



Federal Communications Commission  
Washington, D.C. 20554

April 6, 2020

**DA 20-385**

Jessica J. González  
Gaurav Laroia  
Free Press  
1025 Connecticut Avenue, N.W., Suite 1110  
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Re: Free Press Emergency Petition for  
Inquiry Into Broadcast of False  
Information on COVID-19

Dear Counsel:

Free Press has filed, under section 1.41 of the Federal Communications Commission's rules,<sup>1</sup> an emergency petition requesting an investigation into broadcasters that have aired the President of the United States' statements and press conferences regarding the novel coronavirus (COVID-19) and related commentary by other on-air personalities. The Petition claims that the President and various commentators have made false statements regarding COVID-19, which Commission licensees have broadcast to the public, and which allegedly have caused or will cause substantial public harm.<sup>2</sup> Free Press asks the Commission, under its section 309 public interest authority<sup>3</sup> and its rules prohibiting broadcast hoaxes,<sup>4</sup> to investigate these broadcasts and adopt emergency enforcement guidance "recommending that broadcasters prominently disclose when information they air is false or scientifically suspect."<sup>5</sup>

We deny Free Press's petition. For the reasons explained below, the Petition misconstrues the Commission's rules and seeks remedies that would dangerously curtail the freedom of the press embodied in the First Amendment.

Free Press, an organization purportedly dedicated to empowering diverse journalistic voices, demands the Commission impose significant burdens on broadcasters that are attempting to cover a rapidly evolving international pandemic in real time and punish those that, in its view, have been insufficiently critical of statements made by the President and others. At best, the Petition rests on a fundamental misunderstanding of the Commission's limited role in regulating broadcast journalism. And

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<sup>1</sup> Section 1.41 states, in relevant part, that "[e]xcept where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request." 47 C.F.R. § 1.41.

<sup>2</sup> Free Press Emergency Petition for Inquiry into Broadcast of False Information on COVID-19 (filed Mar. 26, 2020) (Petition).

<sup>3</sup> *Id.* at 1 (citing 47 U.S.C. § 309(a)).

<sup>4</sup> *Id.* (citing 47 C.F.R. § 73.1217).

<sup>5</sup> *Id.* at 7.

at worst, the Petition is a brazen attempt to pressure broadcasters to squelch their coverage of a President that Free Press dislikes<sup>6</sup> and silence other commentators with whom Free Press disagrees.

Free Press asserts that the Commission “has a duty to rein in broadcasters that seed confusion with lies and disinformation.”<sup>7</sup> But the Commission does not—and cannot and will not—act as a self-appointed, free-roving arbiter of truth in journalism. Even assuming for the sake of argument that Free Press’s assertions regarding any lack of veracity were true, false speech enjoys some First Amendment protection,<sup>8</sup> and section 326 of the Communications Act, reflecting First Amendment values, prohibits the Commission from interfering with freedom of the press or censoring broadcast communications.<sup>9</sup> Accordingly, the Commission has recognized that “[b]roadcasters—not the FCC or any other government agency—are responsible for selecting the material they air” and that “our role in overseeing program content is very limited.”<sup>10</sup>

That is not to say that the Commission plays no role in regulating the use of public airwaves to disseminate information. For example, the Commission has historically regulated the broadcast of dangerous hoaxes.<sup>11</sup> But the Commission has applied this rule narrowly in light of the substantial First Amendment concerns involved with the federal government policing the content of broadcast news.<sup>12</sup> Specifically, the broadcast by a station of false information amounts to a violation only if: (1) the station licensee knew that the information was false; (2) it was foreseeable that broadcast of the information would cause substantial public harm; and (3) the broadcast did, in fact, directly cause substantial public harm.<sup>13</sup>

Indeed, a review of the hoaxes that spurred the adoption of the rule underscores the narrow circumstances in which the rule applies, including a radio announcer knowingly stating falsely on air that the United States was under nuclear attack two weeks after the start of the Persian Gulf War;<sup>14</sup> a radio

