

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

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

ORDER DENYING STAY PETITION

Adopted: December 8, 2021

Released: December 8, 2021

By the Chief, Media Bureau:

I. INTRODUCTION

1. On April 22, 2021, the Commission released its Report and Order (Order) in the above captioned proceeding adopting requirements that radio and television stations broadcast clear disclosures for programming that is provided by a foreign governmental entity, and how such stations would exercise reasonable diligence to determine whether a disclosure is needed.1 On September 10, 2021, the National Association of Broadcasters (NAB), the Multicultural Media, Telecom and Internet Council (MMTC), and the National Association of Black Owned Broadcasters (NABOB) (collectively, Petitioners) filed a Petition for Stay Pending Judicial Review (Stay Petition).2 Petitioners ask the Commission to stay the Order while their petition for review of the Order is pending before the United States Court of Appeals for the District of Columbia Circuit.3 We find that the Petitioners have failed to make the required four-part showing to support such extraordinary equitable relief,4 having failed to demonstrate that: (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm absent the grant of preliminary

1 Sponsorship Identification Requirements for Foreign Government-Provided Programming, Report and Order, 36 FCC Rcd 7702, 7702-03, para. 1 (2021) (Order).

2 Petition for Stay Pending Judicial Review of the National Association of Broadcasters (NAB), the Multicultural Media, Telecom and Internet Council (MMTC), and the National Association of Black Owned Broadcasters (NABOB), MB Docket No. 20-299 (filed Sept. 10, 2021) (Stay Petition).

3 Id. at 1; Petition for Review, the National Association of Broadcasters, the Multicultural Media, Telecom and Internet Council, and the National Association of Black Owned Broadcasters v. FCC, No. 21-1171 (D.C. Cir. filed Aug. 13, 2021). In addition, on July 19, 2021, the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (the Affiliates) filed a petition with the Commission seeking a clarification of the Order. See Affiliates' Petition for Clarification, MB Docket No. 20-299 (filed July 19, 2021) (Petition for Clarification). The Affiliates seek a clarification that the rules contained in the Commission's Order and the inquiries associated with these rules do not apply when a station "sells time to advertisers in the normal course of business," in contrast to when it leases airtime on the station. Id. The Petition for Clarification is currently pending before the Commission.

4 As stated by the Supreme Court, "[a] stay is an 'intrusion into the ordinary processes of administration and judicial review,' . . . and accordingly 'is not a matter of right, even if irreparable injury might otherwise result'" to the movant. Nken v. Holder, 556 U.S. 418, 427 (2009) (internal citations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 433-34.

relief; (3) other parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.⁵ Accordingly, we deny the request to stay the effectiveness of these rules.

II. BACKGROUND

2. The principle that the public has a right to know the identity of those soliciting their support is a fundamental and long-standing tenet of broadcast regulation.⁶ Indeed, the Commission promulgated its recent foreign sponsorship identification rules against the backdrop of regulation that has evolved over ninety years to ensure that the public is informed when airtime has been purchased on broadcast stations in an effort to persuade audiences and to enable the public to distinguish between paid content and material chosen by the broadcaster itself.⁷

3. The Commission adopted the foreign sponsorship identification rules specifically to target situations where a station broadcasts material sponsored by a foreign governmental entity.⁸ Although foreign governments and their representatives are legally prohibited from holding a broadcast license directly, foreign governments have contracted with the licensee of a broadcast station to air programming of the foreign government's choosing, or to lease the entire capacity of a radio or television station, without adequately disclosing the true source of the programming.⁹ As noted in the *NPRM*, in many such instances, foreign government programming is not provided to licensees by an entity or individual immediately identifiable as a foreign government.¹⁰ For example, an agency or department of a foreign government may not include the name of the foreign country or government in its title.¹¹ In other instances, the linkage between the foreign government and the entity providing the programming may be attenuated in an effort to obfuscate the true source of the programming.¹² Prior to the Commission's *Order*, there was no specific requirement to identify a foreign governmental entity by name nor indicate the country to which the governmental entity was linked. Accordingly, the foreign sponsorship identification rules adopted in the *Order* sought to eliminate ambiguity for the viewer or listener regarding the source of programming provided by foreign governmental entities.

4. In the *Order*, the Commission adopted requirements modifying the Commission's existing sponsorship identification rules by requiring broadcast stations to air clear disclosures for

⁵ *Washington Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam); see also *Nken v. Holder*, 556 U.S. at 425, 435 (noting that "[t]here is always a public interest in prompt execution" of government orders and, thus, the harm to the government in not being able to execute its duty factors into public interest considerations).

⁶ The Commission's words from nearly sixty years ago, in the context of adopting changes to the sponsorship identification rules, remain equally applicable today: "Perhaps to a greater extent today than ever before, the listening and viewing public is being confronted and beseeched by a multitude of diverse, and often conflicting, ideas and ideologies. Paramount to an informed opinion and wisdom of choice in such a climate is the public's need to know the identity of those persons or groups who solicit the public's support." *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission's Rules*, Report and Order, 34 FCC 829, 849, para. 59 (1963).

⁷ See *Sponsorship Identification Requirements for Foreign Government-Provided Programming, Notice of Proposed Rulemaking*, 35 FCC Rcd 12099-105, paras. 1-11 (2020) (*NPRM*) (describing the evolution of the statutory sponsorship identification requirements in section 317 of the Act and the Commission's implementing regulations).

⁸ *Order*, 36 FCC Rcd at 7708-13, paras. 14-23. The *Order* defined the term "foreign governmental entity" to include those entities or individuals who would trigger a disclosure pursuant to the foreign sponsorship identification rules. *Id.* The instant order accords to the term "foreign governmental entity" the definition established in the *Order*.

⁹ *Id.* at 7702-04, paras. 1, 4 & nn.9, 10. *NPRM*, 35 FCC Rcd at 12099, 12106, 12120, paras. 1, 13, & n.118.

¹⁰ *NPRM*, 35 FCC Rcd at 12106, para 13.

¹¹ *Id.*

¹² *Id.*

programming that is provided by a foreign governmental entity pursuant to leasing agreements.¹³ The foreign sponsorship identification rules require a disclosure at the time of broadcast if material aired pursuant to the lease of time on the station has been sponsored, paid for, or furnished by a foreign governmental entity.¹⁴ The required disclosure uses standardized language to indicate the specific entity and country involved and must be made at the beginning and end of the broadcast and no less frequently than every 60 minutes for broadcasts of over an hour in duration.¹⁵

5. The *Order* also adopted a requirement that a station airing foreign government-provided programming¹⁶ pursuant to a lease agreement must place copies of its disclosures, the names of any programming to which the disclosures are appended, and the date and time the programming aired in its Online Public Inspection File.¹⁷ To make the rules' terms clear and easy to understand, the *Order* uses existing definitions, statutes, or determinations by the U.S. government as to when an entity or individual qualifies as a "foreign governmental entity."¹⁸ These definitions draw from the Foreign Agents Registration Act of 1938 and the Communications Act of 1934, as amended.¹⁹

6. Finally, to provide broadcast licensees with detailed guidance for complying with the rules, the *Order* explains how a licensee may fulfill its existing statutory obligation to "exercise reasonable diligence" to determine if a disclosure is required under the adopted foreign sponsorship identification rules.²⁰ The *Order* states that broadcasters must inform lessees of the newly adopted requirement and inquire of lessees, when entering into a new lease agreement and at renewal, whether the lessee falls into any of the categories that would qualify the lessee as a foreign governmental entity.²¹ Broadcasters must also inquire of the lessee whether the lessee knows if anyone involved in the production or distribution of the programming that will be aired pursuant to the lease agreement, or a sub-lease, qualifies as a foreign governmental entity and has provided some type of inducement to air the programming.²² If the response to these inquiries is in the negative, then a broadcast licensee is to confirm the lessee's status, by consulting the Department of Justice's Foreign Agents Registration Act (FARA) website and the Commission's semi-annual U.S.-based foreign media outlets report, both of which are publicly accessible.²³ A broadcast licensee must also memorialize the inquiries listed above to track compliance and retain such documentation in the licensee's records for either the remainder of the

¹³ *Order*, 36 FCC Rcd at 7703-04, 7713-17, paras. 3, and 24-31.

