existing and proposed rules, the Commission clearly could achieve its objectives in less burdensome ways, as described in detail herein.[59]

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[58] Order, 36 FCC Rcd at 7715-16, ¶ 28.

[59] A regulation is not narrowly tailored if "it is possible substantially to achieve the Government's objective in less burdensome ways." *Edwards v. District of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014) (internal quotation marks omitted). As discussed below, the FCC, *inter alia*, should exclude advertising for commercial products and services from the definition of "lease," and exclude from its due diligence requirements broadcast leases with houses of worship and other faith-based program providers and with individuals and entities physically located within the stations' local markets. There is virtually no risk that these entities would ever be hidden foreign governmental entities seeking to reach viewers and listeners with programming containing the type of foreign propaganda and disinformation concerning to the FCC. Adopting these exemptions would help reduce the burden of the FCC's existing and proposed rules, while still advancing its goals in a more targeted manner. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (stating that under the First Amendment the government may not regulate in "such a manner that a substantial portion of the burden on speech does not serve to advance its goals"). See *also* Section V, *infra* (identifying other ways to narrow the breadth and reduce the burdens of the FCC's proposals).

The FCC therefore should clarify its vague definition of "lease," reduce the scope of leases subject to its due diligence requirements, and refrain from adopting its additional proposals, which substantially exacerbate the First Amendment problems with its foreign sponsorship identification rules.

B. The FCC's Foreign Sponsorship Identification Regulations and Proposals Are Arbitrary and Capricious

For the same reasons that the FCC's foreign sponsorship identification regime is not narrowly tailored under the First Amendment, it is arbitrary and capricious under the APA. The record accumulated across a rulemaking notice, numerous comments and other filings, an order, a petition for reconsideration, and a second notice has identified only a tiny number of instances where broadcast stations ever aired foreign government sponsored programming. In at least one instance, a station cited in the Order (and cited by reference in the Notice) as airing foreign propaganda is in fact no longer doing so.[60]

Yet, the Commission has adopted and now proposes further sweeping mandates for thousands of broadcast outlets across the country, no matter how small, to expend additional resources in their program leasing processes and arrangements (including revising them yet again); to attest to lengthy certifications containing FCC-specified language and to obtain similar certifications from all their lessees (or, alternatively, have lessees provide proof about FARA/Section 722 registration), however remote the chance any such lessees are foreign governmental entities; and to upload all those certifications pointlessly attesting that innumerable lessees are not foreign governmental entities or agents into their

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[60] *See* Notice at n. 2, citing Order, 36 FCC Rcd at 7702, n. 1. The Order (at notes 1, 74) repetitively cited a Washington, D.C. area radio station airing Chinese governmental programming but that station no longer does so. *See Report: Washington DC AM Station Drops Chinese Programming Following Scrutiny*, INSIDE RADIO (Jan. 24, 2022) (reporting that Station WCRW stopped airing programming from China Radio International).

online public files. The Commission has failed to show a rational connection between facts on the ground and the policies it has adopted and proposed.[61]

V. THE COMMISSION SHOULD CLARIFY THE SCOPE OF THE TERM "LEASE" AND MAKE CERTAIN OTHER MODIFICATIONS

A. The Definition of "Lease" Should Exclude All Broadcast Matter Advertising Commercial Products or Services

The Commission should clarify that the term "lease" does not encompass broadcast matter advertising commercial products or services.[62] The Order states that by narrowing the application of its foreign sponsorship identification rules to leases, the Commission would "ensure that the new disclosure obligations do not extend to situations where there is no evidence of foreign government sponsored programming," observing that "the record does not demonstrate that *advertisements*; archival, stock, or supplemental video footage; or preferential access to filming locations are a significant source of unidentified foreign sponsored programming."[63] Thus, the Commission already has found that the record in this proceeding does not support the inclusion of advertising within the scope of the term

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[61] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (stating that, to pass APA muster, an "agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made") (citations omitted); *see also ALLTEL Corp. v. FCC*, 838 F.2d 551, 560-61 (D.C. Cir. 1988) (finding rule arbitrary and capricious where FCC had not shown that "eliminating the possibility of some unknown amount of suspected abuse outweighs the other disadvantages" of the rule adopted).