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<sup>6</sup> See, e.g., “De-Trump the Airwaves” (Apr. 1, 2020), available at <https://www.freepress.net/our-response/expert-analysis/explainers/de-trump-airwaves>; “Trump Wants to Destroy Public Media” (Feb. 12, 2020), available at <https://www.freepress.net/our-response/expert-analysis/explainers/trump-wants-destroy-public-media>; “Trump’s Advisers Get It All Wrong on the Save the Internet Act” (Apr. 9, 2019), available at <https://www.freepress.net/our-response/expert-analysis/insights-opinions/trumps-advisers-get-it-all-wrong-save-internet-act>; “Trump Has Zero Credibility When It Comes to Human Rights” (Jan. 4, 2018), available at <https://www.freepress.net/our-response/expert-analysis/explainers/trump-has-zero-credibility-when-it-comes-human-rights>; “Trump’s Secret Weapon Against a Free Press” (Nov. 15, 2017), available at <https://www.freepress.net/our-response/expert-analysis/explainers/trumps-secret-weapon-against-free-press>. We forego further citations in the interest of space.

<sup>7</sup> Petition at 7.

<sup>8</sup> *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”); see also *id.* at 732-33 (Breyer, J., concurring).

<sup>9</sup> 47 U.S.C. § 326 (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).

<sup>10</sup> FCC, THE PUBLIC AND BROADCASTING 7 (August 2019), <https://www.fcc.gov/media/radio/public-and-broadcasting>.

<sup>11</sup> *Id.* at 11.

<sup>12</sup> “[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Alvarez*, 567 U.S. at 716 (plurality opinion) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted)).

show host knowingly broadcasting a friend’s fake confession of a murder, leading to a costly police investigation;<sup>15</sup> and a radio announcer knowingly announcing falsely that another radio host had been “shot in the head,” causing police officers to rush to the scene.<sup>16</sup>

Notwithstanding the narrow scope of the broadcast hoax rule, Free Press pushes the Commission to expand its construction of the rule in order to enable government-led flyspecking of broadcasters’ editorial judgments—in this case (though the novel construction urged could apply far more broadly), their decisions to air statements by the President and others regarding COVID-19—and to issue prospective enforcement guidance discouraging such coverage absent disclaimers about their accuracy.<sup>17</sup> We decline this invitation both because the broadcast hoax rule does not support such a reading and because the relief requested raises significant First Amendment concerns.<sup>18</sup>

With respect to the rule, a broadcaster’s decision to broadcast and comment on statements made by the President, relating to one of the most severe public health crises in a century, does not amount to airing an intentional or knowing falsehood.<sup>19</sup> On this point, we agree with Free Press—context is key. At this moment, broadcasters face the challenge of covering a rapidly-evolving, national, and international health crisis, in which new information—much of it medical or technical in nature and therefore difficult to corroborate or refute in real time—is continually revealed, vetted, and verified or dismissed. In addition, we note that the President and members of the White House Coronavirus Task Force, including public-health professionals, have held daily press conferences in which they exhaustively answer critical questions from the press. Under such circumstances, it is implausible, if not absurd, to suggest that broadcasters knowingly deceived the public by airing these press conferences or other statements by the President about COVID-19. Moreover, there is a strong argument that broadcasters are serving the public interest when they air live coverage of important news events, such as briefings by the President, the White House Coronavirus Task Force, and state governors, during this national emergency.

Tellingly, the single concrete example provided by Free Press of alleged substantial public harm from broadcasters airing the President’s remarks highlights the weakness of its argument. The President has expressed optimism that a combination of hydroxychloroquine and azithromycin, taken together, could be effective in treating patients with COVID-19. This optimism has been shared by New York Governor Andrew Cuomo, the Food and Drug Administration, and a number of medical professionals.<sup>20</sup>

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<sup>13</sup> 47 C.F.R. § 73.1217.

<sup>14</sup> Letter from Donna R. Searcy, Secretary, FCC, to Emmis Broadcasting Co., Licensee, KSHE (FM), 6 FCC Rcd 2289, 2289 (1991).

<sup>15</sup> Letter from Donna R. Searcy, Secretary, FCC, to Lyle Reeb, General Manager, Radio Station KROQ-FM, 6 FCC Rcd 7262, 7262 (1991).

