Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

The national broadcast television ownership rule prevents entities from owning or controlling TV stations that, in the aggregate, reach more than 39 percent of the TV households in the country. In calculating reach for purposes of the rule, VHF stations are attributed with 100 percent of the TV households in the Designated Market Areas (DMAs) where they are located, and UHF stations are attributed with 50 percent of the TV households in their DMAs.[1] The Commission now seeks comment on whether to modify or eliminate the national audience reach limit, including its calculation methodology, in light of increased video programming options for consumers, technological changes and other factors.[2]

Given these marketplace developments, the National Association of Broadcasters (NAB)[3] strongly opposes any rule changes further restricting TV broadcasters vis-à-vis their competitors, including a *de facto* lowering of the national cap by altering the methodology for calculating UHF stations' reach. NAB proposes that the Commission retain the 39 percent

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[1] 47 C.F.R. § 73.3555(e).

[2] Notice of Proposed Rulemaking, MB Docket No. 17-318, FCC 17-169, at ¶ 1 (rel. Dec. 18, 2017) (Notice).

[3] NAB is a nonprofit trade association that advocates on behalf of free and local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies and the courts.

limit and determine compliance with it by accounting for *all* TV stations at 50 percent of their theoretical audience reach. This is a sound approach that the Commission should adopt.

As an initial matter, NAB agrees with the FCC that it has statutory authority to modify or eliminate the national TV cap and associated calculation methodology. Despite multiple opportunities, Congress never enshrined the 39 (or the earlier 35) percent cap into statute – which, as the D.C. Circuit Court of Appeals has pointed out, would have insulated the national TV ownership rule from FCC review. And while the 2004 Consolidated Appropriations Act (CAA) relieved the Commission of its affirmative obligation to review and justify the national cap every four years, the CAA notably did not prohibit the FCC from reviewing it.

In examining the national TV ownership rule here, the Commission must recognize that TV broadcasting does not in any way dominate the 21st century video landscape. In 2002 – even before consumers' widespread adoption of broadband and the explosive growth of internet video – an FCC report described broadcast television as surviving "in a sea of competition."[4] But the competitors that TV stations faced over a decade and a half ago were veritable minnows compared to the whales of today's marketplace. Even comparatively large TV station groups are dwarfed by a number of pay-TV/broadband companies and online video providers, let alone the social media giants. Yet, unlike broadcasters, these massive companies, many with market capitalizations in the hundreds of billions of dollars, are not subject to national or local structural ownership rules.

In this environment, the traditional competition and diversity justifications for a broadcast-only national TV ownership rule have significantly eroded. Competition for audiences and advertisers between over-the-air (OTA) stations, multichannel video

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[4] J. Levy, M. Ford-Livene, and A. Levine, OPP Working Paper Series #37, *Broadcast Television: Survivor in a Sea of Competition* (Sept. 2002) (Sea of Competition Report).

programming distributors (MVPDs), internet-delivered "virtual" pay TV services like Sling TV and PlayStation Vue, subscription video on demand (SVOD) services such as Netflix and Amazon Prime and social media platforms is fierce and flourishing. This intense competition has led to the current era of "peak TV," in which viewers have complained that "there are so many TV programs to choose from that it's hard to know where to start."[5] The FCC's traditional concern with localism, moreover, is effectively enhanced by local, not national, competition, and is more directly promoted by other FCC rules, such as those permitting efficient enforcement of TV stations' local program exclusivity arrangements and those ensuring market-based negotiation of retransmission consent agreements.

In light of these current marketplace realities, the Commission, at the very least, should not cut back on the existing level of TV station ownership permitted nationwide, whether by lowering the 39 percent cap itself or by accounting for all stations at 100 percent of their theoretical reach. The FCC lacks any factual or legal basis for adopting a stricter national ownership rule.

NAB urges the Commission to retain the 39 percent audience reach limit and determine compliance with it by accounting for all TV stations at 50 percent of their theoretical reach. As further explained below, the national audience reach cap has been based since its inception in 1985 on the premise that stations reach *all* the TV households in the DMAs in which they are located (although UHF stations were "discounted" by half to take account of the physical limitations of the UHF band at that time). This presumption erroneously equates "reach" with viewers; it essentially treats every household a station can

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[5] Andrew Wallenstein, *Too Many Shows? Peak TV Overwhelms Viewers, Survey Finds*, Variety (Nov. 6, 2017) (discussing a survey by Hub Entertainment Research).

reach (which is presumed to be every household in the DMA) as a *viewing* household. Surely it should make a difference for regulatory purposes whether 20 percent or 100 percent of TV households actually watch a station, but the current approach does not recognize that distinction. In contrast, the Commission does not import this fiction into the cable context, as it attributes TV households to a cable multi-system operator only if that operator *actually serves* the home, not simply because it is *available* to that home.

This presumption of 100 percent audience reach underlying the broadcast national cap is completely disconnected from the current reality of TV stations' marketplace position. It significantly exaggerates the competitively effective reach of TV station groups whose actual audiences and advertising revenues have been fragmented by ever-increasing competition from a growing range of multichannel and online video providers. The Notice specifically inquired about any "station or market characteristics that would warrant discounting or weighting a station's audience reach when determining compliance with a national cap."[6] The competitive characteristics of the digital video market justify accounting for all TV stations at half their presumed audience reach.

NAB's proposed approach presents many advantages. As our comments discuss in detail:

- Our proposal recognizes that broadcasters face formidable competitive challenges in the video marketplace and avoids an unjustifiable contraction of the national audience reach limit, without relying on an analog-era rationale for attributing UHF stations.

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[6] Notice at ¶ 21.

- NAB’s proposal accounts for the arbitrary audience reach metric underlying the national TV ownership rule. Understanding that the rule’s conception of audience reach is not based on science or economics, our proposal treats all stations more rationally and consistently, given current market conditions.
- Accounting for both VHF and UHF stations at 50 percent of their theoretical reach is more equitable for VHF stations, which, in the digital TV environment, are not technically advantaged vis-à-vis UHF stations. This approach also avoids rolling back the current cap, which accounts for UHF stations at 50 percent of their presumed reach.
- NAB’s plan would prevent significant disruptions to TV station owners and their viewers, especially those who rely, in whole or in part, on OTA broadcasting, which include disproportionate numbers of younger, lower income and minority viewers.
- NAB’s proposal is clear, simple and straightforward to apply. Its approval also would obviate the need for the FCC to adopt additional rules addressing thorny questions about grandfathering and the transferability of grandfathered station groups.
- NAB’s plan is not designed to significantly expand the already permitted levels of common TV station ownership nationwide. Given that the considerable majority (over 70 percent) of full-power commercial DTV stations are UHF stations already accounted for at 50 percent of their theoretical reach, retaining a 39 percent cap with a modified method of accounting for only the smaller number of commercial VHF stations would have a relatively limited overall effect.

For all these reasons, NAB believes that approval of its proposal is warranted, and we urge the Commission to adopt it.

II. THE FCC HAS STATUTORY AUTHORITY TO MODIFY OR ELIMINATE THE NATIONAL TV AUDIENCE CAP AND ASSOCIATED CALCULATION METHODOLOGY

The Commission requests further comment on its authority to modify or eliminate the national audience reach limit, noting its earlier conclusion that it has authority to modify or eliminate the cap, including its calculation methodology.[7] NAB agrees with the FCC's previous conclusion.

A. Congress Has Never Enshrined the National TV Ownership Cap into Statute

In Section 202(c)(1)(B) of the Telecommunications Act of 1996, Congress directed the FCC to "modify its rules for multiple ownership" by "increasing the national audience reach limitation for television stations to 35 percent."[8] Subsequently, in 2003, the FCC approved an order modifying the national TV ownership rule by raising the cap to 45 percent.[9]

While court challenges to the FCC's 2003 order were pending and the effectiveness of the FCC's new ownership rules stayed, Congress passed the 2004 Consolidated Appropriations (CAA). Section 629(1) of the CAA referred to Section 202(c)(1)(B) of the 1996 Act, and directed the FCC to modify its national TV rule "by striking '35 percent' and inserting '39 percent.'"[10] Congress's action in Section 629(1) was notably limited, only directing the Commission to (again) modify its national TV *rule*. Neither the CAA (nor the 1996 Act) ever "enshrined" the 39 percent cap (or the 35 percent cap) "in the statute itself."[11] And Congress

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[7] Notice at ¶¶ 7-9; Report and Order, 31 FCC Rcd 10213, 10222-24 (2016).

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111 (1996 Act). The FCC had adopted a 25 percent national TV cap in 1985.

[9] *See 2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620 (2003) (also amending the local and cross-ownership rules).

[10] CAA, Pub. L. No. 108-199, § 629(1), 118 Stat. 3, 99.

[11] *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002)

in no way suggested that the FCC *lacked the authority* to raise the cap to 45 percent; rather, Congress only indicated that it disagreed with the number the FCC selected.

Moreover, if Congress had intended to prohibit the FCC from modifying or eliminating its national audience reach rule in the future, it could easily have done so by establishing the 39 percent limitation in the CAA or by amending the Communications Act of 1934 (Act) to address national TV ownership. One very simple statutory provision would have sufficed in either case: "The Commission shall not grant any application or construction permit for a full-power commercial TV station license to any entity if doing so would result in that entity owning or controlling TV stations that, in the aggregate, reach more than 39 percent of U.S. TV households nationwide."

Because Congress chose not to enshrine the 39 percent cap into statute, the FCC retains its full authority under the Act to grant broadcast TV licenses in the public interest and to establish, modify and eliminate rules regulating the ownership of TV stations.[12] The Supreme Court has broadly interpreted the FCC's licensing and rulemaking authority under Title III to uphold a wide range of ownership rules.[13] Congress, of course, is well aware of the

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[12] 47 U.S.C. § 303(r) provides that the Commission "from time to time, as public convenience, interest, or necessity requires, shall," *inter alia*, "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." *See also* 47 U.S.C. § 154(i) (FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions").

[13] *See, e.g., FCC v. NCCB*, 436 U.S. 775, 793-794 (1978) (upholding adoption of newspaper/broadcast cross-ownership rule under FCC's authority in Section 303(r) and 154(i) of the Act to "issue regulations codifying its view of the public-interest licensing standard"); *NBC v. U.S.*, 319 U.S. 190, 214-218 (1943) (citing Section 303 of the Act as granting the FCC "broad licensing and regulatory power" and upholding adoption of the FCC's chain broadcasting rules as a permissible exercise of its of power to license stations in the public interest); *U.S. v. Storer Broadcasting Co*., 351 U.S. 192, 203 (1956) (concluding that the FCC had authority to impose rules limiting the multiple ownership of AM, FM and TV stations under its public interest rulemaking and licensing authority).

FCC's authority under the Act and long history of regulating broadcast ownership.[14] Thus, Congress' action in Section 629 of the CAA – referring back to the 1996 Act and its direction to modify an FCC rule rather than establishing any national reach limit in a statute – did not usurp the FCC's broad authority under the Communications Act in this area.