[62] Notice at ¶ 32 (seeking comment on pending Affiliates Associations' Petition concerning the application of the foreign sponsorship identification rules to advertising).

[63] Order, 36 FCC Rcd at 7716 ¶ 29 (emphasis added). *See also id*. at n. 85 (observing that advertisements remain subject to the FCC's existing sponsorship identification rules in Section 73.1212(f), 47 C.F.R. §73.1212(f), which states that "[i]n the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification," such identification is deemed to be sufficient).

"lease."[64] Perhaps inadvertently, the Order states elsewhere that "we do not mean to suggest that traditional, short-form advertising constitutes a lease of airtime for these purposes."[65] The inclusion of the qualifiers "traditional" and "short-form" in this reference to advertising has caused substantial confusion among broadcasters as they seek to comply with the new rules.[66] The presumably inadvertent suggestion that some advertising might be subject to the rules – notwithstanding the Order's repeated assertion that the FCC's concerns and the rules' scope did not include advertising – has led many broadcasters to err broadly on the side of caution and conducting time-intensive and costly diligence on commercial advertising that, by the Commission's own observation, does not remotely present a risk of the undisclosed airing of foreign propaganda. This vagueness and uncertainty has imposed massive undue burdens on broadcasters and rendered the rules wildly overinclusive for their stated purpose.

Accordingly, NAB and MMTC urge the Commission to grant the Petition and clarify that advertising of any length and in any format is excluded from the definition of leases. Specifically, the Commission should exclude all broadcast matter advertising commercial products or services from the definition of the term "lease." As the Affiliates Associations observed, the term "broadcast matter advertising commercial products or services" is a well-established term used in Section 73.1212(f) of the FCC's rules,[67] which makes no mention

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[64] None of the few examples of foreign government sponsored programming discussed in the Order, Notice, or elsewhere in the record were advertisements.

[65] Order, 36 FCC Rcd at 7715-16, ¶ 28.

[66] Affiliates Associations' Petition at 3 (the FCC's "reference to 'traditional, short-form advertising' has already caused confusion among the Affiliates Associations' members . . . [t]he problem is that the phrase 'traditional, short-form advertising' is not defined in the [Order] and is not a term commonly understood in the industry").

[67] Affiliates Associations Comments at 2-6.

of any time limitation or type of advertisement. The existing sponsorship identification rules deal extensively with the full range of commercial advertising in all its forms. There is no evidence that any such advertising has presented the sorts of foreign propaganda with which the Commission is concerned and no evidence that the existing sponsorship identification rules are inadequate to serve the FCC's purposes. The inclusion of advertising for commercial products and services within the scope of the foreign sponsorship identification rules when the Commission has identified no record evidence that such programming is (or could be) foreign government propaganda would serve no discernible public interest objective and would be arbitrary and capricious under the APA.[68]

Finally, mandating diligence steps for agreements with advertisers violates the PRA. The PRA requires information collections mandated by the Commission to be "necessary for the proper performance of the functions of the Commission" and for the information collected to have "practical utility."[69] Mandating information collections concerning advertisers under either the current or proposed rules, when the Commission itself has

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[68] *See, e.g., ALLTEL Corp*., 838 F.2d at 560-61 (finding rule arbitrary and capricious where FCC had "done little more than hypothesize" the existence of the problem purportedly addressed by the rule). And as the Affiliates Associations also previously explained, developing an entirely new definition of advertising for purposes of the foreign sponsorship identification rules without notice or comment is contrary to Sections 553(b) and (c) of the APA. Affiliates Associations Comments at 6-8 ("Sections 553(b) and (c) of the APA require agencies to give public notice of a proposed rulemaking that includes 'either the terms or substance of the proposed rule or a description of the subjects and issues involved' and to give interested parties an opportunity to submit comments on the proposal." The 2020 rulemaking notice "did not mention advertising or suggest that the Commission was considering changes to the sponsorship identification requirements for advertisements or to the coverage of Section 73.1212(f). Thus, broadcasters had no notice that the new foreign sponsorship identification rules might apply to some or all advertising matter.").