¹⁴ *Id.* at 7708-09, para. 14.

¹⁵ *Id.* at 7727-30, paras. 50-56.

¹⁶ In this *Order*, use of the term "foreign government-provided programming" refers to all programming that is provided by an entity or individual that qualifies as a "foreign governmental entity" pursuant to the Commission's foreign sponsorship identification rules. See *Order*, 36 FCC Rcd at 7739-41, Appendix A (listing new section 73.1212(j)(1) of the Commission's rules).

¹⁷ *Order*, 36 FCC Rcd at 7730-31, paras. 57-61.

¹⁸ *Id.* at 7709-12, paras. 15-20.

¹⁹ *Id.*

²⁰ *Id.* at 7719-20, 7739-41, para. 35, and Appendix A (laying out the new 47 CFR § 73.1212(j)).

²¹ *Id.* at 7720-21, para. 38. The *Order* also requires that lease agreements that are in place when the foreign sponsorship identification rules become effective come into compliance with the new requirements, including undertaking reasonable diligence, within six months. *Id.* at 7727, para. 48.

²² *Id.* at 7721, 7739-41, para. 39, and Appendix A.

²³ *Id.* at 7722-23, 7739-41, paras. 40-41, and Appendix A. The Commission's semi-annual U.S.-based foreign media outlets report is accessible via the Commission's website.

then-current license term or one year, whichever is longer, so as to respond to any future Commission inquiry.²⁴

7. In their Stay Petition, Petitioners contend that the *Order* contravenes section 317 of the Act, violates the Administrative Procedure Act (APA) by being arbitrary and capricious, and unduly burdens speech in contravention of the First Amendment.²⁵ Petitioners assert that by requiring licensees to verify a lessee's status via publicly accessible sources, the *Order* violates the plain language of section 317(c) as interpreted by the D.C. Circuit Court, asserting that section 317(c) requires licensees to do no more than obtain information from entities with which they are in immediate contact.²⁶ Petitioners also argue that the *Order* is arbitrary and capricious because the Commission does not establish a problem warranting regulation of all leased programming nationwide, fails to impose the disclosure requirements on non-broadcast media distributors, and subjects more types of leased programming to the investigation requirements than reasonably should be included.²⁷ Petitioners cite these same reasons in asserting that the *Order* unduly burdens speech and violates the First Amendment.²⁸ Finally, Petitioners contend that compliance with the Commission's foreign sponsorship identification rules will subject them to irreparable economic harm of the sort that justifies a stay and that the balance of hardships and public interest weigh in favor of a stay.²⁹ For the reasons discussed below, the Bureau finds that Petitioners have failed to meet their requisite burden of demonstrating why the circumstances at issue here justify such extraordinary relief.³⁰

III. DISCUSSION

A. Petitioners Have Failed to Show a Likelihood of Success on the Merits

8. Petitioners' allegations that the *Order* violates section 317(c) of the Act, is arbitrary and capricious, and contravenes the First Amendment are unlikely to succeed on the merits. As discussed in greater detail below, the relevant statutory provisions and their accompanying legislative history, the careful tailoring of the Commission's new requirements to address the identified harm, as well as First Amendment jurisprudence highlight the fallacies of Petitioners' claims and demonstrate why a stay is not justified in this case.

1. The Order's Reasonable Diligence Requirements Do Not Violate Section 317(c) of the Act

9. The Order's reasonable diligence requirements regarding foreign government-sponsored programming are wholly consistent with section 317(c) of the Act.³¹ The minimal requirements address

²⁴ *Id.*

²⁵ Stay Petition at 1-2.

²⁶ *Id.* at 8-12.

²⁷ *Id.* at 12-15.

²⁸ *Id.* at 16.

²⁹ *Id.* at 17-20.

³⁰ *See supra* para. 1 (laying out criteria for a stay).

³¹ Section 317(a) of the Act requires a licensee to make an announcement about any content aired in exchange for money or other consideration disclosing by whom on or whose behalf such payment was made. 47 U.S.C. § 317(a). Section 317(c), in turn, states that "[t]he licensee of each radio station shall 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(c). Drawing from the additional statutory authority contained in section 317(e), which directs the Commission to prescribe regulations to implement the provisions of section 317, the Commission modified its existing sponsorship identification rules to address the circumstance of a foreign governmental entity's leasing time on a station. *See* 47 U.S.C. § 317(e) and *Order generally*.

the root problem of foreign governments' leasing time on broadcast stations without full disclosure and provide an efficient and objective means by which to determine whether a foreign governmental entity is the source of the programming at issue. Moreover, any suggestion that the foreign sponsorship identification rules disregard the "deals directly" language contained in section 317(c)³² are based on a mischaracterization of the rules themselves.

10. The rules require that, as an initial matter, the licensee make inquiries of the lessee -- *i.e.*, a person with whom the licensee "*deals directly*" -- about whether the lessee is either a foreign governmental entity or is aware of anyone further back in the chain of production or distribution qualifying as a foreign governmental entity. If the lessee responds in the negative, the licensee must independently verify *only* the lessee's status via two publicly accessible websites.³³ To the extent that Petitioners claim that the foreign sponsorship identification rules require the licensee to undertake an independent investigation of whether someone further back in the chain of production or distribution qualifies as a foreign governmental entity, this is a misrepresentation or misunderstanding of the new rules.³⁴ Merely imposing a disclosure requirement in the absence of reasonable efforts on the part of licensees to determine whether a foreign governmental entity has sponsored the relevant programming would render section 317(c) of the Act toothless, as such information cannot be readily discerned without the steps outlined in the Commission's order.

11. Section 317(c) requires a licensee to exercise "reasonable diligence" to obtain information to make a sponsorship announcement "from . . . persons with whom [the licensee] deals directly in connection with any program or program matter for broadcast."³⁵ Relying on language in *Loveday v. F.C.C.*,³⁶ Petitioners assert that the statute "is satisfied by appropriate inquiries made by the station to the party that pays it for the broadcast."³⁷ The *Loveday* language does not, however, answer the question of whether there is *ever* any duty to investigate further. In fact, the statute is silent as to whether "reasonable diligence" ever imposes a duty to confirm or investigate the paying party's response to inquiries. In the *Order*, the Commission reasonably concluded that section 317(c) imposes a limited duty to do so in the circumstances covered by the foreign sponsorship identification rules.

12. The ordinary meaning of "reasonable diligence" is "[a] fair degree of reasonable diligence expected from someone of ordinary prudence under circumstances like those at issue."³⁸ The legislative history indicates that Congress intended to accord the term its ordinary meaning, and, thus, allow the Commission to use its expertise in determining how to apply this standard in given situations.³⁹ Whether someone of ordinary prudence would investigate sponsorship information depends on the

³² See Stay Petition at 4 (stating that during the rulemaking Petitioners had urged the Commission to "implement the 'reasonable diligence' requirement in a manner consistent with the sponsorship identification statute by allowing stations to make inquiries of those with whom they 'deal directly' and that are likely to be foreign entities, rather than consulting government lists").

³³ See *supra* para. 6 stating that the lessee must consult the Department of Justice's FARA website and the Commission's semi-annual U.S.-based foreign media outlets report, both of which are publicly accessible.

³⁴ See Stay Petition at 8-12 (asserting that the Commission's foreign sponsorship identification rules somehow constitute an "independent investigation" in contravention of the statute which only requires "appropriate inquiries made by the station to the party that pays it for the broadcast.")

³⁵ 47 U.S.C. § 317(c).

³⁶ *Loveday v. F.C.C.*, 707 F.2d 1443 (1983) (*Loveday*).

³⁷ See Petition at 9 (quoting *Loveday*, 707 F.2d at 1449).

³⁸ Black's Law Dictionary (11th ed. 2019).

³⁹ Leg. History of the Communications Act Amend. Of 1960: P.L. 86-752; 74 Stat. 889, Sept. 13, 1960, p. 31 (1960) ("the term 'reasonable diligence' has a sufficiently accepted legal meaning so as to permit the Commission to apply this standard in given factual situations," quoting statement of Federal Communications Commission Chairman to the Communications Subcommittee of the Senate Committee on Interstate & Foreign Commerce, Aug. 10, 1960).

circumstances at issue. For example, how credible is the information provided? A licensee cannot rely on information that is “simply not credible.”⁴⁰ Likewise, the nature of the broadcast may also be a factor. For instance, “[t]he ‘reasonable diligence’ standard can require a higher duty of care by stations whose formats or other circumstances make them more susceptible to payola.”⁴¹ Whether any investigation is appropriate may also depend on the practicability of investigation.