B. The CAA Relieved the FCC of its Obligation to Review the Cap Every Four Years

The CAA also relieved the FCC of its duty under Section 202(h) of the 1996 Act to review its national cap rules periodically. Section 629(3) of the CAA provides that Section 202(h) "does not apply to any rules relating to the 39 percent national audience reach limitation."[15]

Notably, however, Section 629(3) does not prohibit the FCC from reviewing its national audience reach rules, including as part of its quadrennial ownership reviews. Rather than saying that the Commission could not review its national TV rules, Congress only said that the FCC was not obligated to do so every four years. If Congress had intended to prevent the FCC from reviewing its national TV cap rules under Section 202(h), Section 629(3) could easily have said that the FCC "shall not review" the 39 percent national reach limit, or any rules related to it, as part of the obligatory Section 202(h) quadrennial review of all the other ownership rules. Moreover, Section 629 does not address the FCC's authority to review the national cap rules *outside* of the quadrennial review process, as the Third Circuit Court of

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[14] *See, e.g.,* H.R. Rep. No. 104-204, at 54 (1995) (noting that FCC regulation of broadcast ownership dates to the 1940s). *See also Hall v. U.S.*, 566 U.S. 506, 516 (2012) ("We assume that Congress is aware of existing law when it passes legislation.").

[15] Section 629(3) additionally changed the Section 202(h) requirement for the FCC to review its broadcast ownership rules from every two years to every four years.

Appeals found.[16] Given the absence in Section 629(3) of prohibitory language on the Commission, a reviewing court should not infer a prohibition on the FCC here, but should give effect to Congress' specific choice of language. "The short answer" as to why Section 629(3) should not be read as prohibiting FCC review of the national cap "is that Congress did not write the statute that way."[17]

Read as described above, Sections 629(1) and 629(3) make sense as a whole. Taken together, Congress directed the FCC (for the second time) to modify the level specified in its national TV audience reach rule and determined that the FCC is no longer required to review that rule every four years under Section 202(h). This multi-part structure of Section 629 would have been wholly unnecessary if Congress had simply intended to set a 39 percent cap and prevent the Commission from altering it. As explained above, Congress easily could have established the 39 percent cap in statute. In that case, there would have been no need to even include in the CAA a provision exempting the national TV cap from Section 202(h), as the FCC would have no authority to alter a cap enshrined in statute, under Section 202(h) or otherwise. As the D.C. Circuit succinctly observed in reviewing challenges to the FCC's retention of its earlier 35 percent cap, "[h]ad Congress wished to insulate the [national TV cap] Rule from review under § 202(h), it need only have enshrined the 35% cap in the statute itself."[18]

C. The FCC's Interpretation of Section 629 Does Not Make Congress' Action Ineffective or Superfluous

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[16] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (3d Cir. 2004) (the FCC "may decide, in the first instance, the scope of its authority to modify or eliminate" rules relating to the national cap "outside the context of § 202(h)").

[17] *Corley v. U.S.,* 556 U.S. 303, 315 (2009) (internal citations omitted).

[18] *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002).

Some may argue that, if the Commission determines that it retains the authority to modify or eliminate the 39 percent national TV cap, then Section 629 becomes a nullity. That is not the case. Section 629, appropriately interpreted as exempting the national cap from mandatory quadrennial reviews under Section 202(h), serves a clear and significant regulatory purpose – it allows the FCC to leave the national cap rules intact without examining them on a regular basis.[19] As a practical matter, an exemption from mandated regular reviews has the effect of leaving rules in place, often for long periods of time.[20] Indeed, according to the Third Circuit, Section 202(h)'s requirement for the FCC "periodically to justify its existing regulations" – an "obligation it would not otherwise have" – is what "makes § 202(h) 'deregulatory.'"[21] Thus, interpreting Section 629 as removing the national cap rules from Section 202(h)'s "deregulatory" mandate has significant regulatory effect and does not make Congress' action ineffective or superfluous. There is no need to misread the CAA as setting the 39 percent level in stone entirely outside the FCC's regulatory purview to give effect to Section 629.[22]

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[19] In fact, Congress may well have removed the national cap from the obligatory Section 202(h) reviews because it had just directed the FCC to modify its national TV rules by changing the cap to 39 percent and saw little point in forcing the FCC to review the cap again in the next periodic review.

[20] Although the FCC has an obligation under administrative law principles to reexamine its rules over time, especially if circumstances change, *see, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), once rules are on the books, they tend to stay there for extended periods. For example, prior to an order in 1984 raising the limit on the number of TV stations an entity could own nationally, the FCC had not reexamined and revised its national TV ownership rule since 1953-54. And some of the rules being reexamined as part of the FCC's media modernization initiative date back many decades. *See, e.g., Amendment of Sec. 73.3613 of the Commission's Rules Regarding Filing of Contracts*, Notice of Proposed Rulemaking, MB Docket No. 18-4, FCC 18-8, at ¶ 2 (Jan. 30, 2018).

[21] *Prometheus*, 373 F.3d at 395.

[22] To the extent that any reviewing court may find Section 629 ambiguous on the question of the FCC's authority, the Commission's reasonable interpretation of Section 629 is entitled to

III. THE REALITIES OF TODAY'S VIDEO MARKETPLACE HAVE UNDERMINED THE BASES FOR A BROADCAST-ONLY NATIONAL TV CAP

The Commission has maintained national limits on the ownership of TV stations since 1941.[23] The digital revolution and transformation of the video marketplace in the 21st century, however, have eroded the traditional justifications for a broadcast-only national cap. Broadcast TV in no way dominates today's video landscape, but is one service among many competing for viewers and vital advertising revenue. The regulatory framework applicable to broadcasting, however, has not reflected marketplace changes.

A. TV Station Owners Must Compete Against Massive Pay-TV/Broadband Providers and Online Video Providers Unencumbered by Comparable Regulation

Television broadcasters are the only participants in the video marketplace subject to national and local structural ownership rules – the FCC imposes no comparable limits on online video service providers, satellite TV operators or, as a practical matter, cable TV providers.[24] The largest pay-TV provider today, AT&T/DirecTV, has more subscribers than the

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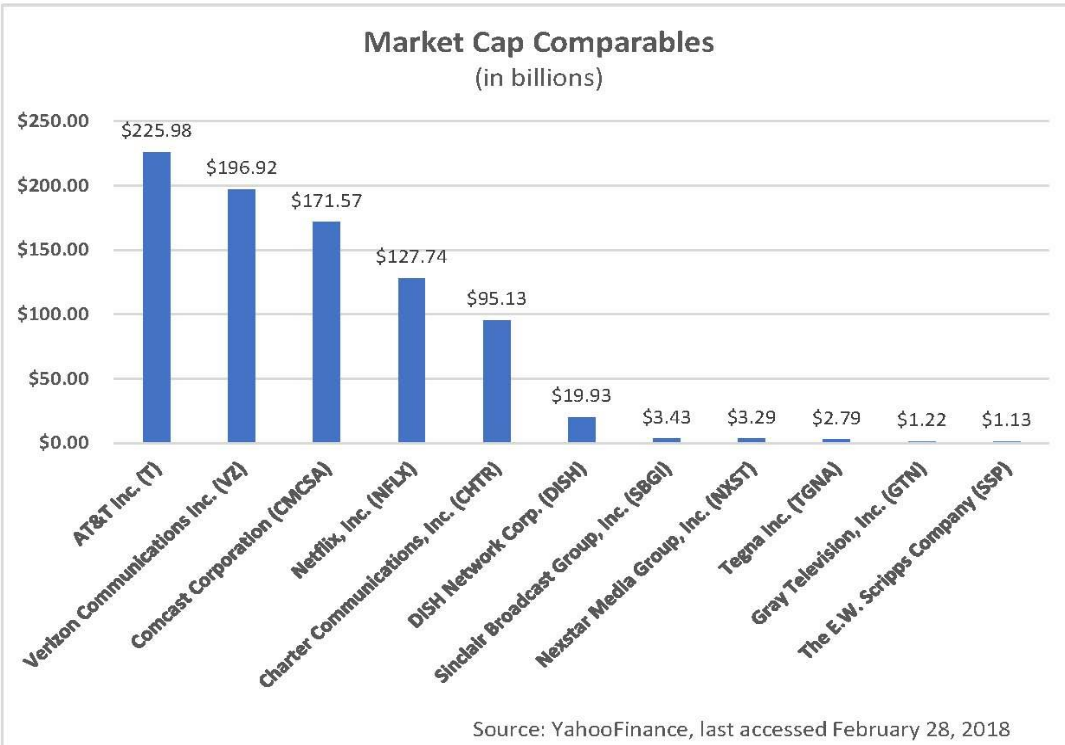
deference. *See Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc*. 467 U.S. 837, 843-44 (1984). In a case involving the FCC's authority under the Communications Act, the Supreme Court specifically found that an agency's interpretation of a statutory ambiguity concerning the scope of its own regulatory authority is entitled to deference under *Chevron*. *See City of Arlington, Texas v. FCC*, 569 U.S. 290 (2013). For the reasons set forth in these comments and those previously given by the Commission, the FCC's interpretation of its authority under Section 629 as allowing it to modify or repeal the national TV ownership cap is permissible and therefore will be given deference by a reviewing court.

[23] *Broadcast Services Other than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three TV stations).

[24] In 2009, the D.C. Circuit Court of Appeals vacated the FCC's cable horizontal ownership cap. *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009). In 2001, the same court vacated the vertical cable ownership limits. *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). Congress had mandated that the FCC set cable horizontal and vertical limits in 1992. 47 U.S.C. § 533(f). However, because of court reversals, vacatur and remands, these limits have been invalid for a much longer period of time than they were in effect.

top 25 MVPDs combined in 1985.[25] Notably, with only one exception, the largest pay-TV providers are also the largest broadband providers.[26]

As shown here, TV broadcasters today must compete against these pay-TV/broadband companies, and online video providers such as Netflix, that dwarf them in size, with market capitalizations orders of magnitude greater than even large TV station groups.



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[25] As of the third quarter of 2017, AT&T/DirecTV had over 24.3 million video subscribers (and over 25.1 million subscribers if the internet-delivered DirecTV Now is included), while subscribers to the 25 largest MVPDs in 1985 totaled 24.05 million. *See* Leichtman Research Group, Press Release, *Major Pay-TV Providers Lost About 405,000 Subscribers in 3Q 2017; Top Internet-Delivered Pay-TV Services Added About 535,000 in 3Q 2017* (Nov. 15, 2017); Mike Farrell, *Eat or Be Eaten: Consolidation Creates a Top-Heavy List of the 25 Largest MVPDs*, Multichannel News at 9 (Aug. 17, 2015).

[26] Measured by subscribers, the ten largest providers control a whopping 94.4 percent of the nationwide pay-TV market and 92.1 percent of the nationwide broadband market; the top four providers control 79.2 percent of the pay-TV market and 70.5 percent of the broadband market; and the top three control 67.1 percent of the pay-TV market and 63.7 percent of the broadband market. *Multichannel Trends*, S&P Global Market Intelligence (Q3 2017 data).