[69] 44 U.S.C. § 3508. The term "practical utility" is defined as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion." 44 U.S.C. § 3502(11).

stated that there is no record evidence of foreign governmental entities airing propaganda in the form of advertising, cannot be necessary for the proper performance of the functions of the Commission, nor does it have practical utility. Instead, broadcasters and advertisers, many of which are small businesses,[70] are spending thousands of hours establishing and effectuating compliance systems and, if the proposed rules are approved, obtaining, signing and filing certifications that yield no information relevant to whether audiences are viewing foreign governmental propaganda.

B. The Commission Should Exclude From Diligence Obligations Certain Leases that Yield Significant Public Interest Benefits and Do Not Have Foreign Governmental Sources

Leased programming arrangements, including time brokerage agreements (TBAs) and local marketing agreements (LMAs), are an important means by which television and radio stations meet the needs and interests of their local communities and serve other public interest goals. A wide range of entities enter into such arrangements with local stations, including individuals, schools, sports teams/leagues, small businesses, houses of worship and other religious programmers, enabling them to share their informational, entertainment, promotional, or religious messages with local viewers or listeners. Leases also represent a common way that new entrants, particularly prospective minority and female broadcasters, enter the ranks of broadcast station ownership.[71] Leased programming arrangements additionally allow broadcasters to meet the needs of underserved audiences by providing specialized programming, including foreign-language

[70] Notice at ¶ 38 (seeking comment on the impact of the proposed rules on small entities with fewer than 25 employees pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. § 3506(c)(4)).

[71] *See, e.g.,* NABOB 2021 Ex Parte at 2-3; MMTC 2021 Ex Parte at 1-2.

programming.[72] Many of these arrangements involve very little remuneration to local stations.[73] The foreign sponsorship identification rules should recognize the many public interest benefits of leased programming and avoid burdening these beneficial arrangements except where the record contains at least some evidence that the lessee in question could be a foreign governmental entity purveying propaganda. Almost no lessees are foreign governmental entities, and there is no evidence that lessees are targets of foreign governmental acquisition, but the rules still require extensive diligence (which would be

[72] *See* NAB 4/15/21 Ex Parte at 2-3; Petition for Stay Pending Judicial Review, MB Docket No. 20-299 (Sept. 10, 2021) at Exhibit 6, Declaration of Amador Bustos, Bustos Media Holdings, LLC, ¶¶ 4-6 (discussing TBAs with three foreign language programmers including Vietnamese programming in Houston, TX, Vietnamese programming in San Martin, CA and Russian religious programming Portland, OR); Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming, Policy Statement, 82 F.C.C.2d 107, 107-111, 120, ¶¶ 1-3, 6-8, 10, 31 and n. 2 (1980) (1980 Policy Statement) (adopting policies to "encourage time brokerage" to "enable[] the market to respond to audience segments which would otherwise be denied their preferred program alternatives" including programming focused on racial/ethnic minorities and foreign language programming; discussing the longstanding use of TBAs to "provide specialized programming, including foreign language programming" dating back to before the passage of the Act).

[73] NAB and MMTC reviewed several agreements involving churches and other religious programmers using the Commission's OPIF system. One AM radio station in a top 25 market has multiple church leases entered into between 2015-2018. Most of these agreements involved programming fees ranging from $100-$150 for a half hour weekly program. The "Baptist Bible Hour" airs on two stations (one AM and one FM) for a full hour each week in the Huntsville, AL radio market (Designed Market Area (DMA) rank #104) at a rate of $160. A religious program called "Through the Bible" currently airs half an hour per weekday on an AM station in the Peoria, IL market (DMA rank #157) for a total of 2.5 hours per week at a rate of $157.50. The Perfect Church in Atlanta currently airs a half-hour weekly program on an AM station licensed to Atlanta (DMA rank #7) at a rate of $125. Jonesville Baptist Church airs a half hour program on two FM stations in the Savannah, GA market (DMA rank #140) at a rate of $300 per week (or $150 per station). The rates being charged likely would cover little more than the stations' costs of airing the programming. The Commission has previously recognized that TBAs "are not especially profitable" and that "imposing reporting requirements" on stations engaging in brokerage operations "could operate as a disincentive." 1980 Policy Statement, 82 F.C.C.2d at 115 ¶ 20. The FCC accordingly declined to impose mandatory equal employment opportunity reporting requirements on TBAs, holding that "[s]uch requirements would be an unwarranted burden on the licensee, the time broker or both." *Id.* at 115 ¶ 21.

expanded upon by the proposals in the Notice) to ensure that the impossible or at least highly improbable has not occurred.

