

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

In the Matter of)	
)	
Amendment of Section 73.3555(e) of the)	MB Docket No. 17-318
Commission's Rules, National Television Multiple)	
Ownership Rule)	

**COMMENTS OF
THE FREE STATE FOUNDATION**

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I. Introduction and Summary

The Free State Foundation ("FSF") submits these comments in response to the Public Notice released by the FCC's Media Bureau on June 28, 2025,¹ seeking to refresh the record in the national television ownership cap proceeding originally initiated in 2017.²

FSF scholars broadly support Chairman Brendan Carr's wide-reaching efforts to "DELETE, DELETE, DELETE" regulations that, at best, have faded into irrelevance and, at worst, arbitrarily anoint winners and losers in what would otherwise be a highly competitive and efficiently operating marketplace.³ Regarding video programming

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Andrew Long, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

¹ Public Notice, "Media Bureau Seeks to Refresh the Record in the National Television Multiple Ownership Rule Proceeding," MB Docket No. 17-318, DA 25-530 (released June 8, 2025), available at <https://docs.fcc.gov/public/attachments/DA-25-530A1.pdf> (Public Notice).

² See generally *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318, Notice of Proposed Rulemaking (released December 18, 2017), available at <https://www.fcc.gov/ecfs/document/121820105395/1>.

³ See, e.g., Comments of the Free State Foundation, *Termination of Certain Proceedings as Dormant*, CG Docket No. 25-165 (filed July 9, 2025), available at <https://freestatefoundation.org/wp-content/uploads/2025/07/FSF-Comments-Termination-of-Certain-Proceedings-as-Dormant-070925.pdf>; "PRESS RELEASE: FSF's Randolph May Commends FCC for Employing Direct Final Rulemaking," *FSF Blog* (July 7, 2025), available at <https://freestatefoundation.blogspot.com/2025/07/press-release-fsfs-randolph-may.html>; Reply Comments of the Free State Foundation, *IN RE: DELETE, DELETE, DELETE*,

distribution specifically, without question it is appropriate to revisit the broader regulatory framework that unfairly and uniquely burdens legacy video providers – broadcast stations, to be sure, but also facilities-based multichannel video programming distributors ("MVPDs") such as cable, direct broadcast satellite, and telco TV providers – even as they suffer steady viewer losses to rapidly growing Big Tech platforms already multiple times larger in terms of subscribers.⁴

In this proceeding, the Commission's attention is focused squarely on the national television ownership cap, set by Congress in 2004 at 39 percent of the total audience, and the cap's impact on (1) broadcast station groups' ability to better compete, through greater scale, with Google, Amazon, Apple, Netflix, Meta, Disney, Paramount, and the like for viewers and ad dollars; and (2) the relationship between local TV affiliates and the Big Four broadcast television networks.

Equally important for public policymakers to consider, however, is the consequence that one-sided (that is to say, asymmetric) relief for broadcasters would

GN Docket No. 25-133 (filed April 28, 2025), available at <https://freestatefoundation.org/wp-content/uploads/2025/04/FSF-Reply-Comments-FCCs-DELETE-DELETE-DELETE-Proceeding-042825.pdf>; Comments of the Free State Foundation, *IN RE: DELETE, DELETE, DELETE*, GN Docket No. 25-133 (filed April 11, 2025), available at <https://freestatefoundation.org/wp-content/uploads/2025/04/FSF-Comments-DELETE-DELETE-DELETE-041125.pdf>.