13. Here, the Commission found that lease agreements (*i.e.*, the relevant program format) are “the primary means . . . by which foreign governmental entities are accessing U.S. airwaves.”⁴² As such, it was appropriate to require more care by stations that lease programming. As the Commission’s definition of “foreign governmental entity” is tied to preexisting statutory definitions in the Foreign Agents Registration Act of 1938 and the Communications Act of 1934, assessing the credibility of a lessee’s negative response need not depend on the licensee’s subjective analysis of the lessee’s response. Rather, the names of entities that have been determined to meet the definitions appear in two public sources, enabling licensees to verify a lessee’s negative response through a “straightforward and limited search.”⁴³ The Commission’s conclusion that, under the circumstances at issue, “reasonable diligence” requires a licensee to consult these two public sources to confirm information provided by a lessee⁴⁴ was reasonable and consistent with the statutory language.

14. In claiming that the *Order*’s requirements violate the statutory “reasonable diligence” standard, Petitioners rely exclusively on one case, the *Loveday* case,⁴⁵ the facts of which are entirely different from the situation at hand. As a threshold matter, the *Loveday* case does not address the scope of the Commission’s authority to promulgate regulations pursuant to section 317 of the Act. Rather, the *Loveday* court focused on whether “the Commission’s interpretation of its own regulations *as applied in [that] case* [was] reasonable and consistent with section 317 of the Communications Act.”⁴⁶ Specifically, the *Loveday* case addressed whether it was reasonable for the Commission to find that licensees had met their reasonable diligence obligation by disclosing as the sponsor the entity that had paid the licensees for the programming.⁴⁷ The *Loveday* court’s statements about whether the Commission could require anything more related to the circumstances presented in *that* case,⁴⁸ and, hence, have no bearing on the instant matter. In that case, the court granted deference to the Commission’s interpretation of its reasonable diligence requirement in the context of the sponsorship identification rules as they existed at that time.

15. The U.S. Court of Appeals for the Sixth Circuit recognized in an earlier case, however, that the Commission is not precluded from providing further clarity as to what constitutes reasonable

⁴⁰ *Trumper Communications of Portland, Ltd.*, 11 FCC Rcd 20415, 20418 (MB 1996) (finding stations could not rely on named sponsor’s assurances as to real party in interest that were contradicted by evidence from public filings).

⁴¹ *Commission Warns Licensees About Payola and Undisclosed Promotion*, Public Notice, 4 FCC Rcd 7708 (1988).

⁴² *Order*, 36 FCC Rcd at 7703-04, para. 3.

⁴³ *Id.* at 7725-26, para. 45 and 7710-11, para. 17.

⁴⁴ *Id.* at 7722-23, paras. 40-41.

⁴⁵ *Loveday*, 707 F.2d 1443.

⁴⁶ *Id.* at 1459 (emphasis added).

⁴⁷ In that case, the petitioners had named another entity as the source of the programming in letters to the licensees, though they provided no documentation or other support for their claims that the real sponsor was someone other than the entity that had paid for the programming. *Loveday*, 707 F.2d at 1448-49.

⁴⁸ As the *Loveday* court itself noted in determining the appropriate standard of review: “The ruling challenged here was issued in a specific factual context and resolved only the issues presented by petitioners’ application.” *Loveday*, 707 F.2d at 1447.

diligence in the context of its sponsorship identification rules.⁴⁹ In the *WHAS* case, that court stated: “[W]e are by no means precluding the FCC from adopting a Regulation calculated to require a station to make reasonable efforts to go beyond a named ‘sponsor’ for a political program in order to ascertain the real party in interest for purposes of announcement.”⁵⁰ We note that the *Loveday* case, which Petitioners rely on so heavily, does not dispute the Sixth Circuit’s determination that the Commission has this authority. Rather, the *Loveday* court merely states that since amending its regulations after the *WHAS* ruling, “the Commission ha[d] never indicated in enforcement proceedings that section 317 or its own regulations require a station to conduct any investigation or to look behind the plausible representations of a sponsor that it is the true party in interest.”⁵¹ In this case, however, the Commission *has* adopted clear procedures for a licensee to follow in performing its reasonable diligence to ascertain whether programming has been provided by a foreign governmental entity.⁵²

16. As the Commission explained in detail in the *NPRM* and *Order*, the foreign sponsorship identification rules are consistent with legislative history accompanying the statute as well. Petitioners’ claim that “the Commission recites but does not analyze the statutory language or history of Section 317(c)”⁵³ disregards not only the discussion in the *Order* about the statute,⁵⁴ but also the extensive discussion about the background of sections 317 and 507⁵⁵ in the *NPRM* that established the foundation for the Commission’s proposal to require broadcasters to make certain inquiries regarding the status of those providing programming to be aired on broadcast stations.⁵⁶ Petitioners’ assertion that Congress never intended for the type of queries adopted in the Commission’s *Order* is based on highly selective fragments of that legislative history and cannot withstand further examination.

17. Rather than focusing on the impetus for the 1960 amendments, which include the very statutory provision that Petitioners assert has been misconstrued, Petitioners instead discuss what

⁴⁹ *United States of America v. WHAS, Inc.*, 385 F.2d 784 (1967) (*WHAS*).

⁵⁰ The *WHAS* case concerned a Commission appeal of a federal district court ruling finding that the Commission’s sponsorship identification rules as they existed in the early 1960s left some ambiguity about the level of investigation required to determine the true sponsor of certain programming. *WHAS*, 385 F.2d at 788. In response to this decision, in 1975, the Commission modified its rules to include the “could be known” language contained in the current rule, which holds a licensee responsible for what is known or could be known regarding the source of the programming through reasonable diligence. See *Amendment of the Commission’s Sponsorship Identification Rules (Sections 73.119, 73.289, and 76.221)*, Report and Order, 52 FCC 2d 701 (1975). In modifying its rule, the Commission stated:

Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public’s paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply ‘run with the territory.’

Id. at 709, para. 24.; see also *NPRM*, 35 FCC Rcd at 12122-23, nn.127, 134; *Order*, 36 FCC Rcd at 7725-26, n.132.

⁵¹ *Loveday*, 707 F.2d at 1456-57.

⁵² As stated in the *Order*, the specific guidance provided in the foreign sponsorship identification rules about what constitutes “reasonable diligence” with regard to foreign government-provided programming (*i.e.*, what inquiry to make of whom, where specifically to look when investigating a lessee’s status, and the frequency of such inquiries) obviates the concern raised by the *Loveday* court about licensees having “to guess in every situation what the Commission would later find to be ‘reasonable diligence.’” *Order*, 36 FCC Rcd at 7725-26, n. 132.

⁵³ Stay Petition at 10.

⁵⁴ See, *e.g.*, *Order*, 36 FCC Rcd at 7704-06, 7720-21, 7726-27, paras. 5-8, 37-39, 46-47.

⁵⁵ 47 U.S.C. §§ 317, 508.

⁵⁶ See *NPRM*, 35 FCC Rcd at 12100-06, paras. 4-12 (discussing at length how starting with the Radio Act of 1927, through the Communications Act of 1934, and amendments thereto, as well as the associated legislative history, it has been clear that Congress places paramount importance on broadcast audiences knowing who is trying to persuade them, and on the Commission’s implementing regulations that require the necessary disclosures).