For example, there is no risk that China owns the local public high school with a lease to air sporting events and spelling bees or that the school could be acquired by China between its initial lease and its lease renewal. But incredibly, the FCC's rules require stations to make this inquiry and check back each time the lease is renewed. The church or synagogue down the street from the station's studio isn't owned by the Russian government or its agent, but the FCC's rules still require stations to repeatedly make inquiries into the foreign governmental status of such lessees. In some instances, station personnel may actually be asking houses of worship whose services they will attend that weekend whether they are foreign governmental entities. There is absolutely no record evidence to support these pointless initial inquiries or the inane repeat inquiries at each lease renewal.

To minimize the impact of its diligence standards on stations and their lessees without sacrificing access to potentially relevant information, NAB and MMTC urge the Commission to exempt from its diligence requirements two types of leases (in addition to separately clarifying that advertisements for commercial services or products are not "leases"). First, it should exclude all leases involving religious or faith-based programming, whether such programming is offered by a local house of worship or another religious programmer. Second, it should exclude programming that is locally produced and distributed.

1. Religious/Faith-Based Programming

Broadcasters' partnerships to air programming produced and distributed by houses of worship or other faith-based programmers should be excluded from the definition of lease or otherwise excepted from the diligence requirements in the current or proposed foreign

sponsorship identification rules. An overwhelming number of leases involve local houses of worship and local, regional or national faith-based programmers.[74] These lease arrangements allow houses of worship to reach older adults, persons with disabilities and those with illnesses or mobility issues who might otherwise struggle to attend religious services in person or access them online. Many religious programmers also rely on radio to engage those who do not currently attend religious services and attract potential new adherents to their faith. The availability of faith-based programming on broadcast stations is a significant way for stations to meet the needs and interests of their local communities. Faith-based programming leases enhance the quality, quantity and diversity of broadcast programming and advance other important Congressional and Commission policy goals.[75]

Significantly, the record contains no evidence that houses of worship or other religious programmers are, or could be, foreign governmental entities, or, even if they were, that they would air political propaganda. Despite this, stations conducted pointless due diligence on thousands of faith-based programmers over the past year under the FCC's

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[74] For example, one broadcaster with approximately 100 radio stations estimates that a majority of its leases involve faith-based programming. A group of television broadcast stations with a significant presence in both large and very small DMAs estimates that if it excludes all forms of advertising, half of its leases involve houses of worship or other religious programmers. Indeed, the only example of broadcaster leases cited in the Notice references leases in a single station's online public inspection file, which identifies 52 TBAs, virtually all of them with churches or other faith-based programmers. *See* Notice at n. 44.

[75] The FCC has long regarded religious programming as responsive to the needs and interests of local communities. *See, e.g., En Banc Programming Inquiry Report and Statement of Policy*, 44 FCC 2303, 2314 (1960); *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076, 1092 n. 54 (1984); *In re Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 982-83 (1981). *See also* J. Eggerton, *FCC Encourages TV Stations to Air Religious Programming as a Public Service*, BROADCASTING & CABLE (Apr. 9, 2020) (discussing FCC temporary waiver of certain children's programming preemption rules to permit stations to air community events, including religious services, during the early months of the COVID-19 pandemic).

current (and/or pre-vacatur) rules, and unsurprisingly none were foreign governmental entities or their representatives. Existing rules requiring faith-based programming lessees to be investigated at lease inception and renewal are, in many cases, downright offensive to these lessees, and at the least are imposing widespread and significant burdens without any justification. The proposed expansion of the foreign sponsorship identification rules to mandate the use of specific certification language, require broadcasters to obtain certifications from lessees, and mandate the placement of such certifications in stations' online public inspection files further compounds these undue burdens. Because the existing and proposed rules fail to effectuate the FCC's stated goals and impose unjustified burdens on broadcast licensees and their lessee partners, the rules are arbitrary and capricious in contravention of the APA and violative of the PRA.[76]

2. Locally Produced and Distributed Programming.

Broadcasters' partnerships to air programming produced and distributed by individuals or entities physically located within their local markets should be excluded from the definition of lease or otherwise excepted from the diligence requirements. The record contains no evidence that organizations physically located within a station's local market are (or reasonably could be) foreign governmental entities.