⁴ See, e.g., Andrew Long, "No Basis Exists in 2025 for Rules Targeting Traditional Video Providers," *Perspectives from FSF Scholars*, Vol. 20, No. 13 (March 6, 2025), available at <https://freestatefoundation.org/wp-content/uploads/2025/03/No-Basis-Exists-in-2025-for-Rules-Targeting-Traditional-Video-Providers-030625.pdf>, at 3 ("[T]he 2024 Communications Marketplace Report ... acknowledged 'a downward trend that began in 2012' from a high of 101.6 million subscribers to 54.1 million subscribers at the end of 2023 – a 46.8 percent decline. Recently released earnings reports reveal that those losses continue.... By contrast, the 800-pound gorilla, Netflix, reported an additional 4.82 million subscribers in the United States and Canada during the fourth quarter of 2024, bringing its total to 89.63 million – more than 2.5 times the combined total of" Charter, Comcast, DISH TV, and Verizon.); Andrew Long, "Video Subscriber Updates Underscore Ongoing Shift to Streaming," *FSF Blog* (August 29, 2023), available at <https://freestatefoundation.blogspot.com/2023/08/video-subscriber-updates-underscore.html> ("The latest video subscriber numbers provide further evidence that both facilities-based MVPDs (cable, Direct Broadcast Satellite (DBS), telco TV) and vMVPDs are weathering the impact of a seismic shift in consumer preferences away from the monolithic video 'big bundle' to a self-curated collection of more targeted offerings.").

have on the still heavily regulated relationship between local television stations and facilities-based MVPDs. The laudable journey upon which the Commission has embarked begins with a regulated marketplace and should end with one safeguarded by competitive forces.⁵ While traveling that path, the Commission must be mindful not to exacerbate existing opportunities for arbitrage via an asymmetric, piecemeal approach, particularly in the fraught retransmission consent context.⁶ This especially is true given the July 23, 2025, decision by the United States Court of Appeals for the Eighth Circuit vacating the FCC's rule prohibiting common ownership of two of the Big Four network affiliates in a single geographic market,⁷ a development expected to "open the door for local TV stations ... to increase their leverage when seeking carriage fees from cable and satellite TV operators."⁸

Accordingly, if the FCC concludes that it should – and can, in a post-*Chevron* appellate environment – modify the national television ownership cap, at the same time it should (1) urge Congress to modernize the Communications Act, and, in the interim, (2) identify additional ways to eliminate unwarranted rules targeting facilities-based MVPDs.

⁵ See, e.g., Randolph J. May, "We Need a Communications Act That Befits the Digital Age," *Perspectives from FSF Scholars*, Vol. 20, No. 33 (July 11, 2025), available at <https://freestatefoundation.org/wp-content/uploads/2025/07/We-Need-a-Communications-Act-That-Befits-the-Digital-Age-071125.pdf>.

⁶ See, e.g., Comments of the American Cable Association, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318 (filed March 19, 2018), available at <https://www.fcc.gov/ecfs/document/10319663619613/1>, at 2 ("As ACA and others have repeatedly observed, broadcast consolidation increases a broadcaster's leverage in retransmission consent negotiations. This, in turn, leads to higher rates paid by MVPD subscribers and other harms to the public.").

⁷ See *Zimmer Radio of Mid-Missouri, Inc. v. FCC* (8th Cir. July 23, 2025), available at <https://ecf.ca8.uscourts.gov/opndir/25/07/241380P.pdf>.

⁸ Ted Hearn, "Eighth Circuit Tosses FCC's Top-Four TV Station Ownership Rule," *Broadband Breakfast* (July 24, 2025), available at <https://broadbandbreakfast.com/eighth-circuit-tosses-fccs-top-four-tv-station-ownership-rule/> (subscription required).

At the end of the day, modifying the national television ownership cap without commensurate deregulatory relief for facilities-based MVPDs risks entrenching a marketplace currently distorted by regulatory asymmetries rather than promoting vigorous competition and furthering consumer welfare.

II. One-Sided Regulations Always Interfere With Competition

It is plain to see that the regulatory status quo, in which those that deliver video over the Internet are not subject to legacy rules that single out facilities-based providers, stands at odds with – and, assuredly, exacerbates – the steady migration of consumers from the former to the latter. In a recent post to the *FSF Blog*, Free State Foundation Senior Fellow (and coauthor of these comments) Andrew Long described what – at that precise point in time – was a noteworthy first in streaming's gains at the expense of traditional sources of video programming.