And this chart does not even include the social media giants, which have become significant providers of video content, including scripted programming.[27] Facebook's market cap, for example, exceeds $528 billion, dwarfing even AT&T, let alone any broadcast TV station group.[28]

Asymmetric regulation limits TV broadcasters' ability to achieve important economies of scale and scope – including in news production – that subscription video providers may achieve.[29] The competitive hobbling of TV broadcasting and its locally-oriented services does not benefit the viewing public,[30] particularly given the cost to consumers of subscribing to traditional pay-TV services.[31]

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[27] *See, e.g.*, Joe Flint and Deepa Seetharaman, *Facebook Is Going Hollywood, Seeking Scripted TV Programming*, The Wall Street Journal (June 25, 2017). YouTube TV, a live multichannel streaming service, launched last April.

[28] YahooFinance, accessed Feb. 28, 2018. YouTube is part of Alphabet, whose market capitalization exceeded $768 billion on February 28.

[29] Multiple economists have explained in earlier studies that TV broadcasting, including news investment and production specifically, are subject to strong economies of scale and scope. J.A. Eisenach and K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1-2 (2011), Attachment A to Reply Decl. of J.A. Eisenach and K.W. Caves, NAB Reply Comments at Appendix A, MB Docket No. 10-71 (June 27, 2011); Decl. of Mark Israel and Allan Shampine, Compass Lexecon, NAB Comments, MB Docket No. 10-71, at Appendix B ¶¶ 49-51 (June 26, 2014).

[30] Broadcast-only households (*i.e.*, those receiving programming exclusively through OTA reception or a combination of broadcast OTA and internet) have risen to 18 percent of all U.S. TV households (an increase from 14.7 percent reported in 2015). Broadcast-any households, defined as homes with at least one TV set receiving OTA signals, have risen to 25.1 percent of all TV households (up from 21.0 percent reported in 2015). GfK, *Home Technology Monitor 2017 Ownership and Trend Report* (June 2017).

[31] From 1995 to 2016, the price of expanded basic cable service increased at a compound average annual rate of 5.7 percent, compared to just a 2.2 percent compound average rate of growth in the Consumer Price Index. FCC, *Report on Cable Industry Prices*, DA 18-128, at Attachment 7 (Feb. 8, 2018).

B. The Traditional Competition and Diversity Justifications Underpinning the National TV Ownership Rule Have Eroded Over Time

In earlier reviews of its broadcast ownership rules, the Commission found that the national TV rule was "not necessary to promote the goals of competition or diversity."[32] In today's digital marketplace, these justifications for a national cap have only further eroded.

1. Video Competition Is Fierce and Flourishing

In analyzing the "sea of competition" enveloping the broadcast TV industry in 2002, the FCC focused on the widespread deployment of DBS and the expansion in cable availability and channel capacity. At that time, the FCC did not view the internet as a competitor to traditional video services.[33] Since 2002, of course, online video services not only have become strong competitors to broadcast TV, cable TV and DBS, they have transformed the entire video marketplace. The number of outlets and services has exploded, and OTA broadcasters, MVPDs, "virtual" pay-TV services, SVOD services and social media platforms all compete fiercely for audiences' time and attention and advertisers' dollars.[34]

Now in a much deeper sea of competition, the broadcast TV industry is experiencing continuing audience fragmentation and pressure on advertising revenues. NAB previously documented the effects of MVPD competition on broadcast TV,[35] and recent data show that consumers are increasingly embracing internet-based sources of video programming.

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[32] Notice at ¶ 16, citing *2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13818-19, 13842 (2003) (2002 Biennial Review Order) and *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Report and Order, 100 FCC 2d 17 (1984).

[33] Sea of Competition Report at ii, 68.

[34] *See, e.g.*, Comments of NAB, MB Docket No. 17-214, at 3-9 (Oct. 19, 2017).

[35] *See, e.g.*, Attachment A (showing decline in total broadcast TV viewing shares compared to cable); NAB Written *Ex Parte* Communication, MB Docket Nos. 14-50, 09-182 (June 6, 2016); NAB Comments, MB Docket Nos. 14-50, *et al.*, at 34-37, 45-50 (Aug. 6, 2014).

• The leading over-the-top (OTT) services (Netflix, Amazon Prime and Hulu) have grown rapidly, with Netflix, for example, growing from 9.4 million to 54.8 million subscribers between 2008-2017, a 482 percent increase. *See* Attachment B. By mid-2017, 64 percent of U.S. households subscribed to Netflix, Amazon Prime and/or Hulu.[36]

• Seventy-two percent of respondents to a 2017 RBC Capital Markets survey reported subscribing to or using an SVOD or OTT service.[37] Virtual pay-TV services, including Sling TV, PlayStation Vue, DirecTV Now, YouTube TV, Hulu Live and the sports-oriented fuboTV, attract millions of subscribers in total.[38]

As the number of online options expands, consumers acquire more devices for accessing online content, spend more time watching online video sources and spend less time watching linear TV, including broadcast.

• In 2017, nearly 70 percent of U.S. households had at least one TV set connected to the internet (via a smart TV or other device, such as Roku or Apple TV, or a gaming system), and 85 percent of households used at least one laptop or desktop computer.[39] Sixty-one percent of those ages 18-29 primarily watch TV through online streaming services.[40]

• The percentage of consumers ages 12 and older owning smartphones and tablets reached 83 percent and 50 percent, respectively, in early 2018.[41] The total daily time U.S. adults spend with mobile non-voice media is expected to increase from 88 minutes in 2012 to 203 minutes in 2018.[42]

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[36] Leichtman Research Group, Press Release, *64% of U.S. Households Have an SVOD Service; 29% of all Adults Stream an SVOD Service Daily* (July 24, 2017).

[37] Todd Spangler, *Pay-TV Losses Could Accelerate to More Than 5 Million U.S. Households per Year, Survey Indicates*, Variety (Sept. 21, 2017).

[38] *See, e.g.*, Reinhardt Krause, *AT&T's DirecTV Now Streaming Service Tops 1 Million Subscribers*, Investor's Business Daily (Dec. 5, 2017).

[39] Leichtman Research Group, Press Release, *69% of U.S. TV Households Have a Connected TV* (Apr. 27, 2017); Leichtman Research Group, Press Release, *84% of U.S. Households Get an Internet Service at Home* (Dec. 13, 2017).

[40] Lee Raine, *About 6 in 10 young adults in U.S. primarily use online streaming to watch TV*, Pew Research Center (Sept. 13, 2017).

[41] Edison Research and Triton Digital, *The Infinite Dial 2018*.

[42] https://statistica.com/statistics/469983/time-spent-mobile-media-type-usa/. Over a quarter of U.S. adults (and nearly 40 percent of those ages 18-29) now report that they go online "almost constantly," with 43 percent of adults (and nearly half of 18-29 year-olds) saying they go online several times a day. Andrew Perrin, *About a quarter of U.S. adults say they are "almost constantly" online*, Pew Research Center (Mar. 14, 2018).

• Consumers' weekly time spent accessing programming on TV (Live + Time Shifting), counting broadcast, cable and DBS, is declining, especially among younger viewers. Attachment C shows that adults ages 18-24 spent a third less time watching traditional TV per week in 2017 than just three years earlier, while those ages 25-34 spent nearly 25 percent less time and adults ages 35-49 spent nearly 11 percent less time than in 2014.[43]

Advertisers follow audiences. As consumers migrate to other outlets, especially online and mobile, advertisers shift their dollars in response.

• BIA/Kelsey's analysis of the 2018 advertising market, based on its estimates of total local ad spending in all 210 DMAs combined, shows that mobile and online/interactive together garnered 24.3 percent of total local ad revenue, exceeding the 13.7 percent of ad revenues earned by TV stations. *See* Attachment D. A 2018 survey by BIA/Kelsey showed that small and medium-sized businesses use a wide range of advertising and marketing platforms. These businesses reported using Facebook pages and websites the most frequently, with notably fewer using traditional media, including broadcast TV, cable TV, print and radio. *See* Attachment E.

• SNL Kagan's analysis of the U.S. advertising market emphasizes that ad dollars are fleeing traditional media for digital (online and mobile). The digital advertising sector outpaced all others in 2017, taking 32 percent of total ad revenues in the U.S. (local and national combined). By 2027, Kagan predicts that digital will have 45 percent of the total ad market, well ahead of the next largest ad sectors (cable TV, direct mail and broadcast TV stations, in that order).[44] BIA/Kelsey also predicts significant growth in mobile advertising through 2022, as advertisers target social and web platforms.[45]

Even this brief sampling of data clearly shows that broadcast TV stations do not competitively dominate the video marketplace, as they face intense competition for both viewers and advertisers. The fragmentation of audiences and ad revenues among services and outlets has whittled away the competition rationale for a broadcast-only national TV cap.

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[43] The time teens ages 12-17 spend watching traditional TV has declined the most, falling 45.5 percent over the five-year period 2012-2017. J.C. Lupis, *The State of Traditional TV: Updated With Q2 2017 Data*, marketingcharts.com (Dec. 13, 2017).

[44] Derek Baine, *Digital to comprise 45% of $283B ad market by 2027, up from 32% in 2017*, SNL Kagan (Jan. 24, 2018).

[45] Press Release, *BIA/Kelsey Sees Significant Growth in Local Mobile Ad Spending in 2018 and Beyond* (Feb. 1, 2018) (predicting location-targeted mobile ad spending to rise from $17.1 billion in 2017 to $38.7 billion in 2022).

2. Consumers Now Enjoy an Unprecedented Abundance of Diverse Entertainment and Informational Options

In 2015, John Landgraf, the CEO of the cable network FX, told an audience of TV critics that there is "simply too much television" today.[46] *Too much video choice* – it is an extraordinary concept. Yet, even a brief examination of the video landscape supports Mr. Landgraf's observation.