Lease arrangements with local partners enhance the quality, quantity and diversity of broadcast programming and create opportunities for local individuals and entities to reach members of the local community over the air. Lease arrangements with local businesses,

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[76] As explained above, information collections mandated by the Commission must be "necessary for the proper performance of the functions of the Commission" and the information collected must have "practical utility." 44 U.S.C. § 3508. Because there is no evidence that religious programming leases may contain foreign propaganda, the burdensome information collections associated with the FCC's current and proposed rules do not meet this standard.

schools, individuals, and organizations advance localism, a cornerstone of our nation's system of broadcasting and a critical element of legislative and regulatory actions affecting broadcasting.[77] Such arrangements also foster ownership diversity by allowing new entrants to gain experience and ultimately own and operate stations.[78] Women and people of color that want to own broadcast stations often struggle to find the necessary financing to purchase their initial stations or buy additional stations.[79] One proven path forward for prospective female and minority broadcasters is to enter into an LMA or TBA with an existing broadcast station owner to gain experience with station operations, and then purchase the station after a track record of success.[80] This path has been such a significant vehicle for new entrants that MMTC launched a program under which established broadcasters would

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[77] Section 307(b) explicitly requires the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b). In effectuating this mandate, the Commission has consistently held that broadcasters are obligated to operate their stations to serve the public interest by airing programming responsive to the needs and issues of the people in their communities of license. *See, e.g., Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 ¶1 (2004).

[78] *See* MMTC 2021 Ex Parte; NABOB 2021 Ex Parte.

[79] *See, e.g., Rules to Promote New Entry & Ownership Diversity*, Report and Order, 33 FCC Rcd 7911, 7913 ¶ 5 (2018) (adopting an incubator program as "to address the primary barriers to station ownership by new and diverse entities: lack of access to capital and the need for technical and operational experience"); *Commission Policies and Procedures Under Section 310(b)(4)*, Declaratory Ruling, 28 FCC Rcd 16244, 16249 ¶ 10 (2013) (acknowledging that "limited access to capital is a concern in the broadcast industry, especially for small business entities and new entrants, including minorities and women").

[80] *See, e.g.,* Letter from James Z. Hardman, Chief Executive Officer and President, Hardman Broadcasting, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 1-2 (May 22, 2018) (Mr. Hardman, an African-American first-time radio station owner, entered into a TBA with the owner and later acquired the station); Letter from Carolyn Becker, President, Riverfront Broadcasting, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 17-289, at 1-2 (May 15, 2018) (Ms. Becker acquired her first two stations by purchasing them after a few years of successful LMA operations; she later purchased several additional stations after first programming those stations pursuant to LMAs).

donate stations to MMTC, which then identified diverse potential owners to program the stations pursuant to LMAs and later acquire the stations.[81] Dozens of stations, including radio and low power television stations, have been part of the successful program,[82] which has been highlighted as a potential model for an FCC incubator program.[83]

Leasing arrangements also foster program diversity by allowing stations to air content that serves niche audiences, including foreign language programming and programming of interest to particular demographic groups within a station's local market. The Commission has previously determined, for example, that even where programming a station to serve a niche audience on a full-time basis was economically unsustainable, time brokerage agreements could enable that audience to be served.[84] To promote such outcomes, the Commission adopted policies encouraging TBAs.[85] The public interest

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[81] Comments of MMTC, MB Docket Nos. 14-50, 09-182, 07-294 and 04-256, at 7-8 (Apr. 17, 2017) (discussing how LMAs have facilitated a transition to ownership for minority and female entrepreneurs through a station donation program operated by MMTC).