Congress may have intended in choosing to include sponsorship identification requirements in the Radio Act of 1927.⁵⁷ In their one attempt to reference the legislative history associated with the 1960 amendments, Petitioners assert that “[t]he legislative history of the 1960 Act indicated that the licensee would not be an insurer of the accuracy of the disclosure; in other words, ‘a licensee need not go behind the information it receives to guarantee its accuracy.’”⁵⁸ This claim relies on a single footnote reference in the *Loveday* case to a Senate Report that accompanied the 1960 amendments. In fact, the Senate Report clearly states that licensees should make an effort to determine who is the true sponsor of the programming and describes the reasonable diligence requirement of subsection (c) as follows:

“The term “reasonable diligence” would require the licensee to take appropriate steps to secure such information, but it would not place a licensee in the position of being an insurer, nor does this condition permit a licensee to escape responsibility for sponsorship announcements by inactivity on his part.”⁵⁹

The reference to “appropriate steps to secure such information” and the statement about not permitting the “licensee to escape responsibility for sponsorship announcements by inactivity on his part” support the Commission’s implementation of the “reasonable diligence” standard in the context of foreign government-provided programming by clarifying the appropriate steps to be taken – in this case requiring broadcasters to make certain basic inquiries of their lessees and consult two publicly accessible federal government websites.

18. Given the language of section 317(c) and the accompanying legislative history, as well as the case law, Petitioners’ interpretation of section 317(c) is unduly limited. Accordingly, the Bureau finds that the reasonable diligence requirements adopted by the *Order* are wholly consistent with section 317(c) of the Act and Petitioners are unlikely to prevail on that argument.

2. The Commission’s Order is Not Arbitrary and Capricious Under the APA

19. Petitioners’ allegations that the *Order* is arbitrary and capricious under the APA are likewise unfounded and unlikely to succeed on the merits.⁶⁰ Contrary to Petitioners’ contentions, the Commission clearly established a predicate for nationwide rulemaking and a proper basis for modifying the sponsorship disclosure rules applicable to broadcast stations. Petitioners’ claims that the adopted rules are both over- and under-inclusive do not withstand scrutiny, and largely simply repeat issues raised, considered, and rejected, during the rulemaking proceeding.

20. Contrary to Petitioners’ assertion that “the Commission did not establish a problem warranting the nationwide regulation of *all* leased programming at *all* of the 1,324 commercial television stations and 11,288 commercial radio stations across the country,”⁶¹ the *NPRM* and *Order* clearly

⁵⁷ See Stay Petition at 9 (quoting from *Loveday*, 707 F.2d at 1451) (“noting that Congress, in enacting the original sponsorship identification requirement in the Radio Act of 1927, ‘imposed only a very limited obligation upon broadcasters: to announce that a program had been paid for or furnished to the station by a third-party and to identify that party”). While the *Loveday* case, which Petitioners cite in support of their assertions, devotes considerable attention to the legislative history associated with the Radio Act of 1927, the Bureau finds that the more relevant legislative history for the purposes of the instant order relates to the 1960 amendments, which adopted both the provision at issue and related provisions seeking disclosure of the individual who has sponsored the programming, even if that individual is not in direct contact with the licensee. See *Loveday*, 707 F.2d at 1449-1452 (discussing the legislative history associated with the Radio Act of 1927).

⁵⁸ Stay Petition at 10 (citing *Loveday*, 707 F.2d at 1455, n.18, which in turn quoted Senate Report No. 1857, 86th Cong., 2d Sess. at 6 (Aug. 19, 1960)).

⁵⁹ Senate Report No. 1857, 86th Cong., 2d Sess, at 6 (Aug. 19, 1960).

⁶⁰ Stay Petition at 12-15.

⁶¹ *Id.* at 12.

articulate the basis for the Commission's action and how it addressed the potential harm identified.⁶² Taking the Petitioners' assertion to its logical conclusion would lead to a preposterous outcome with regard to regulatory authority. There is no requirement that the American public suffer some requisite amount of harm before regulatory intervention is justified.⁶³ Moreover, as described in the *NPRM*, Congress passed sponsorship identification legislation precisely because there is harm to consumers stemming from *undisclosed* influences.⁶⁴ The Commission properly identified and articulated its concern, conducted a rulemaking proposing regulations to address that problem rooted in the agency's statutory authority, and adopted rules tailored to the harm supported by the record developed. As such, Petitioners' argument that the rulemaking was arbitrary and capricious cannot withstand scrutiny.

21. Further, Petitioners' claim that the *Order* is deficient because the Commission offers too few examples of undisclosed foreign government programming is circular in nature.⁶⁵ The rulemaking at issue was prompted by evidence of *undisclosed* foreign government programming and the lack of transparency this creates for the American broadcast audience contrary to section 317 of the Act. It is precisely because there has been no disclosure requirement, no standardized guidance about how to identify a foreign governmental entity, and insufficient inquiry by broadcasters as to the source of programming that programming sponsored by a foreign governmental entity has been undetected. Nevertheless, as documented in the *NPRM* and *Order*, the Commission identified a number of such circumstances, as well as mounting evidence that foreign government controlled media outlets are increasingly disseminating material in the United States, often without the audience's awareness of the material's origin.⁶⁶

22. Petitioners' assertion that one of the *Order*'s examples of undisclosed foreign government-provided programming is a Chinese sponsor whose name does not currently appear on either of the two public websites that broadcasters must consult in no way impacts the utility of the Commission's foreign sponsorship identification rules.⁶⁷ In establishing disclosure requirements for foreign government-provided programming, the Commission provided a path to greater transparency, while also guarding against unnecessarily inserting itself and broadcasters into complicated determinations about who and what may qualify as a foreign governmental entity.⁶⁸ As described in the *NPRM* and *Order*, the Commission reasonably elected to rely on existing statutes and determinations rather than creating a new regulatory paradigm, or providing very general guidance that might have led to unbounded investigations about any possible linkages between entities that provide programming and a foreign government. Furthermore, both the FARA website listings and the U.S.-based foreign media outlet lists are dynamic in nature, and the entities appearing on those lists may change periodically. Accordingly, Petitioners' observation that the specific parties involved in one example discussed in the *Order* were not currently registered on either of the relevant websites does not undercut the validity of the Commission's rulemaking or the reasonable basis for the regulations adopted.

⁶² See, e.g., *NPRM*, 35 FCC Rcd at 12105, 12106, 12119, 12120, n.40-41, para. 13, n.115-16, para. 43; *Order*, 36 FCC Rcd at 7702-03, 7704, nn.1, 9, 10.

⁶³ See *infra* n. 95 (discussing agency authority to undertake prophylactic responses to perceived risks).

⁶⁴ *NPRM*, 35 FCC Rcd at 12100-05, paras. 4-11.

⁶⁵ Stay Petition at 12.

⁶⁶ See, e.g., *NPRM*, 35 FCC Rcd at 12106, n.42 (describing news article by Anna Massoglia and Karl Evers-Histrom), *Russia Paid Radio Broadcaster \$1.4 Million to Air Kremlin Propaganda in DC*, OpenSecrets.org (July 1, 2019), <https://www.opensecrets.org/news/2019/07/russia-paid-radio-broadcaster-1-4-million-to-air-kremlin-propaganda/> (describing how a Florida-based company, RM Broadcasting LLC, had been acting as a middleman brokering airtime for Russian government-owned Sputnik International).

⁶⁷ *Stay Petition* at 13.

⁶⁸ See *NPRM*, 35 FCC Rcd at 12107-10, paras. 17-18; *Order*, 36 FCC Rcd at 7709, para. 15.

23. Further, in contending that the *Order* is “dramatically overinclusive” the Petitioners merely repeat their previously addressed—and rejected—proposals about how to interpret the “reasonable diligence” standard. Referring back to their proposals from the underlying rulemaking, Petitioners claim that the “Commission refused to impose any reasonable limit on the type of leased programming subject to investigation requirements.”⁶⁹ In making this claim, Petitioners disregard that the *Order* significantly narrowed the application of the foreign sponsorship identification rules from the initial *NPRM* proposal, which would have applied the disclosure requirements to all foreign government-provided programming, irrespective of whether the programming was provided via a leasing arrangement.⁷⁰ Based on submissions by the Petitioners and others,⁷¹ the Commission determined that focusing on the airing of programming on U.S. broadcast stations *pursuant to leasing agreements* would address the primary present concern with foreign governmental actors gaining access to American airwaves without disclosing the programming’s origin to the public.⁷² In this way, the Commission tailored the rules consistent with the developed record to avoid burdening more programming than necessary.