<sup>16</sup> Letter from Edythe Wise, Chief, Complainants and Investigations Branch, Enforcement Division, Mass Media Bureau, to Frank Battaglia, President, North American Broadcasting Co., Inc. Licensee, Radio Station WALE-AM, 7 FCC Rcd 2345, 2345 (MMB 1992)).

<sup>17</sup> 47 C.F.R. § 73.1217. Free Press also cites, without elaboration, the Commission’s general authority to regulate broadcasting in furtherance of the “public interest” under Section 309. 47 U.S.C. § 309(a).

<sup>18</sup> *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

<sup>19</sup> Of course, the FCC’s broadcast hoax rule does not extend to individuals or cable news networks.

<sup>20</sup> *See An FDA Breakthrough on Treatment*, Wall St. J. (Mar. 30, 2020), <https://www.wsj.com/articles/an-fda-breakthrough-on-treatment-11585609832> (noting the FDA’s emergency approval of hydroxychloroquine and chloroquine for treatment of COVID-19); *An Update on the Coronavirus Treatment*, Wall St. J. (Mar. 29, 2020),

But Free Press draws a connection between those widely-held sentiments and the alleged decision of a husband and wife in Arizona to ingest fish tank cleaner, which resulted in the death of the man and the hospitalization of the woman. Without the context (ironically) that a full investigation by Arizona authorities might supply, it blames this incident on the President's remarks and those broadcasters airing them. To say the least, even assuming the truth of this story,<sup>21</sup> this is not the kind of foreseeable harm contemplated by our rules. While these events are tragic, the Presidential statements in question addressed the potential federal approval and administration of hydroxychloroquine and azithromycin by medical professionals. Under the circumstances, it was not reasonably foreseeable that a broadcaster's decision to air this statement would result in viewers or listeners ingesting cleaning products as a preventative measure to protect themselves from COVID-19.

Nor does the broadcast hoax rule prohibit expressions of opinion about COVID-19, such as those made by the radio commentators cited by Free Press.<sup>22</sup> Free Press's suggestion that the Commission require broadcasters to balance the opinion of these commentators—all of whom appear to be generally supportive of the President's policies—with competing voices or disclaimers amounts to an attempt to use the current crisis to resuscitate the long-dead Fairness Doctrine. We decline that invitation, leaving to broadcasters the editorial decisions about airing political commentary and trusting the American public's ability to differentiate between medical advice and political opinion.

With respect to Free Press's proposal that we issue enforcement guidance or a policy statement recommending that broadcasters post prominent disclaimers when the President and others address the pandemic, we believe that such proposals are inconsistent with the First Amendment. Requiring such disclosures would constitute compelled speech, and "recommending" such disclosures through enforcement guidance or a policy statement would constitute government coercion by another name.<sup>23</sup> And unlike standardized government disclosure requirements (like annual reports required by the Securities and Exchange Commission), the context-sensitive disclaimers requested by Free Press would

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<https://www.wsj.com/articles/an-update-on-the-coronavirus-treatment-11585509827> (noting that "[m]ajor medical centers including the University of Washington and Mass General have added hydroxychloroquine to treatment options" for COVID-19 and that New York state has started a large controlled clinical trial of the drug); *New York to Begin Clinical Trials for Coronavirus Treatment Tuesday, Cuomo Says*, Forbes (Mar. 22, 2020), <https://www.forbes.com/sites/lisettevoytko/2020/03/22/new-york-to-begin-clinical-trials-for-coronavirus-treatment-tuesday-cuomo-says/#23fd7c0b4203> ("The president is optimistic about these drugs and we are all optimistic that it could work," [Governor] Cuomo said.").

<sup>21</sup> We note reports that the woman in question was not a supporter of President Trump and had recently criticized the President on social media; when asked about this, she appeared to indicate that other news reports influenced the couple's behavior: "We weren't big supporters of [Trump], but we did see that they were using it in China and stuff[.]" See *Woman Who Said She Drank Fish-Tank Cleaner Because of President's Advice Is Not a Trump Supporter*, FoxNews.com (Apr. 2, 2020), <https://www.foxnews.com/politics/arizona-woman-fish-tank-cleaner-trump-democrat>. In light of this information, it would seem inadvisable to simply assume the truth of the claim that the woman's conduct was primarily influenced by the President's statements.

