

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Modernization of Media Regulation Initiative) MB Docket No. 17-105
)

COMMENTS OF THE RADIO TELEVISION DIGITAL NEWS ASSOCIATION

The Radio Television Digital News Association (“RTDNA”), by its attorneys, hereby submits these Comments in response to the *Public Notice* (“PN”) adopted by the Federal Communications Commission (“FCC” or “Commission”) on May 18, 2017 initiating a review of FCC rules applicable to radio and television broadcasters (among others).¹ RTDNA is the world’s largest professional organization devoted exclusively to electronic journalism. RTDNA members include local and network news executives, news directors, producers, reporters, photographers, editors, multimedia journalists and digital news professionals in broadcasting, cable and digital media, as well as journalism educators and students.

RTDNA applauds the Commission for its interest in “eliminat[ing] or modify[ing] regulations that are outdated, unnecessary or unduly burdensome.” Among those is 47 C.F.R. Section 73.1206, the so-called “telephone broadcast rule,” which requires that, before broadcasting or recording a telephone conversation for later broadcast, a licensee must inform any party to the call of its intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Mere identification of oneself by name and as calling from a

¹ *In re Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, FCC 17-58 (rel. May 18, 2017).

radio or television station does not provide notice that the call is being broadcast or recorded for broadcast.²

In adopting and reevaluating the rule over the years, the Commission has noted that the rule was crafted so as to balance properly the dual objectives of meeting the legitimate needs of the public to obtain information from broadcast news and information programming and ensuring the public's right to privacy with respect to the recording of telephone conversations that may be used on the air.³ Today, however, there are so many pervasive means through which a recorded telephone conversation may be disseminated for public consumption that to perpetuate a broadcast-only rule under the guise of protecting privacy is nonsensical. Section 73.1206 serves only to restrict broadcast stations in the manner in which their reporters can conduct discussions and interviews with public officials and other potential newsmakers, or engage in investigative journalism. No other media outlet faces this additional layer of regulation — subject to the adequate existing privacy protections described below, other digital or print journalists are free to record a telephone conversation without ever disclosing that they might later post audio or video on their website, disseminate the recording over ubiquitous social media platforms, or simply publish a verbatim transcript in print or online. RTDNA respectfully submits, therefore, that the rule is antiquated, imposes discriminatory burdens on broadcast journalists, and should be eliminated.

² The Commission has made clear that a violation of the rule occurs as soon as the person at the other end says "hello", if a recorder is running, even if the person being recorded subsequently consents to the broadcast of the call. See, e.g., *In re RCK 1 Group, LLC, License of Station WKKX(AM), Wheeling, West Virginia*, File No. EB-05-IH-2006, DA 09-252 (rel. Feb. 17, 2009).

³ See *Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461 (1988) ("1988 Order"). The current telephone broadcast rule evolved from a preexisting rule that prohibited the recording of telephone conversations for broadcast. See *1972 Public Notice*, 35 FCC 2d at 941; *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970).

In the context of the telephone broadcast rule, the Commission has noted that it was cognizant of the need to balance privacy concerns with inhibiting the free flow of information.⁴ By any of today's measures, however, the rule's effectiveness in protecting privacy is minimal. Broadcast use of an individual's telephone conversations no longer carries the potential for a more serious and intense loss of privacy than the singular recording of a conversation by the other party to the call.⁵ The federal wiretapping statute, state statutory provisions, and prevailing tort law are a more appropriate means of keeping up with and addressing privacy concerns in a multimedia/smartphone/internet age—where recording and posting for wide public dissemination is commonplace—than an administrative agency regulation that applies *solely* to recording telephone conversations, and *solely* to over-the air broadcasting as a distribution means. Today, the telephone broadcast rule is an anachronism.

On the federal level, there are the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, which protect parties' privacy rights in telephone conversations by requiring prior one party consent before recording is permitted.⁶ Indeed, this federal law reflects a specific Congressional determination as to the proper scope of privacy in connection with recording telephone conversations. On the state level, many jurisdictions directly regulate

⁴ 1988 Order at 5464.

⁵ For example, subject to the state and federal privacy protections discussed herein, there is no bar to posting such recordings for mass consumption on the Internet, which the FCC itself has recognized as “the medium used most by the public to obtain information instantaneously.” *Amendment of Section 73.1216 of the Commission's Rules Related to Broadcast Licensee-Conducted Contests*, Report and Order, MB Docket No. 14-226, FCC 15-118 at ¶ 3 (rel. Sept. 17, 2015).