24. While Petitioners had previously urged the Commission, in lieu of adopting specific guidance implementing the statutory “reasonable diligence” standard, to require broadcasters to engage in “reasonable diligence” “only if they have reason to believe that their lessee is affiliated with a foreign governmental entity,”⁷³ the Commission expressly rejected this proposal to limit the types of leasing arrangements subject to the rules. In the *Order*, the Commission found that the Act does not contain a threshold showing of “reason to believe” before requiring broadcasters to engage in “reasonable diligence.”⁷⁴ Moreover, the Commission determined that the practical implication of adopting a standard based on broadcasters’ subjective beliefs regarding which entities or individuals may have ties to a foreign governmental entity opens the door to arbitrary determinations based on factors such as whether the broadcaster has had a previous long-standing relationship with a lessee and would insert an unnecessary level of ambiguity into whether new entrants are receiving nondiscriminatory treatment.⁷⁵

25. In addition, the Petitioners’ preference that the Commission impose a disclosure obligation on cable operators and other media platforms⁷⁶ is irrelevant to the Commission’s use of its existing authority to adopt appropriate regulations for broadcast stations. As discussed in detail below, the Commission has longstanding statutory authority to adopt sponsorship identification rules as to broadcast stations. Indeed, the Commission’s adoption of rules here is consistent with the Commission’s prior application of section 317 of the Act as to broadcasters. Whether the Commission can or should impose similar disclosure requirements on other services does not in any way undermine its determination

⁶⁹ Stay Petition at 14.

⁷⁰ *NPRM*, 35 FCC Rcd at 12115-17, 12123-26, paras. 30-33, 48-51.

⁷¹ *Order*, 36 FCC Rcd at 7736, n.73 (reiterating ex partes by NAB, NPR, and Fox Corp. stating that focusing the application of the disclosure requirement on leasing arrangements would be appropriate).

⁷² *Id.* at 7713-14, paras. 24-25.

⁷³ *Id.* at 7724-25, paras. 44-45.

⁷⁴ *Id.* at 7724-25, para. 44.

⁷⁵ *Id.* at 7725, n.129. With regard to Petitioners’ alleged concerns about the *Order*’s potentially requiring disclosures for certain forms of advertising, we note that there is currently a pending Petition for Clarification before the Commission on this issue, and Petitioners have chosen not to participate in that proceeding. See Stay Petition at 14-15 and n.3 *supra* (describing Petition for Clarification).

⁷⁶ Stay Petition at 13-14 (asserting that the regulations are “underinclusive”).

to exercise its authority to implement disclosure obligations on broadcasters consistent with its statutory mandate to do so.⁷⁷

26. For these reasons, we find the Petitioners' contention that the Commission's action in this proceeding was arbitrary and capricious to be without merit and unpersuasive.

3. The Order's Requirements Do Not Violate the First Amendment

27. The foreign sponsorship identification rules do not violate the First Amendment and, consequently, Petitioners' constitutional arguments also are unlikely to succeed on the merits.⁷⁸ Petitioners' contention that the rule is subject to "at least exacting scrutiny,"⁷⁹ ignores that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."⁸⁰ "[T]he Supreme Court has described First Amendment review of broadcast regulation as 'less rigorous' than in other contexts based on the spectrum scarcity rationale."⁸¹ The D.C. Circuit declined to apply exacting (also known as "intermediate") scrutiny to a content-neutral broadcast regulation in *Ruggiero v. FCC*, instead applying a "heightened rational basis" standard of review.⁸² The Commission's foreign sponsorship identification rules are content-neutral because they require an announcement for leased "programming provided by any foreign government," regardless of content or whether the foreign government's "interests are directly at odds with the United States."⁸³

28. The recently adopted rules also impose a less severe burden on speech than the regulation at issue in *Ruggiero*, which made former pirate broadcasters "ineligible to obtain [a low-power FM radio] license - the only type of license practicably available to most individuals."⁸⁴ "By compelling some disclosure of information and permitting more,"⁸⁵ the disclosure rule adopted by the Commission "promote[s] greater transparency" rather than prohibiting or restricting broadcasters' speech.⁸⁶ In all events, the foreign sponsorship identification rules will satisfy exacting scrutiny.⁸⁷ As discussed below,

⁷⁷ See 47 U.S.C. § 317(e) (stating that the "Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section"); see also *infra* para. 37 (discussing why under First Amendment jurisprudence it was reasonable for the Commission to have limited the scope of its *Order* to broadcasters).

⁷⁸ Stay Petition at 15-17.

⁷⁹ *Id.* at 15 (internal quotations and citations omitted).

⁸⁰ *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

⁸¹ See *Order*, 36 FCC Rcd at 7734-35, para. 69, n.188 (citing *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 637 (1984) (*Turner Broad. Sys.*), *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984), and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-89 (1969)).

⁸² *Ruggiero v. FCC*, 317 F.3d 239, 243-44, 247 (D.C. Cir. 2003) (*Ruggiero*). Although the Commission found that the rule complies with the First Amendment "regardless of the level of scrutiny applied," it did not determine the applicable level of scrutiny. *Order*, 36 FCC Rcd at 7734-35, para. 69.

⁸³ *Order*, 36 FCC Rcd at 7712-13, para. 23 (internal quotations and citations omitted); cf. *Turner Broad. Sys.*, 512 U.S. at 658 (speaker-based laws are suspect "when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).").

⁸⁴ *Ruggiero*, 317 F.3d at 245. Disclosure requirements "may burden the ability to speak, but they ... 'do not prevent anyone from speaking.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010) (*Citizens United*) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003) (*McConnell*) (subsequent history omitted)).

⁸⁵ *Meese v. Keene*, 481 U.S. 465, 480-81 (1987).

⁸⁶ *Order*, 36 FCC Rcd at 7735, 7736, paras. 69 n.189, 73.

⁸⁷ *Order*, 36 FCC Rcd at 7734-36, 7736-37, paras. 69-70, 73.

the rules are substantially related to a “sufficiently important governmental interest.”⁸⁸ Moreover, the burden on speech rights is narrowly tailored to the interest that the *Order* furthers.⁸⁹

29. *Governmental interest.* The governmental interest at stake is indisputably important. Indeed, the Commission found that “the government has a compelling interest in ensuring that the public is aware of when a party has sponsored content on a broadcast station.”⁹⁰ The Commission found the interest to be “even more important” where, as here, “a foreign governmental entity is involved.”⁹¹ The importance is further magnified by evidence that “foreign governments increasingly are making use of U.S. airwaves to promote their policies and viewpoints to the American public.”⁹²

30. Petitioners argue the governmental interest is “not sufficiently important” because “there is no widespread, much less national, problem of foreign propaganda” on broadcast stations.⁹³ In their view, “a wave of foreign propaganda” evidently would be required before any action was warranted.⁹⁴ But, as the U.S. Court of Appeals for the D.C. Circuit has previously stated, “[a]n agency need not suffer the flood before building the levee.”⁹⁵ The Commission reasonably concluded that the examples it cited represent a larger problem.⁹⁶ Moreover, as noted above, the very lack of appropriate disclosure to inform audiences that the programming has been sponsored by a foreign governmental entity or a foreign nation that led to this rule making means that such material could previously have been aired without knowledge of such sponsorship by either the public or the Commission.⁹⁷ Petitioners also contend the Commission irrationally adopted a national rule in response to what it considers several “hyper-localized” incidents, but they do not claim that the risks the Commission seeks to address are specific to the areas where examples of “foreign propaganda” have been documented.⁹⁸ Nor do they articulate why the Commission’s concern with the need for transparency would not also logically apply in other locales and situations involving the lease of time on U.S. broadcast stations besides those mentioned in the *Order*.

31. *Tailoring.* The foreign sponsorship identification rules are reasonably tailored to satisfying the government’s interest in ensuring that sponsorship by foreign governmental entities is announced to broadcast audiences.⁹⁹ The foreign sponsorship identification rules require disclosure “only for programming aired pursuant to a lease of airtime if directly or indirectly provided by a foreign

⁸⁸ *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (*Bonta*) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)).

⁸⁹ *Bonta*, 141 S.Ct. at 2384.

⁹⁰ *Order*, 36 FCC Rcd at 7735, para. 69 and n. 185.

⁹¹ *Id.* at 7735, n.186; *id.* at 7714-15, para. 26 (discussing bar on foreign governments holding broadcast licenses under 47 U.S.C. § 310(a)).