According to Nielsen's The Gauge™, in May consumers spent more time watching Internet-delivered content than cable and broadcast television *combined*: 44.8 percent versus 44.2 percent.⁹ That unprecedented disparity, however, was surpassed the very next month, when streaming expanded its lead by three-and-a-half points: 46.0 percent for streaming versus 41.9 percent for cable and broadcast television.¹⁰

Legacy regulations, however, don't just hamstring competition between facilities-based distributors and Big Tech platforms with global footprints:

Alphabet/Google/YouTube, Amazon, Apple, Meta, Netflix, Disney/Hulu, Paramount,

⁹ See "Streaming Reaches Historic TV Milestone, Eclipses Combined Broadcast and Cable Viewing For First Time," *Nielsen* (June 17, 2025), available at <https://www.nielsen.com/news-center/2025/streaming-reaches-historic-tv-milestone-eclipses-combined-broadcast-and-cable-viewing-for-first-time/>.

¹⁰ See "Netflix Leads Streaming Growth in June on the Strength of Multiple Big Titles in Nielsen's 50th Report of The Gauge™," *Nielsen* (July 15, 2025), available at <https://www.nielsen.com/news-center/2025/netflix-leads-streaming-growth-in-june-on-the-strength-of-multiple-big-titles-in-nielsens-50th-report-of-the-gauge/>.

and so on. They also impact the relative bargaining power between broadcasters and MVPDs in retransmission consent negotiations. If not paired with a long-overdue update to the Communications Act and the FCC's implementing rules, action to raise or eliminate the national television ownership cap likely would further skew retransmission consent negotiations.¹¹ Big picture, therefore, any regulatory relief granted to broadcasters from the national television ownership cap must be paired with corresponding deregulatory measures for MVPDs. To do otherwise would exacerbate asymmetries that presently distort competition and harm consumers.

III. *Loper Bright* Casts Serious Doubts on the FCC's Ability to Act

The discussion to this point presupposes that the Commission in fact has the authority to modify the 39 percent cap established by Congress in Section 629 of the Consolidated Appropriations Act of 2004 ("CCA").¹² However, given the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*,¹³ the Commission can no longer rely upon *Chevron* deference to justify expansive interpretations of ambiguous statutory text. Instead, reviewing courts now will determine the "best reading" of the statute. Here, the best reading seems to be that, by replacing the 45 percent cap established by the FCC with one of its own choosing – 39 percent, which reportedly represented a legislative compromise designed to avoid causing existing station groups to fall out of compliance¹⁴ – and excluding the cap from the Commission's quadrennial

¹¹ See, e.g., Tom Sly, "Who's Really A Buyer And Who's A Seller Once Deregulation Comes?" *TVNewsCheck* (July 14, 2025), available at <https://tvnewscheck.com/business/article/whos-really-a-buyer-and-whos-a-seller-once-deregulation-comes/> (positing that, should broadcast networks increase their ownership of local affiliates, they "would have a stronger bargaining position with MVPDs").

¹² Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629 (2004).

¹³ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

¹⁴ See, e.g., Carl Hulse, "After Disputes, Congress Passes Spending Plan," *The New York Times* (January 23, 2004), available at <https://www.nytimes.com/2004/01/23/us/after-disputes-congress-passes-spending-plan.html> (subscription required) ("The Federal Communications Commission had agreed to let companies

review of media ownership rules,¹⁵ Congress intended to retain for itself the authority to define and/or modify the cap.