As shown below, 2017 set another record for the number of scripted original series at 487 – a number that does not include the 750-some unscripted series airing each year.[47] The number of streaming scripted series increased by 680 percent just between 2012 and 2017, and the number of basic and premium cable scripted series has grown by 483 percent and 147 percent, respectively, since 2002. As a result, broadcast TV shows accounted for only 31.4 percent of the total scripted original series last year, compared to 74.2 percent in 2002, even though the number of original broadcast series grew over this time.[48]

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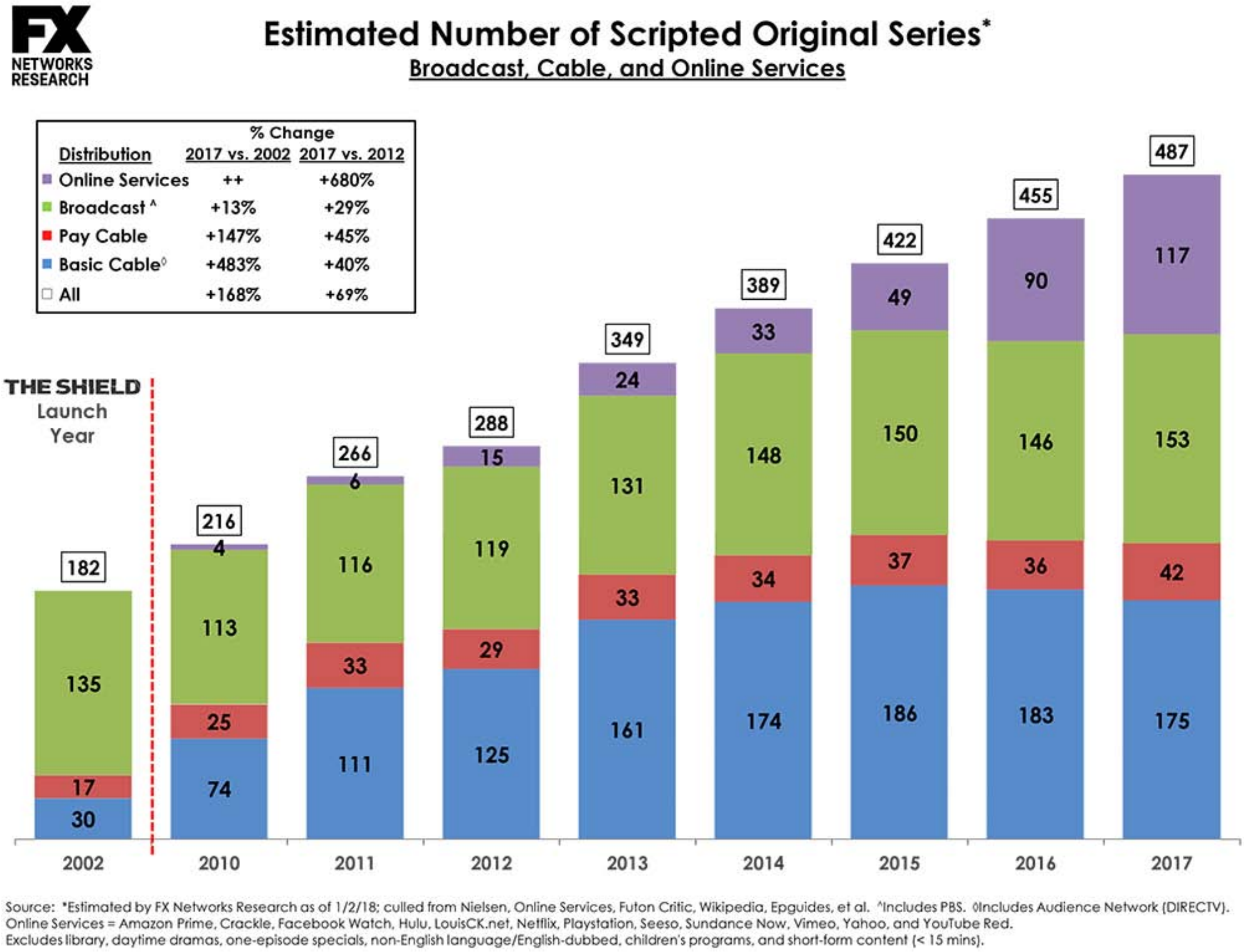
[46] Yvonne Villarreal, *FX Networks CEO John Landgraf: "There is simply too much television*," The Los Angeles Times (Aug. 7, 2015).

[47] Jason Lynch, *There's No Stopping Peak TV*, adweek.com (Jan. 5, 2018).

[48] Broadcast TV stations also have increased program diversity by airing thousands of multicast channels, many of which offer specialized genres (*e.g.*, comedy, science fiction, faith/family) or target specific demographic groups (*e.g.*, women, African Americans, Hispanics). *See* Comments of NAB, MB Docket No. 17-214, at 15-16 (Oct. 10, 2017), for a more detailed discussion; *see also* Peter Leitzinger and Atif Zubair, *TV station multiplatform analysis 2018* (Jan. 31, 2018) (the total number of OTA channels aired by full-power, Class A, and LPTV stations in the U.S. grew to 6,335, up from 2,518 at end of 2010).



Unsurprisingly, a 2017 survey found that 49 percent of U.S. consumers agreed that "there are so many TV programs to choose from that it's hard to know where to start."[49] And Americans also "already have access to more streaming services than they know what to do with."[50] The average U.S. viewer accesses about four video services (including pay-TV and streaming) but only uses about two regularly, according to an October 2017 survey by PwC.[51] Despite these findings, viewer choices are still growing rapidly, with Parks Associates

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[49] Andrew Wallenstein, *Too Many Shows? Peak TV Overwhelms Viewers, Survey Finds*, Variety (Nov. 6, 2017) (discussing a survey by Hub Entertainment Research).

[50] Ashley Rodriguez, *Americans can't keep up with all the TV services they have*, qz.com, Dec. 18, 2017).

[51] *Id*.

reporting late last year that the number of OTT video services available in the U.S. exceeded 200, with additional streaming services expected to launch soon.[52]

Beyond vast entertainment choices, consumers now have innumerable online options for obtaining news and information. Online news use is rapidly "closing in on TV" as the most often used source of news,[53] and 67 percent of Americans (including 55 percent of those ages 50 and older) reported last year that they get at least some of their news on social media, with increasing numbers using multiple social media sites for news.[54] Overall, 93 percent of adults now get at least some news online, and "digital native" news outlets continue to increase their audiences.[55] And according to recent reports, "Netflix is poised to enter the TV news business," with specific plans for a weekly news magazine show to rival broadcast network programs such as *60 Minutes*.[56] In short, the traditional diversity rationale for a national cap on ownership of broadcast TV stations has been eroded by consumers' unprecedented and still growing choices for entertainment and information in the digital age.

C. Competition in Local Markets Promotes the FCC's Localism Goals

The Notice also seeks comment on whether the existing cap remains necessary to promote localism, the FCC's third traditional goal of its ownership rules.[57] NAB believes that

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[52] Mike Snider, *Cord cutters, here's what to expect in 2018*, USA Today (Dec. 18, 2017).

[53] In 2017, 43 percent of Americans reported that they "often" obtain news online, just seven percentage points lower than the 50 percent who "often" get news on TV (counting local and national broadcast and cable TV). Jeffrey Gottfried and Elisa Shearer, *Americans' online news use is closing in on TV news use*, Pew Research Center (Sept. 7, 2017).

[54] Elisa Shearer and Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, Pew Research Center (Sept. 7, 2017).

[55] *Digital News Fact Sheet*, State of the News Media, Pew Research Center (Aug. 7, 2017).

[56] Tom Teodorczuk, *Netflix is posed to enter the TV news business*, marketwatch.com (Mar. 13, 2018).

[57] Notice at ¶ 13.

competition for viewers and vital local advertising revenue – rather than the level at which any national TV ownership rule is set – drives TV stations to produce, acquire and air attractive programming responsive to local audiences in markets across the country.

NAB initially observes that the local TV rule, by definition, is more properly the focus of localism concerns than a national rule. The FCC only recently reformed its local TV rule, concluding that a revised rule would provide public interest benefits, including more high-quality local news, especially in small and mid-sized TV markets.[58]

It is, moreover, competition in local TV markets that drives localism. Every broadcast licensee, whether it owns stations in a single market, several markets or dozens of markets, wants its stations to attract the most viewers and, thus, the most advertisers in each local market. Stations' profitability – and even their viability – depend upon doing so, particularly given the heightened competition TV stations now face.[59] Thus, regardless of the precise level of the national cap, TV station owners have the same strong incentives to compete for audiences and adverting revenue in local markets.

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[58] *2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, MB Docket Nos. 14-50, *et al*., FCC 17-156, at ¶ 72 (rel. Nov. 20, 2017) (modifying the local TV rule to "help local television broadcasters achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace"); *id.* at ¶ 77 (eliminating the eight-voices element of the rule because it "prevents combinations that would likely produce significant public interest benefits," such as news and other programming meeting the needs of a station's local community, particularly in "revenue-scarce small and mid-sized markets").

[59] As the FCC has repeatedly observed, TV stations "derive revenues primarily by selling time to advertisers during their broadcasts. The amount of revenue generated depends largely on the size and demographic characteristics of the audiences that broadcasters reach. Accordingly, broadcasters seek to provide content that will attract viewers and maximize their audiences." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, DA No. 17-71 at ¶ 74 (rel. Jan. 17, 2017). According to SNL Kagan estimates, TV stations earn about 69 percent of their revenue through the sale of on-air advertising time, and an additional seven percent of their revenue through online advertising. *Id.* at ¶ 103.

NAB knows of no evidence demonstrating that broadcasters provided more high-quality programming relevant to the needs and interests of their local communities when the national cap was 25 or 35 percent, rather than 39 percent. In fact, available evidence suggests the opposite. A survey conducted in 2003 found that TV stations originating local news aired, on average, 3.7 hours of local news on weekdays, 1.4 hours on Saturdays, and 1.3 hours on Sundays – a total of 21.2 hours per week.[60] By comparison, in 2016, the amount of local news offered by TV stations hit a new record high, with stations originating news providing an average of 5.7 hours on weekdays and an additional 2.1 hours on both Saturdays and Sundays, for a total of 32.7 hours per week – a *54 percent increase* since 2003.[61] Total newsroom employment reached 27,600 in 2016, which tied 2012 for the third highest total staffing ever.[62]

This result is unsurprising. As competition for viewers from pay-TV, online sources and other broadcasters has increased, TV stations in markets across the country have responded by offering more local news programming and additional entertainment programming via multicast channels, including some with specialized local focus.[63] *Local* is, after all, broadcasting's major differentiating feature in a crowded media landscape.

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[60] RTNDA/Ball State University Survey 2004, *Additional Data: Newsroom Staffing and Amount of News*, available at: http://rtdna.org/uploads/files/04Research.pdf. This report released in 2004 was based on a survey done in the fourth quarter of 2003, prior to the 2004 adoption of the 39 percent cap.

[61] Bob Papper, *RTDNA Research: Local news by the numbers*, rtdna.org (June 5, 2017).

[62] Bob Papper, *RTDNA Research: Newsroom staffing*, rtdna.org (June 19, 2017).

[63] *See* NAB Comments, MB Docket No. 17-214, at 15-16 (Oct. 10, 2017) (discussing, *e.g.*, the diginet Justice Network, which combines mystery, crime and investigation programming with BeSafe, an initiative to make communities safer that uses the network's localized servers to feature local most-wanted fugitives and missing children).