⁹² *Id.* at 7735, para. 69, n. 186.

⁹³ Stay Petition at 12-13, 16.

⁹⁴ *Id.* at 13.

⁹⁵ *Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009); *Chamber of Commerce of U.S. v. SEC*, 412 F.3d 133, 141 (D.C. Cir. 2005) (agencies have authority for “precautionary or prophylactic responses to perceived risks” based on “documented abuses”) (quoting *Certified Color Mfrs. Assn. v. Mathews*, 543 F.2d 284, 296 (D.C. Cir. 1976)).

⁹⁶ *Order*, 36 FCC Rcd at 7704, 7713-14, paras. 4, 25. The Commission was not alone in perceiving a problem that calls for action. *See id.* at 7704, para. 4, n. 9 (citing Congressional expressions of concern).

⁹⁷ *See supra* at para. 22.

⁹⁸ Stay Petition at 12-13.

⁹⁹ *See Americans for Prosperity*, 141 S. Ct. at 2384 (exacting scrutiny “require[s] a fit that is not necessarily perfect, but reasonable”) (quoting *McCutcheon v. Fed. Elec. Comm’n*, 572 U.S. 185, 218 (2014)).

governmental entity.”¹⁰⁰ The Commission “significantly narrowed the scope of the programming covered by” the rule from its initial proposal to minimize the speech burden.¹⁰¹

32. Petitioners argue the *Order* is overinclusive because its “reasonable diligence” requirements cover all leased programming.¹⁰² The *Order* compels disclosure, however, only where leased programming is sponsored by a foreign governmental entity.¹⁰³ Accordingly, the burden on speech rights is narrowly tailored to the interest the *Order* serves.¹⁰⁴ The speech burden also is coextensive with the underlying sponsorship identification requirements, which petitioners do not purport to challenge.¹⁰⁵

33. Further, the *Order*’s requirements are neither burdensome nor excessive. As described above, the foreign sponsorship identification rules require a licensee to inform the lessee of the disclosure rule, ask whether the lessee qualifies as a foreign governmental entity or is aware of such an entity in the program production chain, confirm a negative response by consulting Department of Justice and Commission websites, and maintain a record of its compliance.¹⁰⁶ Asking two questions of the lessee is a minimal burden.¹⁰⁷ The same goes for verifying that the lessee’s name does not appear on two public lists.¹⁰⁸ And “broadcaster recordkeeping requirements simply run with the territory.”¹⁰⁹

34. In addition, narrower alternatives to the disclosure rule are inadequate.¹¹⁰ The Commission explained that proposals to narrow the rule to situations where broadcasters “have reason to believe that their lessee is affiliated with a foreign governmental entity” would make the rule “virtually ineffectual and unenforceable” and might “favor existing lessees at the expense of new and diverse entrants.”¹¹¹

35. Petitioners also contend the Commission could have achieved its goal by “requiring the sponsor itself to provide the desired information for the licensee to include when airing the leased programming.”¹¹² There is no reason to believe this alternative would be effective when lessees’ existing statutory obligation “to communicate information to the licensee relevant to determining whether a

¹⁰⁰ *Order*, 36 FCC Rcd at 7735-36, para. 70.

¹⁰¹ *Id.* See *supra* at para. 24.

¹⁰² Stay Petition at 14-15, 16.

¹⁰³ See *Order*, 36 FCC Rcd at 7739-41, Appendix A.

¹⁰⁴ *Order*, 36 FCC Rcd at 7734-35, paras. 69-70.

¹⁰⁵ See 47 U.S.C. §§ 317(a)-(e) and 47 CFR §§ 73.1212(a)-(i); and *Order* at paras. 28 and 30.

¹⁰⁶ See *Order*, 36 FCC Rcd at 7739-41, Appendix A.

¹⁰⁷ See 47 U.S.C. § 317(c) (requiring licensees to exercise “reasonable diligence” to obtain the information required for a sponsorship announcement). In this regard, we note that the Commission’s pre-existing sponsorship identification rules state that “[w]here an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, . . . , could be known to the station, the announcement shall disclose the identity of the person or persons or entity on whose behalf such agent is acting instead of the name of the agent.” 47 CFR § 73.1212(e).

¹⁰⁸ *Order*, 36 FCC Rcd at 7725-26, para. 45; see *id.* at 7723, para. 43 n.123 (declining to require “a general Internet search” based on concerns expressed by petitioner NAB and others).

¹⁰⁹ *McConnell*, 540 U.S. at 236 (internal quotations and citations omitted).

¹¹⁰ See *John Doe No. 1 v. Reed*, 561 U.S. 186, 198-99 (2010) (disclosure requirement was “substantially related to the important interest of preserving the integrity of the election process” where, *inter alia*, proposed alternatives were less effective).

¹¹¹ See *Order*, 36 FCC Rcd at 7724-25, para. 44 (internal quotations and citations omitted); see also *supra* para. 25.

¹¹² Stay Petition at 17.

disclosure is needed,”¹¹³ violation of which is subject to a \$10,000 fine or imprisonment,¹¹⁴ has not prevented abuses. Petitioners’ alternative also is inconsistent with the statute, which requires licensees to exercise reasonable diligence to obtain information for announcements.¹¹⁵ Consistent with the statute, the foreign sponsorship identification rules apply to “*broadcast licensees*” rather than to lessees.¹¹⁶

36. Petitioners argue the *Order* is fatally underinclusive because it does not apply to cable and satellite television, social media and the Internet.¹¹⁷ The Supreme Court has rejected like arguments under exacting scrutiny.¹¹⁸ A regulation “‘is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective.’”¹¹⁹ The *Order* is justified by evidence of undisclosed sponsorship of leased broadcast programming by foreign governmental entities.¹²⁰ The Commission proposed the foreign sponsorship identification rules in response to that problem, as well as congressional expressions of concern regarding the problem and the historical regulatory concern with foreign influence in broadcasting.¹²¹ Cable and satellite television programming were beyond the scope of the proposed rules, and the Commission was not required to expand the rulemaking in response to arguments that it also should address cable and satellite programming.¹²² Although Petitioners contend that “the primary problems of disinformation or propaganda sponsored by foreign governments . . . have occurred over social media and the Internet,”¹²³ they do not contend the Commission has regulatory authority over social media and other Internet content under section 317 or explain how an announcement requirement might work in that context.

37. Finally, petitioners argue the administrative burden the *Order* imposes may chill speech by discouraging broadcasters from entering lease arrangements and impeding the ability of prospective lessees “to disseminate their content.”¹²⁴ Petitioners’ argument is speculative given the minimal burden the *Order* imposes.¹²⁵

¹¹³ *Order*, 36 FCC Rcd at 7726, para. 46; 47 U.S.C. § 508(b) and (c).

¹¹⁴ 47 U.S.C. § 508(g).

¹¹⁵ 47 U.S.C. § 317(c).

¹¹⁶ *Order*, 36 FCC Rcd at 7732-33, para. 63 (emphasis in original).

¹¹⁷ Stay Petition at 13-14, 16.

¹¹⁸ *Citizens United*, 558 U.S. at 368 (adhering to *McConnell*, 540 U.S. at 230-31, in rejecting challenge to Bipartisan Campaign Reform Act of 2002 provision “because it requires disclaimers for broadcast advertisements but not for print or Internet advertising.”).

¹¹⁹ See *Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 819 (D.C. Cir. 2001) (quoting *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995)).

¹²⁰ *Order*, 36 FCC Rcd at 7713-14, para. 25; see *McConnell*, 558 U.S. at 207 (finding that corporations and unions used soft money to finance televised election-related advertising before elections justified applying segregated-fund requirement to broadcasting but not print media and the Internet).

¹²¹ See *Order*, 36 FCC Rcd at 7702, 7704, 7713-15, paras. 1, 4, nn.9, 25-26; *NPRM*, 35 FCC Rcd at 12107-08, para. 17 n.52.

¹²² See *U.S. v. Edge B’casting Co.*, 509 U.S. 418, 434 (1993) (“Nor do we require that the Government make progress on every front before it can make progress on any front.”); *NTCH, Inc. v. FCC*, 950 F.3d 871, 881 (D.C. Cir. 2020) (rejecting argument that FCC should have expanded rulemaking to consider a broader solution to the problem before it).