[82] *Id.*

[83] Comments of MMTC, MB Docket Nos. 14-50, 09-182, 07-294 and 04-256, at 7-8 (Apr. 17, 2017); Supplemental Comments of the Diversity and Competition Supporters, MB Docket No. 09-182, at 4-7 (Apr. 3, 2012) (proposing various qualifying activities for an incubator program to promote diversity, including an LMA option).

[84] *See, e.g.,* 1980 Policy Statement, 87 F.C.C.2d at 111-112, ¶¶ 10, 12 (discussing two television stations in urban areas airing programming primarily in foreign languages and observing that a station programmed exclusively for any one of the demographic groups in the stations' markets might not be economically sustainable, while brokered programming enabled offerings geared towards their interests; goal of policy statement was to "encourage licensees to participate in brokerage arrangements, so that groups presently unable to support a specialized facility will have the opportunity to support responsive brokered programming by independent producers."); *Deregulation of Radio,* Report & Order, 84 FCC 2d 968 at Appendix D, ¶ 30 (1981) ("Because specialized audiences may be too small to support full-time programming, time brokerage and time sharing within a station could be encouraged. The Commission has, in fact, just released a *Policy Statement* encouraging such time brokerage arrangements.").

[85] 1980 Policy Statement.

benefits of leasing arrangements identified by the Commission decades ago when it adopted its 1980 Policy Statement remain true today. And just as the Commission previously found, placing regulatory burdens, such as reporting obligations, on these arrangements could create disincentives for both licensees and lessees.[86] To be clear, the burden is not just informing leasing parties of the rules and obtaining (repeatedly) certifications, but also the possibility of making an unintentional misstep, which could lead to a Commission enforcement action. For these reasons, the Commission should exclude local entities from its extensive foreign sponsorship identification due diligence.

C. The Commission Should Modify its Definition of "Foreign Governmental Entity"

Even assuming *arguendo* that the Commission possesses the statutory authority to adopt them (which it does not), the certification requirements are unduly legalistic and burdensome. The Commission should simplify its definition of the term "foreign governmental entity" to make the diligence process less burdensome for both broadcasters and lessees, regardless of whether it adopts its proposed certification rules.

The definition of the term "foreign governmental entity" is complex and requires a level of legal understanding and analysis that the broadcast station personnel, church pastors, and other non-lawyers reading certifications do not have and should not reasonably be expected to perform. The definition of this term, as well as the 2.5 pages of certification language in the proposed rules, are both evidently written by lawyers for lawyers, and are replete with references to the United States Code and the Code of Federal Regulations. The lessee certification requirements alone have 15 different cross references to the United

[86] *See* note 73, *supra, citing* 1980 Policy Statement, 82 F.C.C.2d at 115 ¶¶ 20-21.

States Code or the Code of Federal Regulations, and some of those provisions in turn have embedded references.

Perhaps such exactitude was necessary under the former (now invalidated) provisions that required broadcasters to check whether lessees were registered under FARA or Section 722 of the Communications Act. But this burden is excessive for the purposes of the present rule. The Commission should recognize that most lessees are small businesses or churches whose personnel are not legally trained (and indeed that is true of many small broadcasters). They generally will not know what the U.S.C. and the C.F.R. are, much less how to navigate the Codes and interpret specific provisions. And because one is certifying compliance with the Codes under the proposed rule, lessees and broadcasters would need to repeatedly check the Code provisions at every renewal to see if the provisions have changed. That is extraordinarily burdensome, especially for the many leases that renew frequently (on monthly or weekly bases).

Non-lawyers simply cannot make these certifications on their own or would be intimidated by the requirement to do so. Less sophisticated or resourced lessees may especially be deterred. In many cases, such as a local church trying to provide church services to elderly parishioners over the radio, hiring a lawyer will be cost-prohibitive. The end result is that, in a number of cases, potential lessors may choose not to lease airtime, even if there is no risk of foreign governmental sponsorship, thereby unduly burdening the First Amendment rights of speakers and listeners, as discussed in detail above. The Commission should simplify the definition of “foreign governmental entity” and, if it determines to adopt its highly questionable certification proposals, the language for those certifications as well.