In sum, the evidence indicates that competition for viewers from other outlets, rather than the impact of the national ownership cap, spurs TV stations in local markets to provide locally-oriented programming. Other FCC rules, including, for example, the local program exclusivity rule (*see* Section VI.A. below), much more directly promote the FCC's localism goal.[64]

IV. THE FCC MUST NOT CUT BACK ON THE CURRENT LEVEL OF OWNERSHIP ALLOWED NATIONWIDE

Because the traditional rationales underpinning a broadcast-only national TV rule have lost relevance over time, the Commission would have no basis whatsoever for tightening the existing national cap in this proceeding. Doing so would be arbitrary and capricious, given competitive realities in the video market.[65] In addition, no party has demonstrated any concrete harms caused by the current cap and calculation methodology, which have been in effect since 2004. To the contrary, since the early 2000s, the video marketplace has undergone a competitive transformation resulting in unprecedented viewing options for consumers. Without a showing that the current national audience reach limit harms the

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[64] NAB also observes that in assessing the relevance of any rule to its localism goal, the FCC should take a broad view of localism rather than focusing on any one metric, given that TV stations serve their communities in myriad ways. Stations, for example, air local news and public affairs programming; provide extensive emergency journalism; cover local events and local sports teams, including college and high school; air political candidate debates and other election coverage; support local civic and charitable organizations and give them a public voice; promote community events and awareness campaigns; and raise funds for victims of disasters and others in need in local communities. *See, e.g.*, NAB Reply Comments, MB Docket No. 04-233, at 6-27 (June 11, 2008).

[65] *See, e.g., Comcast Corp. v. FCC*, 579 F.3d 1, 7-8 (D.C. Cir. 2009) (finding cable horizontal ownership rule arbitrary and capricious because FCC did not account for competitive impact of satellite and fiber optic companies, despite record evidence of increasing competition among these video providers).

public interest and that lowering the cap would ameliorate those harms, tightening the cap – by whatever means – would be contrary to law.[66]

In particular, the Commission should not make the national TV ownership rule more stringent via its calculation methodology, such as by altering how it currently accounts for UHF stations' reach.[67] To be clear, eliminating the so-called "UHF discount," without a corresponding increase in the national cap, would significantly cut back on the level of broadcast TV station ownership currently permitted.[68] While some parties may portray a decision on UHF calculation methodology as nothing more than a technical update, that claim is naïve at best and disingenuous at worst. Were the FCC to begin accounting for UHF stations at 100 percent of their theoretical reach, it would directly affect TV licensees' long-standing compliance with the national TV rule, their ability to acquire or sell stations, and their ability to achieve economies of scale and scope to compete with much larger pay-TV and online video service providers. Such a decision also would threaten a number of broadcast companies with divestitures, disrupt station operations and harm viewers across the country. The Commission therefore cannot, consistent with law, repeal the UHF discount without

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[66] *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 560-61 (D.C. Cir. 1988) (finding a rule arbitrary and capricious where FCC had "done little more than hypothesize" that a certain problem existed and where FCC had not shown that "eliminating the possibility of some unknown amount of suspected abuse outweighs the other disadvantages" of the rule adopted); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (invalidating certain FCC rules and stating that the court must consider at the outset "whether the Commission had made out a case for undertaking rulemaking at all since a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist") (citation omitted).

[67] *See* Notice at ¶ 20 (seeking comment on whether to repeal the UHF discount).

[68] *See* Order on Reconsideration, 32 FCC Rcd 3390, 3395 (2017) (UHF Reconsideration Order) (adjusting "the UHF discount affects compliance with the national audience reach cap," and repealing "the discount has the effect of substantially tightening the cap in some cases").

acknowledging that it is tightening the national TV rule itself;[69] without providing a reasoned analysis supported by the record for making the cap stricter;[70] and without demonstrating that a more restrictive cap would promote the public interest in today's marketplace.[71]

The Commission could not begin to make these requisite showings for any alteration to its calculation methodology resulting in a stricter national TV ownership limit. As the Sixth Circuit has stated, "[p]recisely because" ownership restrictions "have such a profound effect on the ability of businesses to compete in the marketplace," the Commission must provide a factually supported economic rationale to justify them, rather than "broadly stated fears" about market power and concentration.[72] Particularly given the FCC's acknowledgment in multiple proceedings of the "greatly increased options for consumers in the selection and viewing of video programming" and increased competition among video providers since the

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[69] *See, e.g., AT&T Co. v. FCC*, 974 F.2d 1351, 1354-55 (D.C. Cir. 1992) (finding FCC order arbitrary and capricious when the agency insisted that its order merely "clarified," rather than changed, a prior rule); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1238-39 (D.C. Cir. 1993) (concluding that FCC acted arbitrarily and capriciously in an interstate access rate case by "uncoupl[ing]" its "authorized return" number from its standard monitoring period and using a shorter time period, without explanation or justification).

[70] An agency changing course must "supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42 (1983). In fact, an agency must provide a more detailed justification for changing policy "when its prior policy has engendered serious reliance interests that must be taken into account." *FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009).

[71] *See, e.g., Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 881-82 (D.C. Cir. 1999) (stating that the "FCC is bound to regulate in the public interest," and rejecting the FCC's explanation of "why the public would benefit" from two rules challenged by broadcasters); *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (stating that the FCC's "rulemaking power is expressly confined to promulgation of regulations that serve the public interest").

[72] *Cincinnati Bell Tel. Co. v. FCC,* 69 F.3d 752, 764 (6th Cir. 1995) (finding wireless ownership restrictions affecting the eligibility of entities to participate in an auction to acquire additional licenses to be arbitrary).

cap was last modified,[73] it cannot now justify, with the necessary documentary and economic support, a more restrictive national cap.

V. THE FCC SHOULD RETAIN THE 39 PERCENT LIMIT AND DETERMINE COMPLIANCE WITH IT BY ACCOUNTING FOR ALL TV STATIONS AT 50 PERCENT OF THEIR PRESUMED REACH

NAB urges the Commission to retain the current 39 percent national TV cap and reevaluate the purpose of its method for calculating compliance with the cap. While the original technical purpose of accounting for UHF stations at half their presumed 100 percent reach is outdated,[74] this does not mean that the FCC now should automatically account for all TV stations at 100 percent of their presumed reach, as the Notice apparently recognizes.[75] Certain parties seeking to change the current treatment of UHF stations under the cap assume that the FCC's audience reach methodology is sound and tethered to reality in the first place, when, in fact, it is merely an accounting metric. And even a brief reexamination of the audience reach component of the national TV rule shows that the rule's conception of reach is wholly unrealistic in today's highly competitive video marketplace. As explained in detail below, the Commission should account for all TV stations at a more reasonable 50 percent of their presumed reach while retaining the current cap.

A. Compliance with the National Cap Is Currently Calculated Based on a Theoretical and Competitively Unrealistic Conception of Audience Reach

The national audience reach cap has been based since its inception on the premise

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[73] UHF Reconsideration Order, 32 FCC Rcd at 3396; *see also* Notice at ¶ 11.

[74] *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Memorandum Opinion and Order, 100 FCC 2d 74, 93 (1985) (1985 National Ownership MO&O) (explaining the inherent physical limitations of analog UHF television).

[75] *See* Notice at ¶ 20 (inquiring about the importance of non-technical justifications for the FCC's current calculation methodology for UHF stations, and seeking comment on whether eliminating that methodology would "on balance, serve the public interest").

that stations "reach" *all* of the TV households in the DMAs in which they are located.[76] The Commission, however, recognized in 1985 when first adopting a national cap based on 100 percent TV household reach, as well as a "discount" for UHF stations, that the rule's conception of reach was "theoretical."[77] Over 15 years ago, the D.C. Circuit acknowledged that the broadcast TV national cap is expressed in terms of potential audience reach and that, in practice, stations cannot achieve an audience share that approaches their potential reach.[78] Moreover, basing the national ownership rule on potential audience reach (*i.e.*, on homes "passed") is another example of disparate regulation on broadcast television. In the cable context, a "home is attributed to a multi-system cable operator only if that MSO *actually serves* the home, not simply because it is *available* to that home."[79]

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[76] "The audience reach of entities having an ownership interest in a commercial television station will be calculated by attributing to the owner the percentage of *total* ADI [now DMA] households found in each ADI market in which the owner has a commercial television station." 1985 National Ownership MO&O, 100 FCC 2d at 92, n.52 (emphasis added). Under the current rule, "[n]ational audience reach means the *total* number of television households" in the DMAs "in which the relevant stations are located divided by the *total* national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license." 47 C.F.R. § 73.3555(e)(2)(i) (emphases added).

[77] 1985 National Ownership MO&O, 100 FCC 2d at 93 (referring to the "theoretical" audience reach of the New York market as comprising 7.72 percent of all TV households). When initially adopting a 25 percent national audience reach limit, the FCC "discounted" the presumed reach of UHF stations by half to take account of the physical limitations of the UHF band at that time. In doing so, the FCC stated that the "owners of UHF stations should be attributed with only 50 percent of an ADI [now DMA] market's *theoretical* audience reach." *Id*. (emphasis added).

[78] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002). *Accord 2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18551 (2002) (explaining that the national TV rule is "based on the homes 'passed,' not the homes actually viewing the stations of a group owner").

[79] *2002 Biennial Regulatory Review*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18551 (2002) (emphases added).

The disconnect between a rule calculated on presumed audience reach and the reality of TV stations' competitive position has become more glaring over time. The FCC originally devised the national audience reach rule in the analog era when viewers primarily depended on a very limited number of broadcast channels. In 1985, DBS had yet to commence service, the internet was unknown to consumers and cable TV had limited subscribership and channel offerings.[80] In today's fragmented video market where viewers easily access hundreds of channels and thousands of programs, and where advertisers have myriad options, the potential reach of a station or station group in the abstract says little about the competitively effective reach of the station or group in the marketplace.

As shown below, for example, the top-rated TV program during the 1985-1986 season (*The Cosby Show*) received three times the ratings as the top-rated program in the 2016-2017 season (*The Big Bang Theory*). While the most popular video programming remains on broadcast TV, these programs' effective reach has eroded from 1985 (when the FCC adopted a 25 percent national cap), to 1996 (when the cap was raised to 35 percent), to 2004 (when

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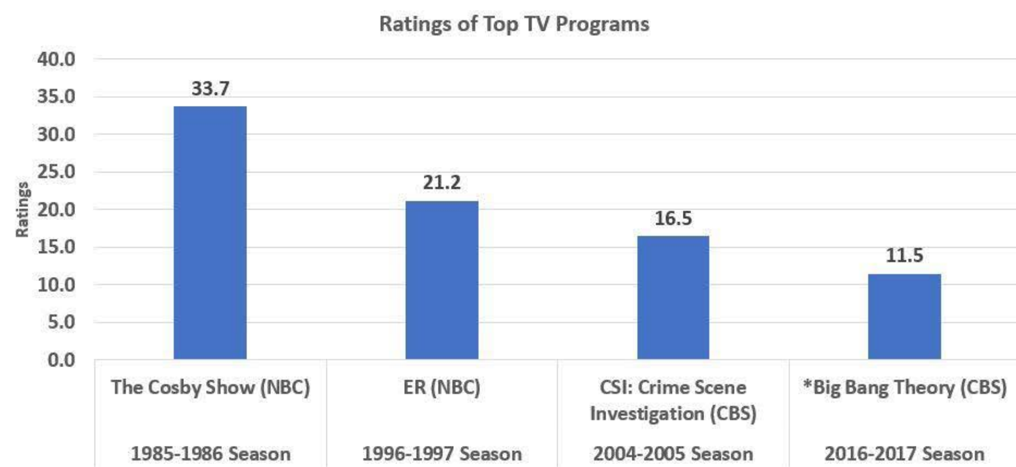
[80] In 1985, 36.7 million households subscribed to cable (about 43 percent of the TV households in the country at that time), and even by the early 1990s, the average cable system offered only about 36 channels. S. Rep. No. 102-92 at 3 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1135. As of late 2017, according to S&P Global Market Intelligence, 75 percent of TV households subscribed to a traditional MVPD (not counting competing virtual pay TV services), and the number of subscribers to OTT video services such as Netflix is tens of millions higher than the number of cable TV households in 1985.

the current 39 percent cap was set) to today.[81]



Sources and Notes:
1985-1986, 1996-1997, 2004-2005 Seasons: *Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present.* Household ratings based on Live-Only viewing;
*2016-2017 Season: *Television and Record Industry History Resources web site. Tim Brooks, editor.* Household rating based on Live +7 Day viewing.