<sup>22</sup> Petition at 4-5 (citing statements from, among others, Rush Limbaugh and Mark Levin).

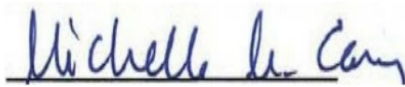
<sup>23</sup> Cf. Letter from Tom Wheeler, FCC Chairman, to Fred Upton, Chairman, House Energy and Commerce Committee (Feb. 14, 2014) ("The Commission has no intention of regulating political or other speech of journalists or broadcasters by way of this [Critical Information Needs] Research Design, any resulting study, or through any other means."); FCC, "Setting the Record Straight About the Draft Study" (Feb. 21, 2014), [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0221/DOC-325722A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0221/DOC-325722A1.pdf) ("Chairman Wheeler agreed that survey questions in the [Critical Information Needs] study directed toward media outlet managers, news directors, and reporters overstepped the bounds of what is required. Last week, Chairman Wheeler informed lawmakers that that Commission has no intention of regulating political or other speech of journalists or broadcasters.").

improperly involve the federal government in making editorial judgments about whether broadcasters had accurately and sufficiently evaluated claims made by the President and other government officials. Moreover, pressuring broadcasters to air such disclosures would impose significant burdens on them, burdens that could chill news coverage at a time when information is one of the only weapons the American public has to protect itself from a contagious and deadly virus.

Instead, we conclude that the antidote to the alleged harms raised by Free Press is—ironically enough—a free press. The rapid and comprehensive coverage of the present pandemic, free from burdensome disclaimers, agency investigation, or other government oversight, advances the public interest in maximizing information flow, while facilitating the vetting of statements by public officials via the ordinary journalistic process.<sup>24</sup>

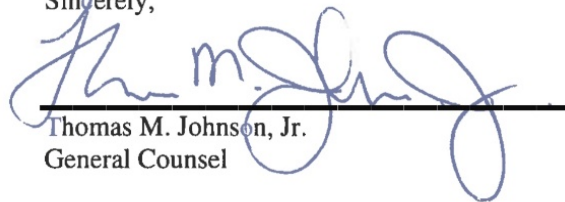
In short, we will not second-guess broadcasters (much less deploy the formal investigative power of the state against them) that are serving a critical function in providing the public comprehensive coverage of the current public health crisis and the government’s response. We leave to the press its time-honored and constitutionally protected role in testing the claims made by our political leaders—as well as those made by national advocacy organizations.

The Federal Communications Commission believes that freedom of the press is “essential to a free society and a functioning democracy.”<sup>25</sup> **ACCORDINGLY**, it is ordered that the Emergency Petition for Inquiry **IS DENIED**.



Michelle M. Carey  
Chief, Media Bureau

Sincerely,



Thomas M. Johnson, Jr.  
General Counsel

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<sup>24</sup> We emphasize, however, that the Commission has taken and will continue to take a proactive role in protecting consumers from actual fraud during this national health emergency. Among other things, the Commission has established a website to educate consumers about COVID-19 phone and text-based scams. *See* FCC, “COVID-19 Consumer Warnings and Safety Tips,” <https://www.fcc.gov/covid-scams>.

<sup>25</sup> Free Press, “Changing Media: Public Interest Policies for the Digital Age” at 242 (2009), *available at* [https://www.freepress.net/sites/default/files/201909/changing\\_media\\_public\\_interest\\_policies\\_for\\_the\\_digital\\_age.pdf](https://www.freepress.net/sites/default/files/201909/changing_media_public_interest_policies_for_the_digital_age.pdf); *see also id.* at 199 (“Freedom of speech and freedom of the press are essential to a free society and a functioning democracy. Everyone should have the right to access and impart information and opinion through the media of their choice.”).