¹²³ Stay Petition at 13.

¹²⁴ *Id.* at 16-17.

¹²⁵ See *infra* at Section III.B.

B. Petitioners Have Failed to Show that Broadcast Licensees Will Suffer Irreparable Harm

38. Petitioners have failed to establish that broadcast licensees will suffer irreparable harm. To establish irreparable harm, a moving party must show that it will suffer injury that is “‘both certain and great,’ ‘actual and not theoretical,’ ‘beyond remediation,’ and ‘of such imminence that there is a present need for equitable relief to prevent irreparable harm.’”¹²⁶ The harm that Petitioners allege is conjectural, consists of economic injuries that are not severe enough to be cognizable as irreparable harm, and is not imminent. Accordingly, Petitioners have not met their burden.

39. The Petitioners’ alleged harms are neither certain nor great and appear to be largely conjectural. Petitioners’ assert that, absent a stay, broadcasters will be required to expend substantial resources to bring their leasing arrangements into compliance with the *Order*’s requirements and estimate compliance costs as cumulatively amounting to “‘hundreds of thousands of dollars in employee time and legal fees.’”¹²⁷ As stated in the *Order*,¹²⁸ broadcast licensees have longstanding obligations both with regards to sponsorship identification and the filing of lease agreements in their public files. We find that the requirements adopted in the *Order* are a reasonable extension of licensees’ existing obligations and should not require an overhaul in how licensees operate nor impose undue costs.¹²⁹

40. While the adopted rules rely on statutory terms and definitions that have not previously been part of the Commission’s broadcast regulations,¹³⁰ petitioners exaggerate and mischaracterize the level of knowledge or expertise they are required to have of these statutes. Familiarity with FARA terms and definitions is not required for licensees to be able to navigate the FARA website.¹³¹ Only those entities that may have a separate legal obligation to register as a foreign agent under FARA need be as intimately familiar with the statutes as Petitioners suggest.¹³² A licensee’s employees need only be able to navigate to the relevant public websites and compare the names of the licensee’s lessees with those listed on the websites.¹³³ Such a check would be less extensive or time consuming than a credit check or background check, which are common practices for most businesses when entering into contractual agreements with others. We question Petitioners’ suggestion that hours of training will be required for employees to perform such searches on public websites.¹³⁴

41. Petitioners have not identified any harms justifying a stay and rather present largely theoretical claims of economic injury. Petitioners attach six attestations in which broadcast licensees

¹²⁶ *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal citations omitted); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

¹²⁷ Stay Petition at 18. *But see Order*, 36 FCC Rcd at 7721, 7727, n.111, para. 48 (specifically stating that licensees are not required to implement their responsibilities through contractual provisions and giving licensees 6 months to ensure that programming aired pursuant to existing lease agreements complies with the new rules).

¹²⁸ *Order*, 36 FCC Rcd at 7720, para. 37.

¹²⁹ *See id.*

¹³⁰ *Id.* at 7722, para. 40. The terms and definitions have long been used by the Department of Justice, and reliance on these established rules enables the Commission to provide greater clarity about the newly adopted requirements. *See id.* at 7709-12, paras. 15-20.

¹³¹ *See id.* at 7722-23, para. 41.

¹³² *See id.*; Stay Petition at 18.

¹³³ *Order*, 36 FCC Rcd at 7722-23, para. 41.

¹³⁴ We note that the Commission refined and narrowed the search requirement from what was originally proposed in response to NAB’s *ex parte* request. *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, NAB, to Marlene Dortch, Secretary, FCC, MB Docket No. 20-299, at 7-9 (filed Apr. 13, 2021). In particular, the Commission eliminated the requirement to conduct a less defined Internet search as proposed in the draft circulated to the Commissioners for review prior to being adopted.

attest to having large numbers of leasing agreements for which they would need to satisfy the diligence requirements.¹³⁵ On closer review, however, many of the harms Petitioners allege do not withstand analysis. Petitioners assert that they would have to expend extensive time and resources to alter their lease agreements so as to obtain certifications from lessees regarding their status.¹³⁶ In fact, Petitioners may choose to memorialize their reasonable diligence efforts in whatever manner they choose. It was at the behest of one of the Petitioners that the Commission stated that licensees may implement the requirements through contractual provisions between the licensee and lessee, should they so choose.¹³⁷ In this regard, the Bureau notes that many such lease agreements already contain provisions regarding compliance with the Commission's existing sponsorship identification requirements,¹³⁸ and that consequently modifications to such contractual provisions seem unlikely to be overly burdensome to the parties.¹³⁹

¹³⁵ Stay Petition at Exhibits 1-6.

¹³⁶ Stay Petition at 18. We note that in this regard the number of leasing agreements is not necessarily the relevant number for consideration. Rather, the relevant number may actually be the number of individual *lessees*. This is because, once a licensee makes an inquiry of a lessee, this inquiry satisfies the diligence requirements for all of the leasing agreements between the licensee and that lessee. While in some cases the broadcasters claim a large number of leases, nowhere in the declarations does any licensee attest to having agreements with a large number of unique lessees. Thus the form letter attestations attached by Petitioners citing numerous leasing agreements are of limited utility in determining the magnitude of the obligation. Furthermore, the attestations themselves contain misleading information about how many stations will actually be impacted by the foreign sponsorship identification rules. For example, the attestation from Karen Wishart of Urban One, Inc. includes an exhibit listing all of Urban One's radio stations, both FM and AM. Stay Petition at Exhibit 5. Review of the on-line public inspection files (OPIFs) of these stations, however, reveals that the overwhelming majority of leasing agreements are found in connection with Urban One's AM stations and that almost none of the Urban One FM stations have any leasing agreements. Thus, the total number of stations operated by Urban One appears not to be representative of the burden it may face under the rules adopted. Furthermore, a review of the OPIFs for the stations listed in the declaration of Elizabeth Neuhoff of Neuhoff Communications do not show any leases on file. On the assumption that Neuhoff Communications is in compliance with the Commission's section 73.3526(e)(14) requirement to file all leases in a licensee's public file, the lack of such filings suggests that the compliance burden associated with the foreign sponsorship identification rules for Neuhoff Communications is either non-existent or purely conjectural at this time.

¹³⁷ *Order*, 36 FCC Rcd at 7721, n.111.

¹³⁸ For example, Sinclair Broadcast Group, one of the largest television broadcasters, appears already to include in its lease agreements a standard provision covering compliance with both sections 317 and 507 of the Act. The provision states:

In order to enable Owner to fulfill its obligations under Section 317 of the Act, Programmer, in compliance with Section 507 of the Act, will, in advance of any scheduled broadcast by the Station, disclose to Owner any information of which Programmer has knowledge or which has been disclosed to Programmer as to any money, service, or other valuable consideration that any person has paid or accepted, or has agreed to pay or to accept, for the inclusion of any matter as a part of the programming or commercial matter to be supplied to Owner pursuant to this agreement. Programmer will cooperate with Owner as necessary to ensure compliance with this provision. Commercial matter with obvious sponsorship identifications shall not require disclosure in addition to that contained in the commercial copy.

See Programming Services Agreement Between Chesapeake Television, Inc. ("Programmer") and Baltimore (WNUV-TV) (filed Sept. 27, 2013), <https://publicfiles.fcc.gov/api/manager/download/3a37f52b-753a-98bb-bb56-f2fb238d2c81/a7897418-f785-6fe2-95d6-9de26cb57362.pdf>.

¹³⁹ Upon examination of the online public inspection files of stations cited in the Stay Petition's attestations, we note that many stations use the same template and identical boilerplate contractual language for all of their leasing agreements. *See, e.g.*, WWIN, Time Brokerage Agreements, <https://publicfiles.fcc.gov/am-profile/wwin/time-brokerage-agreements/e3f75c5a-95b4-49ef-8415-08ecbf81a3a2/> (last visited Oct. 7, 2021). Thus modifying the boilerplate language just once could modify all of the station's contracts going forward, greatly reducing the time and resources that Petitioners claim will be necessary for such modifications. We emphasize that modifying

(continued....)