The Commission concluded in 2013 that "the 2004 Consolidated Appropriations Act does not preclude the Commission from revisiting the national television ownership rule ... in a proceeding separate from the quadrennial reviews of the broadcast ownership rules pursuant to Section 202(h) of the 1996 Act."¹⁶ In a post-*Chevron* appellate environment, however, the best reading of the congressional decision to remove the national television ownership cap from the Commission's quadrennial review of its ownership rules is that it was meant to prevent the agency from modifying (or eliminating altogether) the cap. The Commission's preferred reading – that it remains free to act, just under other, general provisions of the Communications Act, such as Section 4(i) or Section 303(r) – would render meaningless the provision in the CCA that added the following language regarding the quadrennial review to the Telecommunications Act of 1996: "This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)."¹⁷

IV. Conclusion

As a result of unwarranted regulatory restraints adopted in a bygone media environment, both local broadcasters and facilities-based MVPDs fight with one hand

own stations that reach as much as 45 percent of viewers. Congress, backed by some consumer groups, balked, trying to keep the current level of 35 percent. But in the final legislation, the administration, aided by Congressional leaders, won an increase to 39 percent, a benefit to some media conglomerates.").

¹⁵ See generally Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h) (1996). The national television ownership cap is codified in 47 CFR § 73.3555(e).

¹⁶ *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Notice of Proposed Rulemaking (released September 26, 2013), available at <https://docs.fcc.gov/public/attachments/FCC-13-123A1.pdf>, at 6. See also *id.* (contending that "while Congress excluded the national television ownership rule from the quadrennial review requirement under 202(h), it did not foreclose Commission action to review or modify the rule in a separate context").

¹⁷ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629(3) (2004).

tied behind their backs when competing with Big Tech behemoths like Alphabet's YouTube, Netflix, Apple, and Amazon Prime for eyeballs. Without question, competition and consumers alike would benefit from deregulatory measures that address those disparities vis-à-vis Big Tech. But such steps cannot be considered in a vacuum.

That's because unnecessary legacy rules don't merely distort competition in the broader video distribution marketplace. They also impact the relationship between broadcasters and facilities-based MVPDs. Meaningful corrective action must take both dynamics into account. Given the existing statutory landscape, the scope of the interdependent changes required, the impact of *Loper Bright*, and the inherent constitutional value associated with elected officials making such important policy decisions, it is clear that the optimal approach necessarily involves a Communications Act update that accounts for the dramatically changed media environment in a comprehensive way.¹⁸

In any event, the Commission should not act in a piecemeal fashion that, in the short term, increases existing opportunities for regulatory arbitrage, particularly in the retransmission consent context. Instead, it should acknowledge all the regulatory imbalances at play and encourage and assist Congress in pursuing comprehensive statutory reform suited to today's competitive, bottleneck-free video programming distribution marketplace.

¹⁸ See, e.g., Randolph J. May, "We Need a Communications Act That Befits the Digital Age," *Perspectives from FSF Scholars*, Vol. 20, No. 33 (July 11, 2025), available at <https://freestatefoundation.org/wp-content/uploads/2025/07/We-Need-a-Communications-Act-That-Befits-the-Digital-Age-071125.pdf> (arguing that "the current woefully outdated 'stovepipe' regulatory framework is an impediment to the development of market-oriented communications policies") (citation omitted).

In that spirit, and as Mr. Long noted in "FCC Deletes, Modernizes, Streamlines Cable Rate Regulation," a June 2025 post to the *FSF Blog*,¹⁹ we are encouraged by reporting by *Law 360* (subscription required) that House Energy and Commerce Committee Chairman Brett Guthrie (R-KY) recently stated that he is "supportive of the FCC relaxing broadcasting ownership rules so that local broadcasters can better compete at scale and continue serving their communities" – and in the same breath acknowledged that "it's time to have a real conversation and update the 1992 Cable Act."²⁰

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¹⁹ See Andrew Long, "FCC Deletes, Modernizes, Streamlines Cable Rate Regulation," *FSF Blog* (June 26, 2025), available at <https://freestatefoundation.blogspot.com/2025/06/fcc-deletes-modernizes-streamlines.html>.

²⁰ Christopher Cole, "Key House Republican Calls For Telecom Law Reforms," *Law 360* (June 24, 2025), available at <https://www.law360.com/technology/articles/2357099>.