⁶ See 18 U.S.C. §§2510 *et seq.* The federal wiretap law, passed in 1968, permits surreptitious recording of conversations when one party consents, “unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.” Amendments signed into law in 1986 and 1999 (The Electronic Communications Privacy Act of 1986 and Wire and Electronic Communications Interception and Interception of Oral Communications) expand the prohibitions to unauthorized interception of most forms of “electronic communications, including satellite transmissions, cellular phone conversations, computer data transmissions and cordless phone conversations.

recordings of both wire and oral communications, in some cases more restrictively than applicable federal provisions.⁷ Specifically, some expand on the federal law's language and prohibit all surreptitious recording or filming without the consent of all parties. In most states, the laws allow for civil as well as criminal liability. Some states have codified the right to privacy and provided statutory remedies for the violation of this right. Finally, potential invasions of an individual's privacy may be inhibited by the availability to the individual of a civil remedy in tort should his or her conversations be broadcast without proper consent. The application of these other privacy protections in specific cases is subject to full judicial review to ensure that privacy interests have not been violated. Continued Commission involvement in vindicating rights to privacy in the face of these effective, protective alternatives, therefore, strikes RTDNA as a wholly inefficient use of administrative resources.

Moreover, as a practical matter, the broadcast telephone rule has a chilling effect on the timely dissemination of information and the breadth and depth of broadcast news coverage. If a broadcast journalist wishes to include all or part of a telephone conversation he or she has with a source as part of a news story, the reporter must inform the source that the conversation may be broadcast at the immediate outset of the call. Thus, the existing prior notification requirements inhibit spontaneity and immediacy in telephone conversations, undermining the effectiveness of news programming utilizing those conversations. Further, an affirmative requirement that all persons be notified that a conversation with a reporter is being recorded for possible broadcast is difficult to reconcile well-settled law governing the privacy rights of public figures, or those

⁷ Of the 50 states, 38, as well as the District of Columbia, allow you to record a conversation to which you are a party without informing the other parties you are doing so. Twelve states forbid the recording of private conversations without the consent of all parties. Those states are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington. *See* "Can We Tape? A Journalist's guide to taping phone calls and in-person conversations in the 50 states and D.C." available at <http://www.rcfp.org/rcfp/orders/docs/CANWETAPE.pdf>.

whose privacy rights may be limited because of their participation in a newsworthy event particularly when such a public figure is aware that they are engaged in conversation with a broadcaster.⁸ The prior notice obligation also poses problems for journalists who may not know in advance that a particular conversation will ultimately be broadcast. For example, it would violate the rule to start recording without the source's knowledge and then, if a reporter determines there is a portion he would like to use in a story, belatedly ask the source for permission to broadcast the conversation. This uncertainty may actually prevent use of the recorded call since notice cannot be obtained legitimately after the fact for any number of reasons, including the simple inability to again reach the interviewee. Even if a party to the conversation fully understands that he or she is the subject of an interview with a reporter, willingly speaks, and would reasonably expect that all or parts of the conversation might recorded and be used in a broadcast news story, a station still risks a fine if its employee does not affirmative ask permission at the very outset of the call.⁹ Thus, the rule also stands in the way of broadcasters utilizing legitimate interviews, information that could be readily be disseminated on competing non-broadcast media outlets. In certain states, for example, it may well be that a reporter will be within his or her rights to record a telephone conversation without the consent of the other party to the conversation, but if that journalist works for a radio or television station,

⁸ See, e.g., *El Mundo Broadcasting Corp.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 20377, 20379 (Enf. Bur. 2000) (Bureau refused to recognize an exception to Section 73.1206 notice requirements where the conversation recorded and subsequently broadcast involved a well-known on-air personality and a government official).

⁹ In 2011, for example, the Commission upheld a fine issued to a broadcaster for airing a telephone conversation between a station employee and two airport officials about a controversy concerning the local airport. The employee allegedly identified himself as a station employee, and began to ask questions, without specifically stating, however, that the call was being recorded for broadcast. Even though the officials willingly continued the conversation once they knew the call was being taped, the FCC nonetheless fined the station \$4,000. *In the Matter of RE-JOYNETWORK, LLC, Licensee of Station WAAW(FM), Williston, South Carolina*, File Nos. EB-06-IH-1772 and EB-06-IH-1748, DA 11-182 (rel. Feb. 2, 2011).

that reporter is prohibited from sharing that information with listeners and viewers over the primary broadcast platform.

From a constitutional perspective, given its wholly diminished purpose, the rule represents an impermissible intrusion on the First Amendment rights of broadcasters to air speech that is otherwise lawful and which, in fact, may contribute to more robust and open discussions and more comprehensive news reporting, consistent with broadcasters' responsibility as public trustees. Often times, any claim of privacy in the recorded information will be far outweighed by the public's interest in a matter of serious public concern. Notwithstanding the jurisdictional question of whether the Commission has the authority to regulate privacy in this manner under the broad public interest standard governing broadcasting,¹⁰ if ever it could have been said that the rule was narrowly drawn to pursue a legitimate, substantial governmental interest in protecting privacy, that is most certainly no longer the case.

The Commission should eliminate Section 73.1206 in its entirety and leave protection of privacy interests in connection with broadcast uses of telephone conversations to other federal and state laws.

Respectfully submitted,

RADIO TELEVISION DIGITAL NEWS
ASSOCIATION

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¹⁰ See 1988 Order at 5464, ¶ 21.