42. We note that some of the affiants have expressed dismay at having to reduce their leasing arrangements to writing, which they characterize as a result of the foreign sponsorship identification rules.¹⁴⁰ All licensees, however, have a pre-existing requirement to file copies of their lease agreements in their public files.¹⁴¹ Given that requirement, the lease arrangements should already be memorialized in writing. To the extent that the declarants cite to their existing failure to comply with the Commission's rules as the basis for arguing that the new requirement would impose undue burdens, their argument fails.

43. Petitioners also posit that broadcasters may lose sponsored programming because there are other media platforms on which such sponsorship identification inquiries are not required and because the diligence requirements may sow an element of distrust in their relationships with longstanding programming partners.¹⁴² As stated above and in the *Order*, broadcast licensees have existing obligations -- unique to broadcasting -- that require broadcasters to exercise reasonable diligence to obtain the information required to make sponsorship announcements.¹⁴³ Petitioners have not identified any instances where a licensee has actually lost sponsors as a result of its existing obligations, and offer only unsupported speculation about potential losses in the future. We note that licensees are to inform their lessees of the adopted rules, and informing them that the rules apply industrywide should aid in fostering understanding that no one lessee or entity is being targeted for scrutiny.¹⁴⁴

44. We also find that the costs of compliance to broadcast licensees are not severe enough to be cognizable as irreparable harm. Petitioners assert that "where economic loss will be unrecoverable, such as in a case against a Government defendant where sovereign immunity will bar recovery, economic

language in existing and future contracts is but one method by which licensees could memorialize their inquiries to satisfy the reasonable diligence standard, which takes into account a licensee's facts and circumstances in making reasonableness determinations. *Order*, 36 FCC Rcd at 7721, n.111 For example, it may be reasonable for a licensee to send a foreign sponsorship inquiry to a longstanding lessee via email and then simply print out the response to comply with the memorialization requirement of reasonable diligence.

¹⁴⁰ See Stay Petition, Exhibit 4, Declaration of Elizabeth Neuhoff (stating that "many of our sponsored programming arrangements are made over the phone or other informal means and are not necessarily reduced to writing. We will incur increased compliance costs and burdens and potential disruptions to our business because we must now obtain certifications in writing."). Additionally, Urban One's declaration contains nearly identical language indicating that some of their sponsored programming arrangements are informal or oral in nature, and, like Neuhoff's, apparently have not been reduced to writing. See Stay Petition, Exhibit 5, Declaration of Karen Wishart, Urban One, Inc. ("Some of our sponsored programming arrangements are made over the phone or other informal means and are not necessarily reduced to writing. We will incur increased compliance costs and burdens and potential disruptions to our business because we must now obtain certifications in writing."); WWIN, Time Brokerage Agreements, <https://publicfiles.fcc.gov/am-profile/wwin/time-brokerage-agreements/e3f75c5a-95b4-49ef-8415-08ecbf81a3a2/> (last visited Oct. 7, 2021).

¹⁴¹ See 47 CFR § 73.3526(e)(14) (requiring licensees to place copies of every agreement or contract involving a time brokerage (*i.e.*, a lease of airtime on a station) in the station's public file).

¹⁴² Stay Petition at 18-19.

¹⁴³ See *supra* para. 40; *Order*, 36 FCC Rcd at 7720, para. 37.

¹⁴⁴ Stay Petition at Exhibit 6, Declaration of Amador S. Bustos (asserting that some programmers "may feel insulted if I start to question their sponsorship and programming practices). With regard to the statement in Mr. Bustos's Declaration that some of his lessees may perceive the *Order*'s requirements as "ethnic profiling, simply because the radio programming is in a language other than English," we emphasize that the foreign sponsorship identification rules apply to all leasing arrangements and are in no way tied to the content of the programming or the language in which it is broadcast. See Stay Petition at Exhibit 6, Declaration of Amador S. Bustos at para. 7. In fact, leaving it to an individual licensee to ask only if it has a subjective reason to believe there may be a foreign governmental connection, as Petitioners recommend, is more likely to result in some lessees feeling that they have been singled out, rather than having a standard requirement that applies in the case of all leases.

loss can be irreparable.”¹⁴⁵ However, the economic injuries must also be severe.¹⁴⁶ None of the supporting affidavits alleges that the costs of compliance are so great relative to the broadcaster’s overall budget as to “significantly damage its business above and beyond a simple diminution in profits.”¹⁴⁷

45. Finally, petitioners do not establish the immediacy of any harm. Although the *Order* became effective after publication in the Federal Register, compliance with the operative rule portions will not be required until after the information collection components have been reviewed by the Office of Management and Budget (OMB).¹⁴⁸ The OMB review process requires a sixty-day notice and comment period followed by another thirty-day notice and comment period, after which OMB review may take up to sixty additional days.¹⁴⁹ Therefore, the harms asserted by Petitioners are not imminent.

46. For the foregoing reasons, we conclude that the Stay Petition has failed to demonstrate any actual, imminent irreparable harm resulting from the Commission’s *Order*.

C. A Stay Would Harm Other Parties and Be Contrary to the Public Interest

47. As described above, consistent with the requirements of section 317 of the Act, the Commission adopted its foreign sponsorship identification rules to ensure that the American public can better assess the origins of programming carried on broadcast stations and identify instances where foreign governmental entities are involved in the provision of broadcast programming. Any delay in the implementation of the Commission’s *Order* will only further hamper the American audience’s ability to properly gauge the source of programming broadcast on the public airwaves and thus is contrary to the public interest. As the Commission articulated in the *Order*, the evolution of the statutory sponsorship identification requirements in section 317 of the Act and the Commission’s implementing regulations demonstrate the vital importance that both Congress and the Commission place on ensuring that broadcast audiences know who is trying to persuade them, specifically when airtime has been purchased, or programming furnished for free, by someone other than the broadcast station airing the programming. Section 317 and its implementing regulations strive to create the transparency essential to a well-functioning marketplace of ideas, a level of transparency for which the need is particularly acute when programming from foreign governments is involved.¹⁵⁰ Accordingly, any delay in the effectiveness of the Commission’s rules would be harmful to the public and contrary to the public interest.

¹⁴⁵ Stay Petition at 17-18.

¹⁴⁶ We note that the *existing* burden calculations for the costs of the current sponsorship identification and current online public inspection file information collection requirements exceed \$6 million and \$44 million, respectively. We expect the additional information collection requirements related to the newly adopted foreign sponsorship identification rules will be minimal increases in comparison to the already approved collections associated with the existing sections 73.1212, 73.3526, and 73.3527 of the Commission’s rules. See Office of Information and Regulatory Affairs, Office of Management and Budget, *Supporting Statement for OMB 3060-0174* (Mar. 8, 2021), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202103-3060-005; Office of Information and Regulatory Affairs, Office of Management and Budget, *Supporting Statement for OMB 3060-0214* (Aug. 20, 2020), https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202008-3060-012.

¹⁴⁷ *Mylan Pharms., Inc. v. Shalala*, 81 F.Supp.2d 30, 43 (D.D.C. 2000).

¹⁴⁸ See 47 CFR § 73.1212(l).

¹⁴⁹ See 44 U.S.C. §§ 3506(c)(2)(A), 3507(b) (establishing the 60- and 30-day comment cycles); see also Federal Communications Commission, Information Collections Being Reviewed by the Federal Communications Commission, 86 Fed. Reg. 38482 (July 21, 2021) (initiating the 60-day comment cycle and announcing that comments should be submitted on or before September 20, 2021).

¹⁵⁰ See, e.g., *Order*, 36 FCC Rcd at 7708-09, n.40 (describing attempts by the Russian government to spread disinformation).

IV. ORDERING CLAUSES

48. Accordingly, **IT IS ORDERED THAT**, pursuant to the authority contained in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i)-(j), and 303(r) and the authority delegated in sections 0.61 and 0.283 of the Commission's rules, 47 CFR §§ 0.61 and 0.283, this Order Denying Stay Petition in MB Docket No. 20-299 **IS ADOPTED**.

49. It is **FURTHER ORDERED** that the Petition for Stay pending judicial review of the Order in this proceeding, filed by the Petitioners, **IS DENIED**.

50. It is **FURTHER ORDERED** that this Order Denying Stay Petition **SHALL BE EFFECTIVE** upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief, Media Bureau