According to Nielsen, moreover, broadcast TV's total share of prime time viewing (counting broadcast, cable and DBS) among the audience most coveted by advertisers (those ages 18-49) fell from 42 percent in 2007 to 31 percent in 2017.[82] That is, among the average 33.4 million people ages 18-49 using TV[83] during any given minute of prime time in 2017, an estimated 10.2 million were viewing broadcast – and these 10.2 million people represent just 7.9 percent of the estimated total 128.9 million people ages 18-49 in U.S. TV

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[81] These data, moreover, underplay the extent to which the audiences watching top-rated TV programs have shrunk over time. The available household ratings for 2016-2017 used in this chart are based on Live + 7 Day (time-shifted) viewing, while the ratings for the earlier years reflect only live viewing. The decline in ratings points would have been greater for 2016-2017 if the ratings had been calculated in the same way as in previous years.

[82] Nielsen, U.S. Live + Same Day 2007, 2017.

[83] Counting broadcast, cable and DBS, but not streaming or subscription video on demand.

households.[84] Similarly, the average 32.6 million people ages two and older who viewed broadcast TV during any given minute of prime time in 2017 represent only 10.7 percent of the estimated total 304.5 million people ages two and older in U.S. TV households.[85]

These data show that a national ownership rule based on the premise that stations "reach" all TV households in their DMAs significantly exaggerates the competitively effective reach of TV station groups today, as the Notice seems to suggest.[86] As further discussed below, NAB's proposed approach, among other advantages, directly addresses this growing disconnect between the rule's premise and competitive reality.

B. NAB Proposes to Treat All Stations More Rationally and Equitably and Avoid Unnecessary Disruption for TV Stations and their Viewers

NAB's proposal to maintain a 39 percent cap while accounting for both VHF and UHF stations at half of their theoretical 100 percent reach presents many advantages. We explain in greater detail below the reasons why the Commission should adopt this approach.

1. The Proposed Approach Avoids a Legally and Factually Unjustifiable Contraction of the National Cap Without Relying on an Analog-Era Rationale for Attributing UHF Stations

Sections III. and IV. demonstrate that the Commission cannot rationally make its national TV ownership rule more restrictive, whether by eliminating its long-standing methodology for attributing UHF stations or by reducing the 39 percent cap itself. At the same time, however, maintaining a discount for UHF stations based on an analog-era technical rationale is no longer appropriate. NAB's approach based on reevaluating the

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[84] Nielsen, U.S. Live + Same Day 2017; Nielsen's National Television Household Universe Estimates, 2017-18 TV Season.

[85] *Id.*

[86] *See* Notice at ¶ 18 (asking whether "audience reach" was the "proper measurement to use for the cap," rather than another measurement of a station group's size or influence, such as actual viewership, market share or amount of advertising revenue).

purpose of the FCC's methodology for determining compliance with the national cap, and adopting a more reasonable accounting for both UHF and VHF stations, successfully addresses these questions.

2. Accounting for All TV Stations at Half their Artificially Presumed Reach Is More Rational, Given the Competitive Characteristics of the Video Market

Because TV stations do not reach – in any competitively relevant way – all the TV households in the DMAs in which they are located, applying the national TV ownership rule as if they do appears increasingly arbitrary.[87] Accounting for all TV stations at 50 percent of their theoretical reach represents a more rational – yet nonetheless conservative – way to determine compliance under the national cap, as this approach still overstates stations' actual competitive reach.[88] Approval of NAB's proposal also would ameliorate, at least to an extent, the competitive disparity between the way in which TV households are attributed to broadcast stations and the way they are attributed to cable multi-system operators.[89] Current "market characteristics" therefore "warrant discounting or weighting a station's audience reach when determining compliance with a national cap."[90]

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[87] *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) (declining to "defer to the Commission's selection of a precise point on a scale when the scale itself" lacked relevance); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 969 (D.C. Cir. 1999) (finding FCC action arbitrary and capricious because its rationale proceeded from an economically faulty premise).

[88] *See* Section V.A. (explaining, *inter alia*, that even top-rated broadcast TV programs reach (*i.e.*, are seen by) fewer viewers today and that only 10.7 percent of the total persons ages two and older in U.S. TV households viewed broadcast TV, on average, during any given minute of prime time in 2017).

[89] *See* Section V.A. (noting that a home is attributed to a cable MSO only if it actually serves the home, not merely because it is available to that home).

[90] Notice at ¶ 21 (asking about any station or market characteristics that would justify discounting audience reach for purposes of national cap compliance).

3. Accounting for Both VFH and UHF Stations at 50 Percent of their Presumed Reach Is More Equitable

The Commission has acknowledged that, unlike in the analog world, UHF spectrum is now generally considered more desirable than VHF spectrum for TV broadcasting.[91] In fact, the FCC previously sought comment on, and some broadcasters supported, the adoption of a VHF discount.[92] Accounting for both VHF and UHF stations in the same way is more equitable for VHF stations, which, in the DTV environment, are not technically advantaged and are generally disadvantaged from an ownership perspective vis-à-vis UHF stations.

4. The Proposed Approach Would Prevent Significant Disruption to TV Station Owners and their Viewers

Beyond being wholly unjustified under current competitive conditions, simply eliminating the UHF discount and accounting for all stations at their presumed 100 percent reach, as some advocacy groups have supported, would cause unnecessary and widespread disruption to many TV broadcasters (at least in the absence of a very significant increase in the cap itself) and, ultimately, their viewers. The TV industry has relied since 1985 on a calculation methodology that discounted the presumed percent reach of all UHF stations. Television broadcasters invested billions of dollars and built businesses that serve millions of viewers in reliance on that calculation methodology, as the Commission has recognized.[93] Broadcasters' settled expectations should not be cast aside now, particularly given the complete lack of demonstrated, concrete harms from the current levels of common TV

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[91] *See* Notice at ¶ 21.

[92] *See* Report and Order, 31 FCC Rcd 10213, 10237-38 (2016) (declining to adopt a VHF discount "at this time").

[93] *See* Notice at ¶ 20; UHF Reconsideration Order, 32 FCC Rcd at 3396.

ownership.[94] The courts have acknowledged the importance of "decades of industry reliance" in faulting agencies for failing to take such reliance interests adequately into account.[95]

More rationally accounting for UHF and VHF stations in the digital marketplace also would respect the important expectations of TV viewers. Broadcasters owning almost entirely UHF stations have built networks providing additional, diverse OTA services. ION Media Networks' stations air three full-time programming channels, including Qubo, a 24/7 children's education and informational channel.[96] Univision Communications has utilized its UHF stations to create two networks (Univision and Unimás) serving Hispanic viewers and offering diverse Spanish language programming, including local news.[97] Hispanic viewers

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[94] An earlier FCC ownership decision is instructive here. After the Third Circuit remanded the FCC's retention of the existing numerical radio ownership caps in its 2002 biennial review, the Commission declined to make the caps more restrictive. The FCC's decision heavily relied on broadcasters' "settled expectations" and the "economies of scale" they had achieved, which could "increase their ability to provide their local communities with quality programming." *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2074 (2008) (2006 Quadrennial Review Order) (also noting that broadcasters had "incurred significant financial risks" in acquiring the additional radio stations permitted under the caps set in 1996). The FCC declined to cause industry disruption by further tightening the rules, particularly in the absence of "persuasive evidence" that a stricter local radio rule would "serve the public interest more effectively than the current rule." *Id*.

[95] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (finding that the Department of Labor had not adequately justified its new regulation, given "the decades of industry reliance on the Department's prior policy").

[96] *See* Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236, at 5-6 (Nov. 23, 2016). Trinity has used UHF stations to build the world's largest religious network and this country's most watched faith channel. *Id*. at 6.

[97] Univision is now one of the top-five networks in the U.S., regardless of language. In the November 2016 ratings sweeps, Univision stations in New York and Los Angeles were ranked first and second for both early news and late news in the entire country, in any language, among adults ages 18-49. Reply Comments of Univision Communications Inc. in Support of Petition for Reconsideration, MB Docket No. 13-236, at 2-3 (Jan. 23, 2017).

disproportionately depend on the OTA services offered by Univision and other broadcasters.[98] Other companies with many UHF stations have expanded viewer choice locally and provided platforms for new national network entrants, such as FOX, the CW and MyNetworkTV.[99]

Protecting the interests of viewers – especially those who rely wholly or primarily on OTA broadcasting[100] – is another reason the Commission should avoid rolling back the current 39 percent cap by accounting for stations at an essentially fictitious 100 percent reach.

5. The Proposed Approach Would Obviate the Need for Additional Rules Addressing Complex Grandfathering Issues

Beyond preventing needless disruption in the TV marketplace, adoption of NAB's approach would have related practical and equitable advantages. Because our proposal more reasonably accounting for the actual competitive reach of TV stations would not result in broadcasters exceeding the 39 percent national cap, its adoption would obviate any need for rules addressing thorny questions about grandfathering and the transferability of grandfathered station groups.[101] The Commission previously cited the advantage of avoiding

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[98] Among Hispanic households, 19.4 percent are broadcast-only (rising to 26.4 percent in Spanish-language dominated homes) and 26.7 percent are broadcast-any (rising to 33.4 percent in Spanish-language dominant homes). GfK, *Home Technology Monitor 2017 Ownership and Trend Report* (June 2017).

[99] Reply Comments of Tribune Company, MB Docket No. 13-236, at 5 (Jan. 13, 2014).

[100] Such viewers are disproportionately young, lower income and diverse. In total, 38.3 percent of broadcast-only households and 39.0 percent of broadcast-any households are minority households. GfK, *Home Technology Monitor 2017 Ownership and Trend Report* (June 2017).

