To Federal Communications Commission:

The Pelican Institute is the leading free market think tank in the state of Louisiana. Within the Institute is the Pelican Center for Technology and Innovation, which is dedicated to making both Louisiana and the United States hubs for entrepreneurship and innovation in the technology sector.

The Pelican Center for Technology and Innovation has commented on many FCC questions. Most comments have related to closing the digital divide, and considering the effects of COVID-19, solving this issue is more important and urgent than ever. One FCC issue we have not had cause to comment on, however, is free speech- and for good reason.

While the FCC has a history of policing speech on the various media it regulates, most notably radio, both Congress and the FCC have wisely ended much of its role in speech regulation. The FCC has too often been co-opted as a political tool to silence opponents and benefit those in power. With this history in mind, the Pelican Center for Technology and Innovation writes the FCC in opposition to the Petition for Rulemaking to "Clarify provisions of Section 230 of the Communications Act of 1934, as amended."

It wasn't so long ago that the FCC involving itself in questions of speech caused large issues. After being introduced in 1949, the Fairness Doctrine, which obligated holders of broadcast licenses to present both sides of an issue, became the main tool for the FCC to limit speech at the behest of political forces.

The height of the use of the Fairness Doctrine to silence political opponents came during the Kennedy Administration. Right wing radio flourished in the 1960s and was often critical of the Kennedy Administration. The administration used selective application of the Fairness Doctrine to demand equal time on every radio show that presented criticism of the president. This increased scrutiny of radio hosts, along with guaranteed free time to speak in favor of Kennedy, caused many radio stations to drop their right-wing programming.

The FCC was complicit in this activity when Chairman E. William Henry announced in July 1963 a "clarification" of the Fairness Doctrine. This clarification specified what kind of positions espoused on radio would trigger the law. Hardly a surprise, the positions which would trigger the law were those opposed to the president.

The FCC also passed the Cullman Doctrine, which was an "enhancement" of the Fairness Doctrine. It required radio stations to offer response time slots for those who had been mentioned on radio. Those receiving the time slots had to pay for this time *unless* they claimed they could not afford to pay. Unsurprisingly, many groups said they could not afford to pay for the airtime.

This use of the Fairness Doctrine as a political tool hardly ended with the Kennedy Administration. During the election of 1964, the DNC commissioned a group of operatives that included a former FCC lawyer to use the Fairness Doctrine to their advantage. These operatives used the doctrine to ensure

pro-Lyndon Johnson airtime was given to their side anytime a speaker on a station voiced their support for Barry Goldwater.

The campaign produced more than 1,700 free broadcasts in favor of Johnson.

Beyond procuring free airtime for Kennedy and Johnson, the Fairness Doctrine was used to essentially kill right wing radio. Imagine if today, Sean Hannity or Rachel Maddow had to give free time to opposing views on their show. Not only would it take away from their message, but it would come at great cost to their stations and prevent them from using their platform as they see fit.

This is essentially what happened to Carl McIntire, a popular right-wing radio personality during the 1960's. His station count decreased from 398 in 1965, to 183 by 1967. He was hardly the only one, as nearly every conservative program lost between one-third to half their stations during the 1960s. The Fairness Doctrine had proven effective at greatly reducing political content on the radio waves.

Of course, this was hardly the only use of the power of the FCC for political purposes. President Johnson famously used his position to secure a lucrative television license for his wife. President Richard Nixon used the FCC to hold up a television license for the parent company of the Washington Post, which released the Pentagon Papers and eventually broke the Watergate story.

It wasn't until the 1980s, when President Ronald Reagan pushed back against the Fairness Doctrine, that political content began returning to the airwaves. By the end of Reagan's term, the Fairness Doctrine was repealed, leading to the flourishing of the radio broadcasted political discourse we hear today.

In contrast to radio and television, the internet has been a bastion of free speech for most of its history, and this is primarily due to Section 230 of the Communications Decency Act.

The parts of Section 230 of the Communications Decency Act that relate to this proposal are as follows:

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker- No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability- No provider or user of an interactive computer service shall be held liable on account of:

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

The Treatment of publisher or speaker section has been described as the "26 words that created the internet," and this is hardly an exaggeration.

In the early days of the internet, there was a lack of clarity over the extent of the liability a website had over speech it hosted. Was it like a newspaper that was liable for the stories it carried? Or was it more similar to the mail or telephone? This lack of clarity led to a variety of lawsuits and confusing court

rulings which threatened to stop the flourishing of online discourse. Congress wisely dealt with this issue by enacting Section 230 and clarifying that interactive computer services were not liable for the speech they hosted, whether they chose to moderate user-generated content or not. Of course, users could still be liable for the content they posted, as interactive computer services are for the content they create.

The reading of Section 230 has been clear for some time. Section (c) (1) clarifies who is considered the speaker and who faces liability for content posted online. Section (c) (2) further clarifies that moderation of content in good faith does not lead to liability for an online computer service.

The NTIA petition asking for "clarification" misses the plain reading of this rule. There is nothing in the text or Congressional record that suggests Section (c) (1) requires an interactive computer service to act in good faith. Rather, the good faith provision clearly only applies to section (c) (2) of the law, as that is where it appears in statute. Attempts to expand the good faith provision are political in nature and without legal basis.

Even if there was real debate over these sections, weighing in on this question is not the proper role for the FCC. At this particularly political time leading up to a presidential election, the FCC should refrain from rulemakings on free speech questions which could have profound political implications. As online speech continues to be more important in our political climate than ever before, a return to an FCC weighing in on speech during political times would revert us to the worst of the Kennedy Administration.

The FCC's role in closing the digital divide may be more important than ever in the wake of COVID-19. Instead of policing speech, the FCC has rightly focused its attention on this bipartisan issue over the last decade. The Pelican Center for Technology and Innovation urges the commission to maintain its focus on the digital divide. With that in mind, it adamantly opposes the Petition for Rulemaking.

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