D. Mandating the Placement of Certifications Concerning Domestic Lessees in Each Station's Online Public File Does Not Advance the Intended Goals of the Foreign Sponsorship Identification or Online Public Inspection File Rules

Although there are multiple statutory authority and other problems with the FCC's existing and proposed rules, if the Commission nonetheless chooses to require anyone to complete certifications, NAB and MMTC urge the Commission not to mandate the placement of all such certifications in stations' online public inspection files.[87] Rather, the Commission should require stations to place certifications in their public files *only if they are leasing time to a foreign governmental entity*. There is no rational basis for requiring stations to upload certifications stating that lessees are *not* foreign governmental entities. Doing so would require thousands of broadcast stations to report innumerable non-events.

The FCC's foreign sponsorship identification rules intend to "ensure that audiences of broadcast stations are aware when a foreign government, or its representatives, are seeking to persuade the American public."[88] Given this clearly stated purpose, neither the Commission nor the public have an interest in the overwhelming majority of certifications stating that the leasing entities are *not* foreign governmental entities. Certifications by thousands of lessees with no relationship to any foreign governments or their representatives do absolutely nothing to inform members of the public about the rare instances in which broadcast stations air foreign governmental content.[89]

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[87] *See* Notice at ¶ 18.

[88] Notice at ¶ 5.

[89] Indeed, if anything, requiring all certifications by stations and lessees to be uploaded to stations' public files could make it more difficult for the FCC or members of the public to find and view the relevant certifications. Burying the extremely rare certifications by foreign governmental lessees – the proverbial needle – in a haystack of irrelevant certifications aids no one.

In short, adoption of the FCC's proposal to upload all certifications to online public files would be a burden without a benefit, not to mention that it doesn't comport with the stated goals of the online file. As an initial matter, the Commission again ignores the fact that members of the public rarely, if ever, look at stations' online public files for any purpose, let alone to access those files specifically to view certifications about program leases not being with a foreign governmental entity.[90] But even if a larger number of members of the public did access stations' online files, the FCC's proposals for uploading all certifications would not make *relevant* information available to the public, as the public file rules intend. Rather than advancing the FCC's goal of informing audiences when foreign governmental entities are seeking to persuade them, the proposed requirement would be yet another administrative burden creating regulatory risks, including potential substantial forfeitures, for stations that may inadvertently neglect to upload a certification stating that a church, school, civic organization, or local business is not a foreign propagandist. The Commission has identified no harms that realistically would (or even could) result from the

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[90] According to the FCC's response to a recent NAB Freedom of Information Act (FOIA) request, for example, in 2021 the FCC Public Inspection File website as a whole had only 199,431 unique views (and just 248,032 total views). Letter from Sima Nilsson, Media Bureau, FCC to Patrick McFadden, NAB, FOIA Control No. 2022-000374 (Apr. 28, 2022). That averages merely 11.38 unique views per station in an entire year. *See* FCC, *Broadcast Station Totals as of December 31, 2021*, Public Notice, DA 22-2 (Jan. 4, 2022) (reporting a total of 17,529 full power AM, FM and TV commercial and noncommercial stations and Class A TV stations, which are the types of stations required to maintain online public files). But even this limited number of views per station cannot reasonably be attributed to members of the public because stations themselves (and stations' attorneys) view their own (and their clients') online public files to check for completeness and accuracy and to ensure that materials were successfully uploaded. NAB further assumes that these modest numbers of views also included views by FCC staff. Moreover, even overestimating (perhaps substantially) the number of views by the general public by counting all 199,431 unique views as attributable to members of the public, that still would mean only .060 percent of the estimated U.S. population viewed broadcast stations' online public files in 2021. *See* https://www.census.gov/quickfacts/fact/table/US/PST045221 (estimating U.S. population to be 331,893,745, as of July 1, 2021).

absence of a requirement to file all broadcast station and lessee certifications and thus has no basis for its proposed rule elevating ministerial compliance over substantive outcomes.

VI. CONCLUSION

For the foregoing reasons, the Commission should decline to adopt the rule modifications proposed in the Notice; exclude from application of its foreign sponsorship identification rules advertising (of any length or format) of commercial products and services and leases involving faith-based or local programming; and modify its definition of foreign governmental entity.

Respectfully submitted,

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