[101] *See* Notice at ¶¶ 27-28 (asking multiple questions about the grandfathering of station groups to the extent they are made non-compliant with any changed rules; about the transferability of grandfathered station groups, with or without divestitures; about the appropriate date for triggering grandfathering; and whether there are any alternatives to grandfathering and transferability of non-compliant station groups).

the grandfathering of existing station combinations as a factor in declining to adopt stricter radio ownership limits, following a court remand of those limits.[102]

6. NAB's Proposal Is Easily Understandable and Will Be Simple to Apply

NAB's proposed approach should raise no other complexities and will be easy for both the Commission and TV station groups to understand and apply. It is very similar to the FCC's long-standing approach and should present no administrative difficulties or unforeseen burdens.[103]

7. The Proposed Approach Would Have a Relatively Limited Overall Effect on the Existing Levels of Common TV Station Ownership

Finally, NAB's proposal for accounting for VHF stations would not greatly expand upon the already permitted levels of common ownership nationwide, given the predominance of UHF stations in the digital environment.[104] Given that the considerable majority of full-power commercial TV stations are UHF stations already accounted for at 50 percent of their presumed reach, retaining a 39 percent cap with a modified method of accounting for only the smaller number of VHF stations would not allow dramatically higher overall levels of TV station ownership nationwide.

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[102] *See* 2006 Quadrennial Review Order, 23 FCC Rcd at 2074-75 (explaining that its decision not to tighten the local radio ownership caps had the advantage of avoiding both the disruption of divestitures and the grandfathering of existing station combinations).

[103] While accounting for all stations at half of their presumed reach overstates their competitively effective reach, developing a national ownership rule based on *each* TV station or station group's actual competitive reach (*e.g.*, by their audience size or share or their advertising revenue share) would be challenging to formulate and administratively burdensome to implement and apply.

[104] As of December 31, 2017, there were only 364 full-power commercial VHF stations and 1013 full-power commercial UHF stations. FCC News Release*, Broadcast Station Totals as of Dec. 31, 2017* (Jan. 5, 2018). While these numbers will change to a limited degree as they reflect the full effect of the incentive auction, NAB estimates that in the future there will still be close to 1,000 UHF stations and fewer than 400 VHF stations.

The Commission cannot, consistent with law, cut back on the level of TV station ownership currently allowed nationwide. To establish a more rational and equitable national TV rule, the FCC should retain the 39 percent cap and calculate compliance with it by accounting for all TV stations at 50 percent of their theoretical audience reach. Accounting for stations in this manner still overstates their effective marketplace reach and would be a conservative method of accounting for TV stations under the national cap. Given its many advantages, the Commission should adopt NAB's proposal.

VI. WHILE OTHER RULES REFERENCED IN THE NOTICE LACK DIRECT RELEVANCE TO THIS PROCEEDING, THEY DO PROMOTE THE FCC'S TRADITIONAL GOALS

The Notice briefly refers to other issues not directly related to the national audience reach limit and its calculation methodology, including retransmission consent, local program exclusivity and ATSC 3.0.[105] To the extent that these other rules are relevant at all to the current proceeding, NAB observes that they promote the FCC's traditional goals, particularly competition and localism.

A. The Retransmission Consent and Program Exclusivity Rules Help Ensure the Competitive Viability of Broadcast Stations and their OTA Service to Local Viewers

NAB doubts whether the existence of the retransmission consent negotiation and program exclusivity rules usefully informs the FCC's consideration of whether to retain, modify or eliminate the broadcast-only national TV cap. We note, however, as discussed above, that even comparatively large TV station groups are dwarfed by those companies dominating the pay-TV and broadband industries, while competition in the programming marketplace, with extensive new entry and unprecedented viewing options, has fragmented

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[105] *See* Notice at ¶ 17 (referencing rules related to distribution of video programming and carriage negotiations between broadcast stations and MVPDs); ¶ 26 (referencing broadcaster adoption of the Next Generation TV standard).

audiences for broadcasters trying to attract viewers and advertisers.[106] In response, some TV broadcasters have acquired additional stations to achieve operating efficiencies, continue serving viewers in a highly competitive market and negotiate retransmission consent agreements with the massive pay-TV/broadband providers on a somewhat more equal footing.

While some MVPDs may support FCC rules that keep broadcasters smaller in size and competitively weaker, including in retransmission consent negotiations, the pay-TV industry's interest is not the public's interest. Retransmission consent revenue has become increasingly important to the economic viability of TV stations offering OTA services valued by consumers.[107] A 2014 study found that the monies broadcasters earn in retransmission consent fees "accounted for 34 percent of their spending on programming"; in other words, "in the absence of retransmission consent compensation broadcasters would have had to reduce the amount they spend producing content by more than a third."[108] These retransmission consent revenues supplement advertising revenue and help support "local television news and public affairs programming," investments in digital multicasting (including foreign language programming streams) and new technologies, and the retention of "rights to programming, especially sports programming, that would not otherwise have

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[106] *See* Section III.B.; *see also, e.g.*, Comments of NAB, MB Docket No. 15-216, at 8-22 (Dec. 1, 2015); Reply Comments of NAB, MB Docket No. 17-214, at 11-14 (Nov. 9, 2017).

[107] *See, e.g., Justin Nielson, The complete picture of US TV station industry revenues, 2006-2023*, SNL Kagan (June 23, 2017) (showing increase over time in the share of TV station revenues coming from retransmission consent fees, and observing that retrans fee revenues help smooth the ebbs and flows in revenues from political advertising).

[108] Jeffrey A. Eisenach, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting, at 28 (July 2014).

been available on free over-the-air television."[109] In short, the retransmission consent framework promotes the FCC's traditional competition and localism goals.

As NAB also has explained on innumerable occasions, the FCC's local program exclusivity rules: (1) do not grant any exclusivity rights, but merely allow for the efficient enforcement of freely negotiated contracts between TV stations and suppliers of network and syndicated programming; (2) in fact *limit and restrict* program exclusivity by limiting the geographic area in which local TV stations may enter into exclusivity agreements with program suppliers; and (3) promote localism by supporting enforcement of TV stations' local exclusivity, which advertisers on local stations expect and pay for, thereby allowing stations to earn the advertising revenues that support local services and programming, including news.[110] The Commission has long acknowledged the importance of program exclusivity to its localism goal.[111] Congress has expressly recognized that "*localism is based on the exclusive territorial rights* granted to local affiliate stations by programming networks, which are reinforced by regulatory requirements established by the FCC."[112] In fact, the program

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[109] *Id*. at 29-33. *See also, e.g.*, John Ourand, *The eyes have it*, SportsBusiness Journal (Jan. 11, 2016) (explaining that because broadcasters have a dual revenue stream due to retransmission consent, they are able to better compete with cable for rights to sports programming).

[110] *See, e.g.*, Opposition of the Broadcaster Assn's, MB Docket No. 10-71, at 22-26 (May 18, 2010); Comments of NAB, MB Docket No. 10-71, at 15-19 (June 26, 2014). Economic studies submitted to the FCC have explained in detail the importance of exclusivity to investment, including specifically in the broadcast TV context. *See* App. B to NAB Comments, MB Docket No. 10-71 (June 26, 2014), Decl. of Mark Israel and Allan Shampine of Compass Lexecon, Section II.

[111] *See, e.g.*, FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at ¶ 50 (Sept. 8, 2005).

[112] H.R. Rep. No. 113-518, at 5 (2014) (House Committee on Energy and Commerce report on STELAR) (emphasis added). *See also* S. Rep. No. 102-92, at 38 (1991) (stating that the

exclusivity rules – not the national TV ownership rule – are the FCC rules important for localism to thrive, as they help ensure economically viable local TV stations able to effectively serve their communities of license and local audiences.

B. TV Stations' Use of an Improved Transmission Standard Will Enhance Both Competition and Service to Viewers in a Rapidly Changing Digital Marketplace

The Notice (at ¶ 26) also invites comments on how, if at all, the FCC in this rulemaking should consider the voluntary decisions of broadcasters going forward to adopt the Next Generation TV standard. While the FCC recently approved the Next Gen TV standard as serving the public interest,[113] NAB does not see how or why broadcasters' actual use of that standard should be addressed in a proceeding examining the bases for national TV ownership restrictions. The Commission does not consider the spectrum holdings of wireless carriers as relevant to their transitions from 3G to 4G to 5G. Indeed, rather than restricting their spectrum holdings as they improve their technologies, the FCC actively looks for ways to promote wireless carriers' technological transitions.[114] Broadcasters' use of ATSC 3.0, moreover, will enhance local stations' service to their communities and allow broadcasters to more effectively compete in today's internet-oriented video marketplace.[115] The FCC should not consider improved transmission technology that benefits TV viewers as a factor in

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Senate Commerce committee relied on the FCC's program exclusivity rules in creating the retransmission consent regulatory structure).

[113] *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 16-142, FCC 17-158 (Nov. 20, 2017) (Next Gen Order).

[114] *See, e.g., Use of Spectrum Bands Above 24 GHz for Mobile Radio Services,* Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 8014 (2016).

[115] *See, e.g.,* Next Gen Order at ¶ 1 ("This new TV transmission standard promises to allow broadcasters to innovate, improve service, and use their spectrum more efficiently. It also has the potential to enable broadcasters to provide consumers with a more immersive and enjoyable television viewing experience on both home and mobile screens. In addition, ATSC 3.0 will allow broadcasters to offer enhanced public safety capabilities….").

evaluating – let alone retaining – broadcast-only ownership restrictions. To do so would be a perverse disincentive against broadcaster adoption of new technologies and would not serve the public interest.

VII. CONCLUSION

The realities of the modern digital marketplace have eroded the traditional bases underpinning a broadcast-only national TV ownership rule. The FCC therefore would have no factual or legal basis for adopting in this proceeding a more restrictive national cap. NAB urges the FCC to retain the current 39 percent limit and calculate compliance with that cap by accounting for all TV stations at a more rational and equitable 50 percent of their presumed reach. Accounting for stations in this manner still overstates their effective competitive reach in today's highly fragmented video marketplace and would be a conservative method of accounting for TV stations under a 39 percent cap. NAB's approach also would prevent any unnecessary disruptions for broadcast stations and their millions of viewers.

Respectfully submitted,

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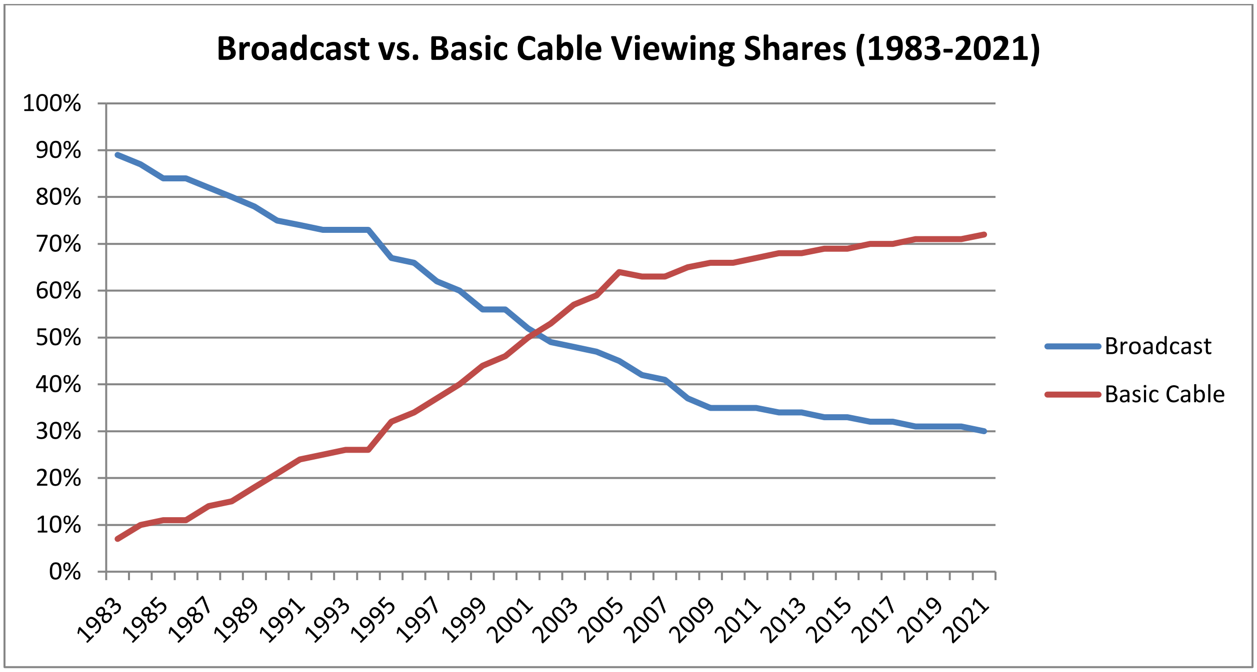
March 19, 2018

ATTACHMENTS

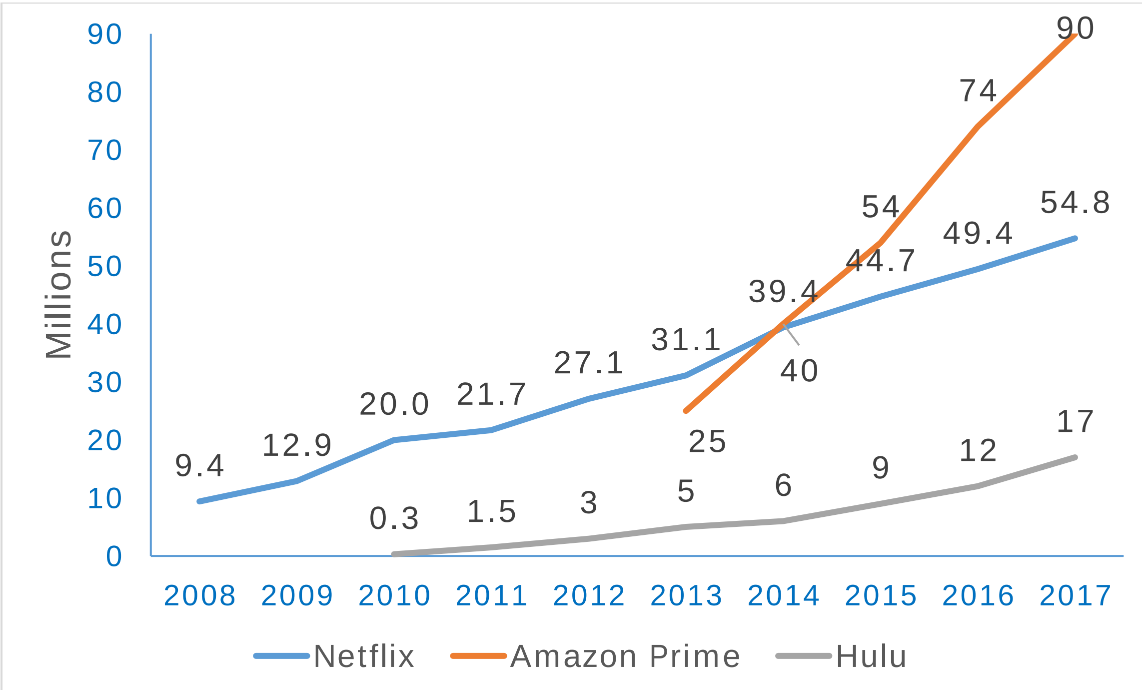
ATTACHMENT A



Source SNL Kagan, Cable/Broadcast TV Advertising Billings Database (2012). Post-2012 data are projections.

ATTACHMENT B

Subscribers to OTT Video Services



Sources:

www.sec.gov/Archives/edgar/data/1065280/000106528016000047/nflx201510k.htm

www.sec.gov/Archives/edgar/data/1065280/000162828018000941/q4nflx201710ka.htm

www.sec.gov/Archives/edgar/data/1065280/000106528016000047/nflx201510k.htm

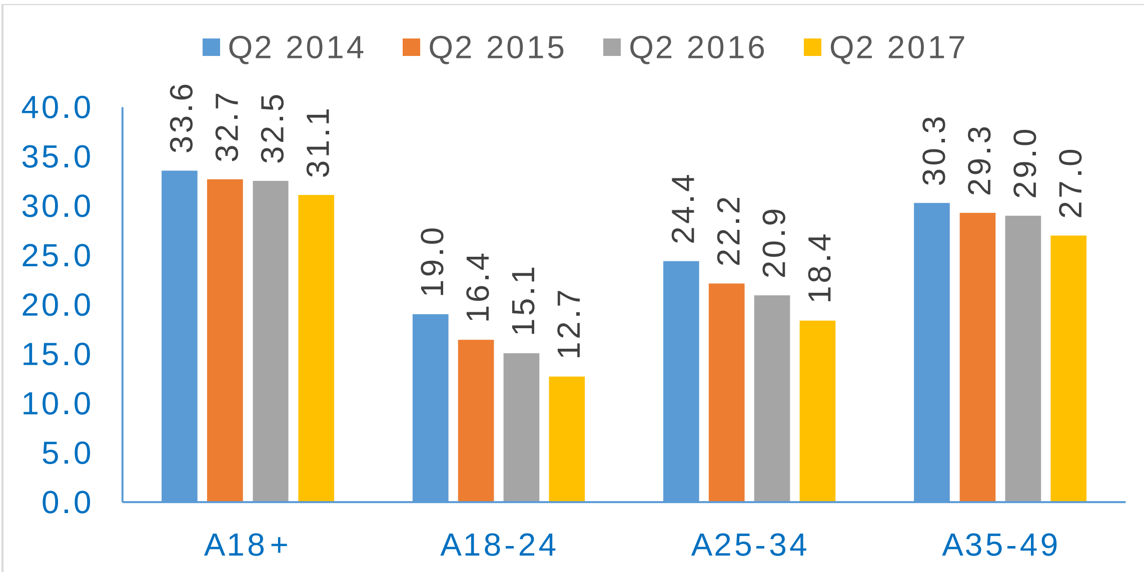
www.sec.gov/Archives/edgar/data/1065280/000162828018000941/q4nflx201710ka.htm

https://www.statista.com/statistics/546894/number-of-amazon-prime-paying-members/

www.sec.gov/Archives/edgar/data/1065280/000106528016000047/nflx201510k.htm

Attachment C

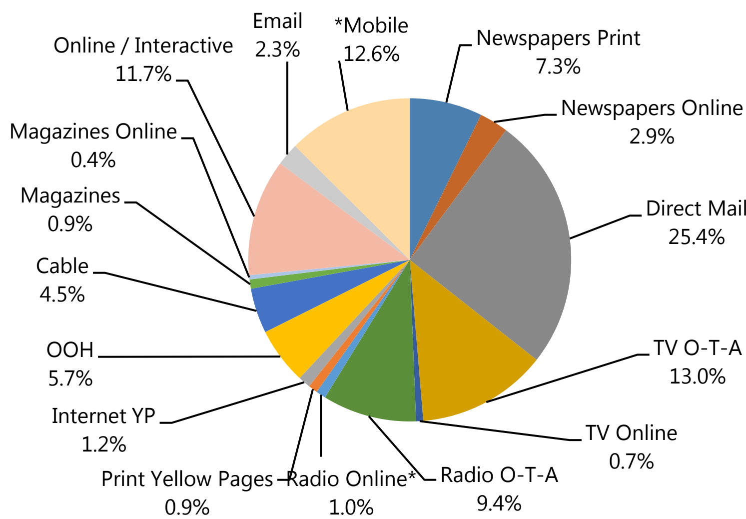
Weekly Time Spent Viewing Live TV + TV Time Shifting (Broadcast/Cable/DBS)



Source: The Nielsen Total Audience Report, 2nd Qtr.

ATTACHMENT D

2018 Local Advertising Marketplace: Total $151.2 Billion

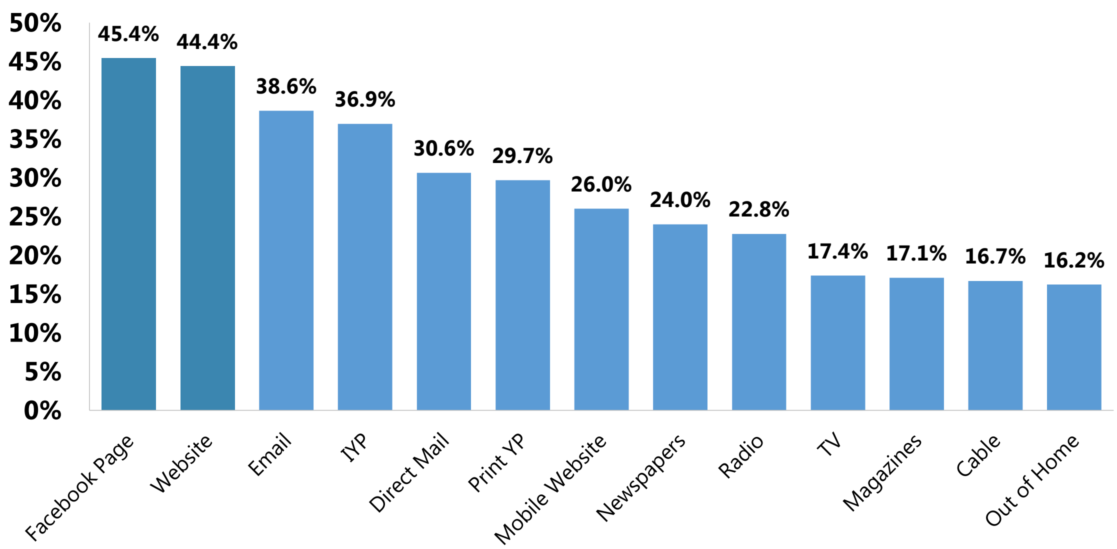


*Radio online revenue includes online revenue from terrestrial and online streaming services. Mobile revenue only includes revenue from pure play mobile platforms; the mobile revenues of traditional media are included in their online revenue.

Source: ADVantage, BIA/Kelsey, 2018

ATTACHMENT E

Advertising and Marketing Platforms Used by Small and Medium-Sized Businesses



Source: Local Commerce Monitor, Wave 21, BIA/Kelsey, 2018